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[Weekly Reporter, Oct. 27, 1906.]

THE

WEEKLY REPORTER,

1905-1906

(FIFTY-FOURTH YEAR),

CONTAINING

CASES DECIDED IN THE SUPREME COURT OF JUDICATURE

WITH

APPEALS TO THE HOUSE OF LORDS AND THE PRIVY COUNCIL

FROM THE 24TH OF OCTOBER, 1905, TO THE 11TH OF AUGUST, 1906.

TOGETHER ALSO WITH SOME CASES DECIDED PREVIOUSLY TO THAT PERIOD.

TO WHICH ARE ADDED

A DIGESTED INDEX

AND

A TABLE OF THE NAMES OF ALL CASES

REPORTED DURING THAT PERIOD,

WITH

REFERENCES TO CONTEMPORANEOUS REPORTS AND PUBLICATIONS.

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Stucley, *In re.* Stucley v Kekewich	C.A.	256	173	[1906] 1 Ch. 67; 75 L. J. Ch. 58; 93 L. T. 718
Suckling v Parker	K.B.D.	438	3	[1906] 1 K. B. 527; 75 L. J. K. B. 302; 94 L. T. 552
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Taff Vale Railway v Pontypridd Urban Council	CH.D.BUCK.J.	—	133	93 L. T. 126
Tanner v Dyball	K.B.D.	—	94	94 L. T. 539
Tasker & Sons, *In re.* Hoare v Tasker & Sons	C.A.	65	22	[1905] 2 Ch. 587; 74 L. J. Ch. 643; 93 L. T. 195
Tattersall, *In re.* Topham v Armitage	CH.D.EADY,J.	603	168	
Taylor v Metropolitan Railway Co.	K.B.D.	—	134	[1906] 2 K. B. 55
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Temperley Steamship Co. v Smyth & Co.	C.A.	150	150	[1905] 2 K. B. 791; 74 L. J. K. B. 876; 93 L. T. 471
Tennant v Stanley. *In re* Stanley	CH.D.BUCK.J.	103	179	[1906] 1 Ch. 131; 75 L. J. Ch. 56; 93 L. T. 661
Thellusson v Valentia	CHD.JOYCE,J.	369	20	[1906] 1 Ch. 480; 75 L. J. Ch. 368; 94 L. T. 468
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Thomas v Bradbury, Agnew, & Co.	C.A.	608	83	
Thompson, *In re.* Thompson v Thompson	CHD.JOYCE,J.	613	5	[1906] 2 Ch. 199; 75 L. J. Ch. 599
——— v Hammersmith Corporation	CH.D.BUCK.J.	279	106	[1906] 1 Ch. 299; 75 L. J. Ch. 129; 94 L. T. 135
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Tozeland v West Ham Guardians	K.B.D.	531	120	[1906] 1 K. B. 538; 75 L. J. K. B. 353; 94 L. T. 486
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Tunnicliffe and Hampson v West Leigh Colliery	C.A.	—	45	[1906] 2 Ch. 22; 75 L. J. Ch. 512; 94 L. T. 715
Turley v Daw	K.B.D.	—	9	94 L. T. 216
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Vickerstaff, *In re*	CH.D. KEK.J.	414	123	[1906] 1 Ch. 762; 75 L. J. Ch. 419; 94 L. T. 463
Victorian Daylesford Syndicate v Dott	CH.D.BUCK.J.	231	109	[1905] 2 Ch. 624, 747*n*; 74 L. J. Ch. 673; 93 L. T. 627
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Wakefield Light Railway v Wakefield Corporation	K.B.D.	495	90	[1906] 2 K. B. 140; 75 L. J. K. B. 388; 94 L. T. 543
Walbran, *In re*. Milner v Walbran	CHD. JOYCE, J.	167	176	[1906] 1 Ch. 64; 75 L. J. Ch. 105; 93 L. T. 745
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——— v London and North-Western Railway	H.L.	129	105	[1905] A. C. 426; 74 L. J. Ch. 629; 93 L. T. 143
——— v London County Council	K.B.D.	616	107	75 L. J. K. B. 549; 94 L. T. 791
Whalley, *In re*	C.A.	249	93	[1906] 1 Ch. 565; 75 L. J. Ch. 328; 94 L. T. 423
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Whitehorne, *In re*. Whitehorne v Best	CH.D. BUCK. J.	580	175	[1906] 2 Ch. 121; 75 L. J. Ch. 537; 94 L. T. 698
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——— v Gabriel	K.B.D.	379	81	[1906] 1 K. B. 155; 75 L. J. K. B. 149; 94 L. T. 17
——— v Howarth	P.C.	—	116	[1905] A. C. 551; 74 L. J. P. C. 115; 93 L. T. 115
——— v Morgan	CH.D. EADY, J	—	111	[1906] 1 Ch. 804; 75 L. J. Ch. 480; 94 L. T. 473
——— v North's Navigation Collieries	H.L.	485	100	[1906] A. C. 136; 75 L. J. K. B. 334; 94 L. T. 447
——— v Permanent Trustee Co.	P.C.	—	115	[1906] A. C. 249; 75 L. J. P. C. 48; 94 L. T. 354
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Woolley v Kelsey. *In re* Kelsey	CH.D. WAR, J.	136	179	[1905] 2 Ch. 465; 74 L. J. Ch. 701; 93 L. T. 662
Woolwich Union v Fulham Union	K.B.D.	14	122	[1905] 2 K. B. 203; 74 L. J. K. B. 556; 92 L. T. 838
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Wray v Wray	CH.D. WAR. J.	136	170	[1905] 2 Ch. 349; 74 L. J. Ch. 687; 93 L. T. 304

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Wrigley v Gill . . .	C.A.	274	112	[1906] 1 Ch. 165; 75 L. J. Ch. 210; 94 L. T 179
Young v Cuthbert . .	CH.D.BUCK J.	296	52	[1906] 1 Ch. 451; 75 L. J. Ch. 217; 94 L. T. 191
——— v Kingston-on-Thames, &c. .	K.B.D.	507	15	[1906] 1 K. B. 338; 75 L. J. K. B. 225; 94 L. T. 196
Ystradyfodwg and Pontypridd Sewerage Board v Bensted	K.B.D.	440	70	[1906] 1 K. B. 294; 75 L. J. K. B. 202; 94 L. T. 20
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WEEKLY REPORTER,

1905-1906.

Privy Council.

(*From the Supreme Court of Victoria.*)

May 16, 1905.

NATIONAL TRUSTEES, &c., CO. OF AUSTRALIA (LIMITED) *v.* GENERAL FINANCE, &c., CO. OF AUSTRALIA (LIMITED). (*a.*)

Trustee—Breach of trust—Acting bonâ fide *under legal advice—Trustee company—Victorian Trusts Act,* 1901 *—Judicial Trustees Act,* 1896 (59 & 60 *Vict. c.* 35), *s.* 3.

A joint stock company, acting as trustees for reward, paid over under legal advice part of a trust fund to the wrong parties.

Held, even assuming they acted honestly and reasonably, that they were not therefore exempt from making good the breach of trust, and that the Victorian Trusts Act, 1901 (*similar to the English Act* 59 & 60 *Vict. c.* 35, *s.* 3), *which gave the court a judicial discretion in such cases, made no difference under the above circumstances. A trustee company receiving remuneration for its services is in a different position to a private trustee.*

This was an appeal from the Supreme Court of Victoria affirming the judgment of à Beckett, J., in the Supreme Court.

The facts are set out at length in their lordships' judgment.

H. Terrell, K.C., and *V. Hawkins,* for the appellants.

Warmington, K.C., and *A. H. Jessel,* for the respondent.

The judgment of their lordships (Lords DAVEY and LINDLEY, Sir FORD NORTH, and Sir ARTHUR WILSON) was delivered by

Sir FORD NORTH.—This is an appeal from a judgment of the Full Court of the State of Victoria, affirming the judgment of à Beckett, J., in the Supreme Court, holding the appellants liable for breach of trust in not having paid to the respondents their share in a trust estate.

The material facts are as follows:

Roderick McDonell (who died in 1858) bequeathed his personal estate to trustees, upon trust to get in the same, and pay one clear fourth part to his wife absolutely; and to invest the residue, and pay the annual income to his daughter, Ann Howe, during her life, and after her death to hold the principal in trust for her children who should attain twenty-one, or if daughters marry, in equal shares.

Six children of Ann Howe attained vested interests, and one of them, Mary Grace Howe, intermarried with John Fraser in July, 1872.

(*a.*) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

Mary Grace Fraser died in August, 1876, intestate, and administration to her estate was granted to her husband, John Fraser, who by the law of the colony as it then stood was absolutely entitled to the whole of her personal estate. She left two children only.

By an Act of the colony which came into operation on the 13th of December, 1884 (the Married Women's Property Act, 1884, 48 Vict., No. 828, s. 25), it was provided that the estate, real and personal, as to which any married woman died intestate after the commencement of the Act should, after payment of duties, and funeral administration or testamentary expenses, and debts, be distributable between her husband and her children or next-of-kin in the like manner and proportions in which the estate, real and personal, as to which a married man died intestate was distributable between his widow and his children or next-of-kin.

By an indenture dated the 6th of February, 1891, John Fraser assigned to the respondents all his share and interest in the personal estate of the testator McDonell, and in the estate of the said Mary Grace Fraser, whether as her husband, or administrator, or otherwise, by way of mortgage, for securing £650, with interest at 20 per cent. per annum.

John Fraser died intestate in June, 1894, without having paid any of the principal or interest due on the mortgage. No administration was taken out to him.

By an indenture dated the 8th of July, 1895, the appellant company (hereinafter called the Trustee Co.) and their managing director, Walter Madden, were, in exercise of a power contained in McDonell's will, appointed trustees of that will, and the investments representing the residue of his estate were transferred to the new trustees.

On the 18th of December, 1897, Anne Howe, the tenant for life, died, and the trust estate became distributable.

The Trustee Co. employed Messrs. Smith & Emmerton, a firm of high standing at Melbourne, as their solicitors in connection with McDonell's trust; and they in March, 1898, took out in the name of the Trustee Co. letters of administration *de bonis non* to Mrs. Fraser, with full knowledge of the actual date of her death. Notwithstanding this the solicitors by some extraordinary slip advised the Trustee Co. and their officers that the two children of Mrs. Fraser were entitled, in equal shares, to her share in McDonell's estate; as to two-thirds thereof in their own right, and as to one-third as beneficiaries under their father, assuming that he left no debts.

On the 13th of June, 1898, Mr. Joy, then acting as liquidator of the respondents, wrote to the manager of the Trustee Co. reminding them of the mortgage and warning them against distributing any part of McDonell's trust estate, as the respondents were entitled to John Fraser's proportion.

On the 30th of September, 1898, Mr. Macoboy, the secretary of the Trustee Co., who had charge of this estate under Mr. Madden, the managing director, and who was in personal communication with the solicitors on the subject, had an interview with Joy with respect to the assignment; and he states that he informed Joy that his company would get one-third and the Frasers two-thirds; and that Joy raised no question as to this. The respondents seem to have accepted this statement as to their rights without verification, though a reference to their mortgage would have shown the date of Mrs. Fraser's death.

Questions were raised by John Fraser's children as to the validity of his mortgage, and what, if anything, was due upon it; and, in consequence, one-third of Mrs. Fraser's share was, under the Colonial Act for the Relief of Trustees, paid into court by the Trustee Co. in March and August, 1899. The other two-thirds were, about August, 1899, divided between her two children. It does not appear how the money paid into court was ultimately dealt with.

It is shown by the evidence of Mr. Macoboy that the solicitors of the Trustee Co. did, at a subsequent date, discover and inform that company that they had made a mistake in advising them that J. Fraser was entitled to one-third only; but no information as to this was given to the respondents. They seem, however, to have subsequently discovered the mistake for themselves, and on the 30th of December, 1902, their solicitors wrote to the trust company that the respondent company, as Fraser's assignee, was entitled to the whole of his late wife's share, or so much thereof as would satisfy their claim, and asked for a statement of Mrs. Fraser's estate; to which, on the following day, Mr. Madden made the disingenuous answer, that the money was paid into court by the trust company in 1899. The respondents' solicitors, however, insisted upon their claim to the whole of the share in the trust funds to which Mrs. Fraser was entitled; and not having received any satisfactory reply, the respondents, on the 11th of March, 1903, issued the writ in this action to recover the amount improperly paid by the Trustee Co. to her children, and obtained judgment in their favour for £673 18s. 10d. and interest. This was affirmed on appeal and the present is an appeal from those decisions.

The appellants' counsel rested their case upon three grounds:

(1) That the trust company had paid the moneys to Mrs. Fraser's children upon the advice of competent legal advisers, and, therefore, there was no breach of trust;

(2) That the respondents were estopped by their conduct from disputing the validity of the payment; and

(3) That the trust company were protected by section 3 of the Trusts Acts, 1901.

With respect to the first point, it is clear beyond all question that John Fraser was entitled to the whole of his wife's share in the trust estate, and not to one-third only; and that the payment of two-thirds to Mrs. Fraser's children instead of to the respondents was a breach of trust. The fact that such payment was made through the bad advice of the solicitors of the trust company is no defence.

In *Doyle* v. *Blake*, 2 Sch. & Lef. 231, at p. 243, Lord Redesdale said: "I have no doubt that they" (the executors) "meant to act fairly and honestly, but they were misadvised; and the court must proceed, not upon the improper advice under which an executor may have acted, but upon the acts he has done. If, under the best advice he could procure, he acts wrongly, it is his misfortune; but public policy requires that he should be the person to suffer." And there are many similar decisions in the books.

The appellants relied on the case of *Speight* v. *Gaunt*, 32 W. R. 435, 9 App. Cas. 1, in which a trustee employed a broker to purchase certain securities for a trust. The broker said that he had done so, and produced a bought note and asked for the money to complete as next day was pay day, and the trustee gave him the necessary cheques, which the broker misapplied. In a suit to make the trustee liable, it was held that the payment to the broker was made in the usual and regular course of business, and that the trustee was not liable; in other words there was not any breach of trust. The present is a very different case.

The second point raised for the appellants was that the respondents' conduct induced them to believe that they admitted the title of Mrs. Fraser's children to the two-thirds, and that they acquiesced in and assented to the payment to them. Unfortunately for the appellants there are no facts upon which such an argument can be based. There is not a shred of evidence to show that the respondents were consulted about, or approved of, or assented to, or even were aware of, such payment being made. It is the common case of all parties that at that time everyone believed that John Fraser, and the respondents through him, were interested in one-third only, and that the application of the rest of the fund was a matter in which the respondents had no concern. Any request to them to concur in the payment of the two-thirds to the children would probably have led to an investigation of the facts, and resulted in the institution of this action some years before 1903. It is true that the respondents did not ask for more than one-third; but they had been informed by the trust company that this was all to which they were entitled, and the trust company cannot complain that the respondents accepted and acted on that statement. They did not discover the error till long afterwards. There is no evidence that they in any way misled the trust company; on the contrary, the trust company misled them.

The third point raised on the appellants' behalf was that, even if there was a breach of trust, they should be relieved therefrom by virtue of section 3 of the Trusts Act, 1901, which corresponds with section 3 of the English Act (59 & 60 Vict. c. 35). That section is as follows: "If it appears to the Supreme Court that a trustee is or may be personally liable for any breach of trust, whether the transaction alleged to be a breach of trust occurred before or after the passing of this Act, but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust, and for omitting to obtain the directions of the court in the matter in which he committed such breach, then the court may relieve the trustee either wholly or partly from personal liability for the same." The courts in the colony have found that the appellants acted honestly and reasonably, and their lordships are prepared to deal with the case on that footing. Mr. Terrell contended that these two things being established, the right to relief followed as a matter of course; but that is clearly not the construction of the Act. Unless both are proved the court cannot help the trustees; but if both are made out, there is then a case for the court to consider whether the trustee ought fairly to be excused for the breach, looking at all the circumstances. It is a very material circumstance that the appellants are a limited joint stock company, formed for the purpose of earning profits for their shareholders; part of their business is to act as trustees and executors; and they are paid for their services in so acting by a commission which the law

of the colony authorizes them to retain out of trust funds administered by them, in addition to their costs. What they now ask the court to do is to allow them to retain a sum of money to which the respondents' title is clear, in order thereby to relieve the trust company from a loss they had incurred in the course of their business by reason of their having paid a like sum to wrong parties. The position of a joint stock company which undertakes to perform for reward services it can only perform through its agents, and which has been misled by those agents to misapply a fund under its charge, is widely different from that of a private person acting as gratuitous trustee. And without saying that the remedial provisions of the section should never be applied to a trustee in the position of the appellants, their lordships think it is a circumstance to be taken into account, and they do not find here any fair excuse for the breach of trust, or any reason why the respondents, who have committed no fault, should lose their money to relieve the appellants, who have done a wrong and have denied the respondents' title. And that is not quite all. If trustees do unfortunately lose part of a trust fund by a breach of trust, the least that can be expected of them is that they should use their best endeavours to recover the fund, or so much thereof as is practicable, for their *cestui que trusts*. In the present case there seems to be some ground for thinking that other proceedings were open to the trust company by which any loss to them might have been averted, at any rate to some extent; but it does not appear that the trust company have taken any such steps, or made any attempt whatever to replace the fund or relieve the respondents from loss; nor have they condescended to give the court any explanation or reason why they have abstained from doing so. It may be that the solicitors would be willing or might be compelled to make good the loss, if the trust company should find they cannot obtain relief elsewhere. The courts in the colony held that under these circumstances the appellants had not made out any case for relief under the Act; and their lordships agree with them.

Their lordships will, therefore, humbly advise his Majesty that this appeal should be dismissed. The appellants must pay the costs.

Solicitors, *G. M. Light; Hicks, Arnold, & Mozley.*

Court of Appeal.

From Chan. Div. (Vaughan Williams, Stirling, and Cozens-Hardy, L.JJ.) June 20, 1905.

KINNAIRD (LORD) *v.* FIELD (No. 1). (*a.*)

Practice—Frivolous and vexatious applications—Interlocutory applications before judgment — Order to prevent.

Where repeated frivolous and vexatious interlocutory applications have been made in an action before judgment, the court will make an order prohibiting any further application without leave of the court.

This was an appeal from a decision of Warrington, J.

The action was brought by the plaintiffs on behalf of themselves and all other members of the Council of the Evangelical Alliance to enforce the carrying out of an agreement made between the council and the defendant by way of compromise to a former action. The defendant, who was conducting his case in person, defended the action and delivered a counterclaim, Before the case came on for trial the defendant made twenty-four interlocutory applications with reference to pleadings, discovery, and the like matters. Most of these applications were dismissed with costs and the remainder proved abortive owing to some irregularity in the notice of motion or because the defendant failed to appear. None of the costs incurred in these applications had been paid by the defendant. The plaintiffs took out a summons asking for an order that the defendant might not be allowed to make any further application in the action without the leave of the court first had and obtained, and that if notice of any such application should be given without such leave being obtained the plaintiffs should not be required to appear on such application, and it should be dismissed without being heard.

Warrington, J., made an order in accordance with the summons.

The defendant appealed.

The defendant in person.—Warrington, J., relied on *Grepe* v. *Loam*, 37 Ch. D. 168, 36 W. R. Dig. 151, but that case is distinguishable. The order there was to restrain repeated frivolous applications for the purpose of impeaching a final judgment. The present applications are all before judgment and for distinct and legitimate purposes.

Buckmaster, K.C., and *Greenwood*, for the plaintiffs, were not called upon to argue.

VAUGHAN WILLIAMS, L.J.—No question can be raised as to the jurisdiction of Warrington, J., to make this order; and when one looks at the series of summonses issued by the defendant in this action and at the nature of those summonses, it is impossible to doubt that there was ample material upon which the learned judge had the liberty of exercising his discretion. Nothing has been brought to our notice which would lead us to doubt that this discretion was wisely and carefully exercised by Warrington, J. The appeal must be dismissed with costs.

STIRLING, L.J.—I am of the same opinion. *Grepe* v. *Loam* shows that there is jurisdiction in the court to make such an order as has been made by Warrington, J., and it is really an example of the mode by which the court interferes to prevent abuse of its process. The only question which remains is whether Warrington, J., was justified in making the order which he did. In that respect it is merely a question of discretion in the exercise of a jurisdiction which appears to me to be inherent in the court. I am unable to differ from Warrington, J., as to the merits of the case, and I think, therefore, that the appeal fails and ought to be dismissed.

COZENS-HARDY, L.J.—I am of the same opinion, I have nothing to add.

Solicitors, *Andrew Wood, Purves, & Sutton.*

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

From K. B. Div.
(Collins, M.R., and Mathew and Cozens-Hardy, L.JJ.) June 8, 1905.

EAST INDIAN RAILWAY CO. v. SECRETARY OF STATE FOR INDIA. (a.)

Inland revenue—Income tax—Annuity payable under contract—Annual sum consisting partly of capital and partly of interest—Income Tax Act, 1842 (5 & 6 *Vict. c.* 35), *s.* 102—*Income Tax Act,* 1853 (16 & 17 *Vict. c.* 34), *s.* 2, *Schedules C and D.*

By virtue of contracts made in 1849 *and* 1854 *between the East India Company and a railway company the Secretary of State for India had the option of purchasing the railway by payment of an annuity Before the time limited for exercising the option arrived, the Secretary of State concluded a bargain with the railway company, which was sanctioned by an Act of Parliament of* 1879, *as to the terms on which the purchase of the railway by payment of an annuity should be carried out. The terms contained a statement that the amount of the annuity of* £5 12*s.* 6*d. into which every* £100 *stock of the company was intended to be commuted at the price of* £125 *was calculated on the basis of* £5 7*s.* 6*d., part thereof being interest at the rate of* £4 6*s. per cent. per annum on the said amount of* £125, *and of a sum of* 5*s. other part thereof being the amount required to be set aside for the purpose of a sinking fund.*

Held, that, notwithstanding the fact that the bargain was concluded before the time limited for exercising the option arrived, and notwithstanding the statement as to the manner in which the annuity was calculated, the principle of Secretary of State for India *v.* Scoble, 51 *W. R.* 675, [1903] *A. C.* 299, *applied, and income tax was payable only on so much of the annuity as in accordance with that case really represented interest.*

Appeal by the plaintiffs and cross-appeal by the defendant from a judgment of Jelf, J.

The action was brought for a declaration that the plaintiff company were entitled to recover a sum of £53,787 18s. 1d., the amount of sums wrongfully deducted for income tax by the Secretary of State for India in respect of certain annual payments to the plaintiffs between the years 1880 and 1903.

By a contract in writing made in August, 1849, between the East India Company and the plaintiffs, the East India Company were to provide land for a railway to be constructed by the plaintiffs in the neighbourhood of Calcutta, and on completion of the railway the East India Company were to grant to the plaintiffs a lease of the land for ninety-nine years. The East India Company were empowered at certain periods during the term to purchase the railway for a gross sum, to be ascertained as therein provided, and were given an option, instead of paying a gross sum, to pay an annuity for the residue of the term. By a subsequent contract between the parties in February, 1854, which recited that the railway commencing at Howrah, near Calcutta, and extending to Burdwan had been nearly completed, it was further agreed that the East India Company should provide land for the construction of a railway to Delhi, and that on the completion of it they should grant the plaintiffs a lease of the land under the same provisions as those contained in the contract of 1849. It was provided by the contract of 1854 that the East India Company might within six months after the expiration of the first twenty-five years of the term of ninety-nine years give notice to the railway company of their intention to purchase, and the railway was thereupon to revert to and become the property of the East India Company on account of the Government of India, and the East India Company were to pay the full amount of the value of all the shares, stock, &c., in the railway company calculated at a certain value. It was also provided that in every or any case in which, under the terms of the contract, the East India Company should before the expiration of the term of ninety-nine years become bound to repay the capital expended by the railway company, or to pay for the purchase of the railway works and stock, it should be lawful for the East India Company, instead of paying a gross sum of money in respect of the premises, to declare their option to pay an annuity to continue during the residue of the term of ninety-nine years, calculated at a certain rate of interest. The two railways were duly completed; and in 1858 the East India Company provided the land for another railway to be constructed by the plaintiffs from Mirzapore to Jubbulpore under provisions of a similar character to those contained in the previous contracts between the parties. Under the Government of India Act, 1858 (21 & 22 Vict. c. 106), all the powers of the East India Company under these contracts became vested in the Secretary of State for India.

In 1879, before the time limited for exercising the right of purchase arrived, the Secretary of State gave the plaintiffs notice of his intention to purchase the railway by means of an annuity terminable on the 14th of February, 1953, calculated on a rate of interest of £4 6s. per cent. on a commuted price of £125 per £100 of capital stock, which gave an annuity of £5 12s. 6d. for each £100 of capital stock so commuted at £125; and the plaintiffs and the Secretary of State entered into an agreement which was subsequently sanctioned by the East Indian Railway Company Purchase Act, 1879. That Act contained provisions for carrying out the terms agreed upon and for paying the annuity. The paid-up capital stock of the railway company was £26,200,000, and the price to be paid by the Secretary of State was, at the commuted price of £125 per £100 of capital stock, the sum of £32,750,000, and the amount of the annuity was £1,473,750. Instalments were paid half-yearly from the beginning of 1880, and the deductions for income tax were made on the total half-yearly payments. The plaintiffs claimed to recover such deductions in so far as they were made in respect of the instalments or annuities paid on account of or as part of capital.

At the trial Jelf, J., held, upon the authority of the House of Lords in *Secretary of State for India* v. *Scoble*, 51 W. R. 675, [1903] A. C. 299, that the annuity which was payable for the purchase of the railway represented in part payment of capital, and that income tax was only payable upon so much of the annuity as represented interest on the unpaid capital, and that the plaintiffs were entitled to have the deductions made for income tax upon the capital refunded.

The case came before the learned judge again, in pursuance of liberty to apply, in order to determine how the judgment was to be carried out. The plaintiffs contended that of the half-yearly payments made from time to time the proportion representing capital, and therefore not taxable, was continually increasing, while the proportion representing interest, and therefore taxable, was continually decreasing, inasmuch as every half-year there was less of the total capital unpaid, and therefore the interest on the unpaid capital was less. The defendant, on the other hand, contended that the interest payable each half-year was a constant unvarying amount treated as though the payment of the whole capital were postponed for seventy-three years, the remaining part of

(a.) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

the annuity payable each half-year representing capital repaid only in the sense that it was a constant unvarying amount calculated to produce a sinking fund, which, if invested at compound interest at the specified rate, would replace the whole capital at the end of seventy-three years.

The two following tables show at a glance the contentions of the plaintiffs and defendant respectively as applied to the amount of income tax wrongly deducted to be refunded for the two half-years in respect of which the deductions were made subject to the protest of the plaintiffs:

PLAINTIFFS' CONTENTION.

1	2	3	4	5	6
Half-year ending	Total annuity payable.	Amount payable on account and as part of capital.	Amount payable as interest on capital unpaid.	Rate of income tax.	Amount to be refunded, having been allowed to be deducted under protest, being income tax on Col. 3.
	£ s. d.	£ s. d.	£ s. d.	s. d.	£ s. d.
1903. March 31 ...	424,545 11 11	49,672 1 5	374,873 10 6	1 3	3,104 10 1
" Sept. 30 ...	424,545 11 11	50,740 0 5	373,805 11 6	0 11	2,325 11 8
					5,430 1 9

DEFENDANT'S CONTENTION.

1	2	3	4	5	6
Half-year ending	Total annuity payable.	Amount payable towards sinking fund.	Interest on whole capital.	Rate of income tax.	Amount to be refunded, having been allowed to be deducted under protest, being income tax on Col. 3.
	£ s. d.	£ s. d.	£ s. d.	s. d.	£ s. d.
1903. March 31 ...	424,545 11 11	18,868 13 10	405,676 18 1	1 3	1,179 5 11
" Sept. 30 ...	424,545 11 11	18,868 13 10	405,676 18 1	0 11	864 16 4
					2,044 2 3

Jelf, J., said that, in order to ascertain which of these two contentions was correct, it was necessary to ascertain the terms upon which the "annuity" was created. If those terms left it uncertain how much of the "annuity" each half-year was to be allocated to the repayment or replacement of capital and how much to the payment of interest, he thought the plaintiffs' principle of allocation might reasonably prevail. But on reference to the East Indian Railway Company Purchase Act, 1879 (42 & 43 Vict. c. cxxvi.), which recited and sanctioned the terms on which the bargain was concluded, he found no uncertainty or ambiguity existing. The "memorandum of terms" recited in the Act contained the following: "That the purchase be made by means of an annuity terminable on the 14th of February, 1953, calculated on a rate of interest of £4 6s. on a commuted price of £125 per £100 of capital stock, which gives, including 4s. for redemption of capital, an annuity of £5 12s. 6d. for every £100 of capital stock so commuted at £125." The Act contained a further recital "that in the said memorandum of terms the amount of the annuity of £5 12s. 6d. into which every £100 stock of the company is intended to be commuted at a price of £125 is calculated on the basis of £5 7s. 6d., part thereof being interest at the rate of £4 6s. per cent. per annum on the said amount of £125 and a sum of five shillings, other part thereof, being the amount required to be set aside and invested half-yearly in every year at a like rate of interest, from the 1st day of January, 1880, up to the 14th day of February, 1953, in order to produce by means of a sinking fund the capital sum of £125 or thereabouts on the said 14th of February, 1953." By section 7 of the Act it was provided as follows: "For the purpose of carrying out and giving effect to the memorandum of terms which have been agreed to between the Secretary of State and the company, the Secretary of State is hereby authorized to create and shall create on or before the 1st day of January, 1880, a clear yearly annuity of £1,473,750, being at the rate of £4 10s. per cent. per

annum in respect of every £100 of stock of the company at the agreed value of £125, and yielding an annuity of £5 12s. 6d. in respect of every such £100 stock, commencing on the 1st day of January, 1880, and terminating on the 14th day of February, 1953, and the said annuity shall have all the incidents of personal estate." It was, therefore, to his mind demonstrated that each half-yearly payment represented—(1) a constant unvarying sum for interest on the whole capital sum during the seventy-three years; and (2) another constant and unvarying sum calculated by way of a sinking fund to replace the whole capital at the end of the seventy-three years (which, of course, could be used for that purpose or not, according to the will of the annuitants). If, therefore, the question was not governed by authority, he came to the conclusion that the defendants' contention was correct and the plaintiffs' incorrect. After referring to the cases of *Secretary of State for India* v. *Scoble* and *Leeds Permanent Benefit Building Society* v. *Mallandaine*, 45 W. R. 501, [1897] 2 Q. B. 402, he was of opinion that there was nothing to prevent the defendant from showing that income tax had been wrongly deducted only in respect of those portions of the "annuity" payments which did not in fact represent interest. He therefore made a declaration that the half-yearly payments by the defendant to the plaintiffs of the "annuity" were partly payments towards a sinking fund calculated, if invested at compound interest, to produce the whole price for the purchase of the railway at the end of seventy-three years, and, therefore, in the nature of capital, and partly interest on the whole of such price so to be produced at the end of such seventy-three years, and that so much of such half-yearly payment as represented capital was not liable to income tax. As to the amount recoverable in respect of wrongful deductions in the past, the learned judge gave judgment for the plaintiffs for the lesser sum only—viz., £2,044 2s. 3d.

The plaintiffs appealed, and the defendant gave notice of cross-appeal.

C. A. Cripps, K.C., and *Tyrrell Paine*, for the plaintiffs.

Sir Robert Finlay, A.G., and *Rowlatt*, for the defendant.

Cur. adv. vult.

June 8.—COLLINS, M.R., read the following judgment: This case comes before us on an appeal and cross-appeal by the plaintiffs and defendant respectively from a decision of Jelf, J. The plaintiffs are the holders of a "so-called annuity" (I use the phrase employed by Jelf, J., to describe it) granted by the Secretary of State for India as the purchase price of the interest of the plaintiffs in certain railways in India, a right to purchase which had been conferred on the Secretary of State upon terms settled between the plaintiffs and the East India Company prior to the construction of the railways. The action is brought to recover sums wrongfully deducted, as the plaintiffs aver, for income tax on the annual payments of the annuity.

The plaintiffs contend that the question of principle applicable to this case has been decided by the House of Lords, affirming the decision of the Court of Appeal in the case of *Secretary of State for India* v. *Scoble* (1903, A. C. 299). The question arose there with respect to an annuity granted on the purchase of the then respondents' interest in another Indian railway under a contract in all material respects identical with that which conferred the right of purchase in this case. The House of Lords there held that what was given under the name of "annuity" in return for the interest purchased was a capital sum payable by instalments with interest, and that, therefore, income tax was payable only on such part of each instalment as consisted of interest; that though called an annuity, it was not, when the substance of the transaction was looked at, the same thing that is made taxable under that name in the Income Tax Acts, which do not purport to tax capital.

It was contended for the Secretary of State that certain modifications had been introduced by negotiation into the contract in this case, which had the effect of altering the nature of the annual payments, and converting them into an ordinary annuity within the meaning of the Income Tax Acts. It was pointed out that in *Scoble's case* the time before which the option of purchase could not be exercised had expired when the option was declared, and that there was, therefore, in existence a debt or capital sum which had to be liquidated; whereas in this case the purchase was arranged by bargain before the time for exercising the option had actually arrived. It was also urged that in the present case the method by which the annuity was to be calculated had been a term of the bargain, and had incidentally altered its character so as to take it out of the principle of the decision in *Scoble's case*.

The case was twice heard before Jelf, J. On the first occasion the latter point was not taken; and he held that, notwithstanding the fact that the option had by arrangement been exercised before the appointed time, the principle of *Scoble's case* applied, and the transaction must still be looked at as an arrangement for payment of a capital sum with interest by instalments, and not as an annuity in the ordinary sense, and he made a declaration in the terms prayed by the plaintiffs. The matter, however, came again before the learned judge, on liberty to apply given, as to how the amounts of interest and principal were to be ascertained in each instalment; and on this occasion the method on which the annuity was calculated as recited in the agreement between the parties, which was subsequently embodied in an Act of Parliament, was strongly relied upon by the Crown as altering the whole character of the annual payments. The learned judge could not recall his judgment already given, but he has pronounced a decision reducing the sum attributable to capital in each instalment to 5s. out of every £5 7s. 6d., and leaving the residue to be treated as income and taxable as such.

Both sides appeal, the plaintiffs on the ground that the statement as to how the annual sum was calculated was merely for the purpose of showing that the sum allowed was a proper one, and could not have the effect of altering the character of the payment, and of turning that which was in truth and in fact the liquidation of a debt by instalments into that which it was held not to be in *Scoble's case*—a mere annuity; the Crown, on the ground that the decision ought logically to treat the whole annual sum as consisting of income only and taxable as such.

It is necessary to read the clauses dealing with the amount of the annuity and the letter which enclosed them, together with the recital in the Act which embodied them. The letter is in these terms: "The board of directors of the East Indian Railway Co. are aware that the period is approaching when, under the terms of the contracts between the East India Company and the East Indian Railway Co., of the 17th of August, 1849, and the 15th of February, 1854, the Secretary of State for India in Council may give notice of his intention to purchase the railway and works described in clauses 23 and 22 of those contracts respectively. Under the terms of the contract, dated the 21st of April, 1858, the Secretary of State in Council, as the board are likewise aware, has no such power in regard to the

Jubbulpore line until after twenty-five years from that date. Being satisfied with the manner in which the affairs of the East Indian Railway have been administered under the direction of the company, the Secretary of State desires to continue a system of management of the same kind, but so as to secure to the State a larger share in the profits of the undertaking than it receives through the operation of the present contract. With this view, while prepared strictly to adhere to the terms of the contracts, in respect of the mode of purchase, the Secretary of State before formally giving notice desires to open a negotiation with the company for the simultaneous purchase of the Jubbulpore line, and for working the whole undertaking under the control of Government. I enclose a memorandum of the terms on which the Secretary of State in Council will be ready to enter into a new agreement with the company for these purposes, and which he desires to submit for their consideration.—I have the honour to be, Sir, your obedient servant, LOUIS MALLET." Then, "Memorandum of terms." I need only read the first of them, I think: "That the purchase be made by means of an annuity terminable on the 14th of February, 1953, calculated on a rate of interest of £4 6s. per cent. on a commuted price of £125 per £100 of capital stock, which gives, including 4s. for redemption of capital, an annuity of £5 12s. 6d. for each £100 of capital stock so commuted at £125. But that the shareholders be allowed an option of leaving in the hands of the Government, for the purposes hereafter mentioned, a proportion not exceeding one-fifth of the commuted value of the capital stock of the company." Then there is a recital which is material also: "And whereas in the said memorandum of terms the amount of the annuity of £5 12s. 6d. into which every £100 stock of the company is intended to be commuted at a price of £125 is calculated on the basis of £5 7s. 6d., part thereof, being interest at the rate of £4 6s. per cent. per annum on the said amount of £125, and a sum of 5s., other part thereof, being the amount required to be set aside and invested half-yearly in every year at a like rate of interest from the 1st of January, 1880, up to the 14th of February, 1953, in order to produce by means of a sinking fund the capital sum of £125, or thereabouts, on the said 14th day of February, 1953." In my opinion, this statement is merely made to justify the amount at which the annuity is fixed, and does not alter the fundamental character of the transaction as declared by the House of Lords in *Scoble's case*. I agree with the learned judge that the other fact as to the anticipation of the time for declaring the option and altering the date from which the instalments are to run does not interfere with the primary consideration that the arrangement is one for the discharge of a debt by payments extending over many years, and, therefore, requiring the addition of interest; and I cannot think that the arithmetical calculation by which the amount is fixed has had the effect of radically changing the transaction. The 5s. which is put down in that calculation as applicable to the formation of a sinking fund is not treated as an instalment of capital, but is treated as income, out of which the receiver can, if he chooses, form a sinking fund. The whole annual sum is in that view composed exclusively of income and taxable as such. If effect is to be given to the principle which declared that each instalment must be taken as including capital and income, it cannot be worked out on the lines indicated in the calculation. It can be worked out on the lines suggested in the table proposed by the plaintiffs. I am of opinion, therefore, that the plaintiffs' appeal should be allowed and the cross-appeal dismissed.

MATHEW and COZENS-HARDY, L.JJ., concurred.

Appeal allowed; cross-appeal dismissed.

Solicitors for the plaintiffs, *Freshfields.*

Solicitor for the defendant, *Solicitor of Inland Revenue.*

From Chan. Div. (Vaughan Williams, Romer, and Stirling, L.JJ.) | May 12, 15, 16; June 6, 1905.

WOODALL v. CLIFTON. (a.)

Landlord and tenant—Lease—Long term—Option to purchase fee—Rule against perpetuities—Covenant running with land—32 Hen. 8, c. 34.

An option in a lease to purchase the fee simple is something wholly outside the relations of landlord and tenant, with which alone the statute 32 Hen. 8, c. 34, deals, and therefore cannot be enforced as running with the land within the purview of that statute, though such a contract in a lease may be good as binding the heirs and assigns, provided it does not infringe the law against perpetuities.

Decision of Warrington, J. (53 *W. R.* 203), *affirmed.*

This was an appeal from the decision of Warrington, J. (reported 53 W. R. 203).

The action raised the question whether an option given to a lessee by the lease to purchase the freehold at any time during the term of ninety-nine years at a fixed price was valid, or was void as creating an executory interest in land to arise on a future event which might not happen within the limits of the rule against perpetuities—*i.e.*, within a life in being and twenty-one years afterwards.

The material portions of the documents and facts giving rise to this question were shortly as follows:

By a lease of July, 1867, some six acres of land at Chislehurst were demised by the then owner to the lessee for a term of ninety-nine years at the yearly rent of £142. This lease contained the following clause:

"Provided always, and it is hereby agreed and declared, that in case the lessee, his heirs or assigns, shall at any time during the said term become desirous of purchasing the fee simple of and in the said lands and premises hereby demised, or any portion thereof not being less than one acre, at and after the rate of £500 per acre, and such further sum for the timber thereon as shall be ascertained by a fair valuation thereof, and upon receipt of the amount of the purchase-money for the same, the lessor, his heirs or assigns, shall and will execute a conveyance or other assurance of the said land and premises with the timber thereon, in favour of the lessee, his heirs or assigns, upon the same terms as to title and otherwise as the lessee and other purchasers of portions of the Camden Park estate have hitherto completed their purchases."

By a lease of July, 1869, some four other acres of land in Chislehurst and Bromley were demised to the same lessee for a term of ninety-nine years at the yearly rent of £112, with an option to purchase similar in its terms to that contained in the 1867 lease, except that the option was reserved to the lessee, his "executors, administrators, and assigns," instead of to his "heirs and assigns," and that the price per acre was to be £600. The lands and premises comprised in and demised by these two leases were now vested in the plaintiff for the residues now unexpired of the terms thereby granted, and he

(a.) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

claimed that as assignee of these terms he was entitled to the benefit of both of the options if the same were valid and subsisting options. Subject to the leases and the options therein contained, the defendants were the owners in fee simple of the lands comprised in the leases. Notices to purchase the whole of the premises demised by the two leases had, in pursuance of the terms of the options, been given by the plaintiff to the defendants, but the defendants, who were trustees, having been advised that the options were invalid as against them, declined to complete the purchase. The plaintiff thereupon commenced the present action against the defendants, and by his writ claimed a declaration that the two options to purchase were valid and subsisting options which had been duly exercised by the plaintiff, and that the plaintiff was entitled to the benefit thereof and to enforce the same against the defendants.

Warrington, J., held that the option clause in question did in terms create an estate or executory interest in land which might arise on an event which might occur after the period allowed by the rule against perpetuities; and, if so, it was void as obnoxious to the rule, on the authority of *London and South-Western Railway Co.* v. *Gomm*, 30 W. R. 321, 20 Ch. D. 562; also that the circumstance of the covenant being contained in a lease and not in a conveyance, did not make the case an exception to that rule. His lordship accordingly made a declaration that the two options were not valid and subsisting options to purchase which could be enforced against the defendants by way of specific performance.

The plaintiff appealed.

Upjohn, K.C., Cave, K.C., and *Marigold*, for the appellant.—A mere option does not create any estate in the land till the exercise of the option. Till such exercise it is a mere matter of contract, and there is no objection on the ground of perpetuity, as the doctrine of remoteness is part of the law of property, not contract. Further, this is a covenant in a lease, and one to which the doctrine of perpetuity has no application.

They cited *London and South-Western Railway* v. *Gomm*, 30 W. R. 321, 620, 20 Ch. D. 652; *Manchester Ship Canal Co.* v. *Manchester Racecourse Co.*, 49 W. R. 418, [1901] 2 Ch. 37; *Edwards* v. *West*, 26 W. R. 507, 7 Ch. D. 858; *Walsh* v. *Secretary of State for India*, 11 W. R. 823, 10 H. L. C. 367; *In re Adams and Kensington Vestry*, 32 W. R. 883, 27 Ch. D. 394; *Mayor of Congleton* v. *Pattison*, 10 East 130; *Roe d. Bamford* v. *Hayley*, 12 East 464; *Friary Holroyd and Healey's Breweries* v. *Singleton*, 47 W. R. 93, 662, [1899] 1 Ch. 86, 2 Ch. 861; *Bally* v. *Wells*, 3 Wils. 25; *Horsey Estate (Limited)* v. *Steiger*, 47 W. R. 644, [1899] 2 Q. B. 79; *Isteed* v. *Stoneley*, 1 Anderson 82; *Simpson* v. *Clayton*, 4 Bing. N. C. 758; *Williams* v. *Earle*, 16 W. R. 1041, L. R. 3 Q. B. 739; Smith's Leading Cases (11th ed.), p. 55, *Spencer's case*, and 70, citing *Anon. case*, 158n.; *Vernon* v. *Smith*, 5 B. & Ald. 1; *Hyde* v. *Skinner*, 2 P. Wms. 196; *Collison* v. *Lettsom*, 6 Taunt. 224; *Lord Ranelagh* v. *Melton*, 13 W. R. 150, 2 Dr. & S. 278; *Weston* v. *Collins*, 13 W. R. 510, 11 Jur. N. S. 190; and *Nicholson* v. *Smith*, 31 W. R. 471, 22 Ch. D. 640.

Rowden, K.C., and *Beaumont*, for the respondent.—An option to purchase unrestricted in point of time is bad as a perpetuity. This covenant does not run with the land. It destroys the relationship between landlord and tenant, and is therefore not within 32 Hen. 8, c. 34.

They cited *Doughty* v. *Bowman*, 11 Q. B. 444; *Thomas* v. *Hayward*, L. R. 4 Ex. 311, 17 W. R. Dig. 73; *Moore* v. *Clench*, 24 W. R. 169, 1 Ch. D. 447; *Chandos (Dowager Duchess)* v. *Brownlow*, 2 Ridgeway P. C. 345; *Hope* v. *Gloucester Corporation*, 3 W. R. 328 7 De G. M. & G. 647; *Redington* v. *Browne*, 32 L. R. Ir. 347; *In re Oliver's Settlement, Evered* v. *Leigh*, 53 W. R. 215, [1905] 1 Ch. 191; *Roe d. Hunter* v. *Gulliers*, 2 D. & E. 133; *Lawes* v. *Bennett*, 1 Con. 167; *Townley* v. *Bedwell*, 14 Ves. 590.

Upjohn, K.C., in reply, cited *Rose* v. *Watson*, 12 W. R. 585, 10 H. L. C. 672; *In re Hollis' Hospital Trustees and Hague*, 47 W. R. 691, [1899] 2 Ch. 540; *In re Ashforth's Trusts, Ashforth* v. *Sibley*, 53 W. R. 328, [1905] 1 Ch. 535.

Cur. adv. vult.

June 6.—ROMER, L.J., delivered the following judgment of the court: A contract in a lease giving an option of purchase might be good, without regard to the provisions of the statute of Henry VIII., as binding the land in the hands of the heirs or assigns, provided it did not infringe the law as to perpetuities. It would not be the less a binding contract because it was contained in a lease. But in the present case it is clear that the plaintiff cannot succeed on such a ground. Unless the covenant or proviso giving the option of purchase could be said to run with the land by virtue of the provision of the statute, then the plaintiff must fail. Now undoubtedly the statute is in its wording very wide, but it has long been held that some limitations must be implied; as, for example, that the statute does not apply to covenants which do not touch or affect the land demised, or to assigns where the covenants relate to things not *in esse*, and "assigns" are not purported to be bound. The question in the present case is whether the statute was intended to cover, or can be construed as covering, such a covenant or provision as we have now to consider, so as to make the liability to perform it run with the reversion. We have come to the conclusion that that question must be answered in the negative. The covenant is one aimed at creating, at a future time, the position of vendor and purchaser of the reversion between the owner and the tenant for the time being. It is in reality not a covenant concerning the tenancy or its terms. Properly regarded, it cannot, in our opinion, be said to directly affect or concern the land, regarded as the subject-matter of the lease, any more than a covenant with the tenant for the sale of the reversion to a stranger to the lease could be said to do so. It is not a provision for the continuance of the term, like a covenant to renew, which has been held to run with the reversion, though the fact that a covenant to renew should be held to run with the land has by many been considered as an anomaly, which it is too late now to question, though it is difficult to justify. An option to purchase is not a provision for the shortening of the term of the lease, like a notice to determine or a power of re-entry; though the result of the option, if exercised, would or might be to destroy the tenancy. It is, to our minds, concerned with something wholly outside the relations of landlord and tenant with which the statute of Henry VIII. was dealing. And the results of allowing such a provision to come within the purview of the statute, and to be enforced as running with the land, would lead to very anomalous and, to our minds, most undesirable results as to perpetuities, conversion, and otherwise, which this court should not validate unless it is obliged to do so. And we cannot think that the court is so obliged on the true construction and effect of the statute. It is strange that there is no direct authority on the point. There are cases where the option has been exercised by the tenant and accepted by the landlord, and subsidiary questions have had to be decided which naturally would be dealt with on the footing that what had already been done could not or need not be questioned

by the court, as, for example, the case of *In re Adams and Kensington Vestry*. But such cases are really of no assistance for the decision of the present case. In our judgment the appeal should be dismissed.

Solicitors, *Stow, Preston, & Lyttelton; Flaigate & Co.*

From K. B. Div. (Collins, M.R., and Mathew and Cozens-Hardy, L.JJ.) — June 6, 1905.

DE BEERS CONSOLIDATED MINES (LIMITED) v. HOWE (SURVEYOR OF TAXES). (a.)

Inland revenue—Income tax—Profits or gains arising from trade—"Person residing in the United Kingdom"—"Trade exercised within the United Kingdom"—Company owning mines abroad—Registration abroad—Head office abroad—Business mainly conducted in London—Income Tax Act, 1853 (16 & 17 *Vict. c.* 34), *s.* 2, *Schedule D.*

A company possessed of diamond mines in Cape Colony, and carrying on the business of diamond merchants, was registered as a limited company in Cape Colony, and had its head office at Kimberley, where the general meetings of the shareholders were held. It had also an office in London, and the majority of the directors resided in England.

Held, having regard to all the circumstances of the case, which showed that the real business of the company was conducted in London, first, that the company was resident within United Kingdom; and, secondly, that it exercised trade within the United Kingdom, so as on both grounds to be chargeable with income tax on the profits of its trade under Schedule D of the Income Tax Act, 1853.

Appeal from the judgment of Phillimore, J., on a case stated under section 59 of the Taxes Management Act, 1880, by the Income Tax Commissioners for the City of London, upon an appeal against two assessments to income tax, one for the year ending the 5th of April, 1901, and the other for the year ending the 5th of April, 1902, each in the sum of £1,557,693, in respect of the profits of the appellant company in the United Kingdom and elsewhere.

The main question raised by the case was whether the appellant company, which was a limited company registered abroad and not registered in the United Kingdom, was "residing" in the United Kingdom within the meaning of section 2 of the Income Tax Act, 1853 (Schedule D).

The question was also raised whether the company exercised a trade within the United Kingdom within the meaning of the same enactment.

The following facts were found by the commissioners or admitted: The appellant company was registered in Cape Colony in 1888 as an incorporated company with limited liability. It was not registered in the United Kingdom as a joint stock company. Its authorized capital was £4,500,000, and there were also debentures to a large amount. By the articles of association it was provided that the head office of the company should be in Kimberley in Cape Colony, or at such other place either in the said colony or in such other country as the directors should from time to time consider advisable, with such branch or branches elsewhere as the directors should deem fit. The company had offices both at Kimberley and in London; but the head office was at Kimberley, and all meetings of shareholders were held at Kimberley. The company owned or was interested in extensive diamond mines and mining and other property in South Africa and investments in English Government securities and shares in an English joint stock company. The profits of the company were chiefly made by the raising and sale of diamonds to a syndicate composed of six or seven firms of diamond merchants, with whom the company had had a series of contracts since 1895, including one made on the 2nd of December, 1901. These contracts were negotiated and executed in London, and the firms composing the syndicate were all described as of London. The contracts, which varied greatly in detail, provided for the purchase by the syndicate (with delivery at Kimberley) of the produce of the mines up to a specified amount, with provisions for the sharing by the company in the profits made by the syndicate on resale, and other provisions designed to control the output and sale of diamonds from the company's mines. It was admitted that the company was liable to income tax in respect of its share under the above agreement of the profits made by the syndicate. The object and effect of these arrangements by the company, who practically controlled the diamond trade of the world, was to regulate and support the market for diamonds, and the negotiation and maintenance of such arrangements was an essential part of the company's business. The management of the business and the control of the company was vested in three life governors or permanent directors and sixteen ordinary directors, and the articles of association provided that four at least of the directors should reside in England. Weekly meetings of directors were held at the London offices, and also at the Kimberley offices, proceedings being regulated by bye-laws which had been drawn up in London. These provided as follows, *inter alia:* (1) That the course of business as respected the technical management of the company's work at the mines and the expenditure there in wages, &c., should be determined by the directors for the time being in Kimberley, who, however, were to consult the London directors on matters of exceptional importance; (2) all other expenditure exceeding £25,000 was to be determined by the majority of all the directors of the company; (3) the policy of the board (*a*) as respected the disposal of its diamonds or other assets, (*b*) in connection with the working or development of the mines and the output of the diamonds, (*c*) as respected the application of the profits, and (*d*) as respected the appointment of elected directors and the filling up of casual vacancies in the board was to be determined by the majority of all the directors of the company, the chairman having a casting vote; (4) matters to be determined by a majority of all the directors were to be determined by resolutions to be submitted to meetings of the directors in London and Kimberley, and the votes recorded in both places to be added together as if taken at one meeting; (5) except as above provided, the London and Kimberley boards were to have equal and concurrent authority, including authority to incur expenditure not exceeding £25,000. The chairman (the Right Hon. Cecil J. Rhodes) attended various meetings of the directors in London when important business was to be transacted or the policy of the board to be determined, and the general manager, who resided half the year in South Africa and the other half in London, had also attended meetings in the latter place. A large number of the directors were resident in London, the largest attendance at a board meeting there had been fifteen, the largest in Kimberley being eight, and the average attendance in London was largely in excess of the average attendance in Kimberley. Matters falling within clause 3 of the bye-laws were

(a.) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

always dealt with at meetings of the directors in London and then communicated to Kimberley. There was no instance of the vote of the Kimberley directors turning a minority in London into a majority or negativing the decision of the London board. It was admitted that the majority of the directors had always given their votes on any important matter to be determined under the bye-law numbered (4) at the meetings of the directors in London. The directors in London appointed four committees—viz., the finance, the diamond, the machinery, and the dynamite committees—to act in London. The finance committee was entrusted, *inter alia*, with the final carrying out of the scheme for the conversion of the company's debentures, under which £3,500,000 5 per cent. mortgage debentures were issued in London in 1894, and it was required to make weekly reports to the directors in London as to the finances, including the payment and discounting of bills. The diamond committee directed and controlled the disposal of diamonds received in London, and submitted for the approval of the directors in London the terms under which the company's production of diamonds was disposed of to the Diamond Syndicate referred to above. The machinery committee executed in London all orders from Kimberley for the purchase of machinery and plant. It acted only on requisitions from Kimberley, and never initiated any policy relating to machinery. Its function was control. The dynamite committee accepted tenders and made contracts for the purchase of dynamite. It also acted only in pursuance of requisitions from Kimberley, never initiating any policy, but merely exercising the function of control. Various other transactions of considerable magnitude, enumerated in the case, were arranged and carried out by the London directors and their committees—*e.g.*, the approval, signing, and sealing in London with the common seal of the company of an agreement with the British South Africa Company as to advances to that company. The case stated that the transactions were always subject to confirmation at Kimberley, but this was only true in the sense that the majority of the directors did not use their power as such majority without formal communication with their colleagues in Kimberley. It was admitted that an absolute majority of all the directors if present in London could not have been overruled by the directors at Kimberley, and further, that as a matter of fact no conflict ever arose, everything decided at meetings in London, at which the Right Hon. Cecil J. Rhodes was present, being accepted without demur. No case was shown in which the directors at Kimberley ever overruled the decision of the directors in London. The general meetings of the company were always held at Kimberley. The general accounts of the company kept at Kimberley, and the balance-sheets, including the audited returns of the London office, were drawn up there and then submitted to all the directors of the company for approval. The minutes showed that the directors in London, who had always been a majority of the board, exercised a controlling influence over the accounts. The dividends, which were always announced in London and Kimberley simultaneously, were arrived at as the result of communications between the directors in London and Kimberley.

The appellant company contended that it was not resident in the United Kingdom and that it did not exercise any trade within the United Kingdom, and was not subject to income tax.

On behalf of the Crown it was contended that the operations of the company were controlled from London, and that London was the real seat of its business regarded as a whole, and that the company was resident here and liable to income tax on the whole profits wherever made.

It was further contended as an alternative that as the whole produce of the mines had been habitually disposed of under contracts made in England with the Diamond Syndicate, the appellant company exercised a trade or business within the United Kingdom.

The commissioners came to the conclusion: (1) That the company's trade or business constituted one trade or business, and was carried on within the United Kingdom, at their London office; (2) that the head and seat and directing power of the affairs of the company were at the London office, from whence its chief operations both in the United Kingdom and elsewhere were in fact controlled, managed, and directed. They determined that the company was a person residing in the United Kingdom and liable to be assessed under section 2 of the Income Tax Act, 1853 (Schedule D), paragraph 1, on the whole of the annual profits or gains arising or accruing from its trade, whether carried on in the United Kingdom or elsewhere. They accordingly confirmed the assessments.

Phillimore, J., came to the conclusion, upon the facts, that the direction and control of the policy and important operations of the company were exercised in London, and he held that the company was "resident" in the United Kingdom within the meaning of section 2, Schedule D, of the Income Tax Act, 1853, and was assessable to income tax upon the whole of its profits, wherever made.

The company appealed.

Cohen, K.C., *Danckwerts, K.C.*, and *Felix Cassel*, for the appellants.

Sir Robert Finlay, A.G., and *Rowlatt*, for the Crown.

The following cases were referred to: *Attorney-General* v. *Alexander*, 23 W. R. 255, L. R. 10 Ex. 20; *Cesena Sulphur Co.* v. *Nicholson*, 1 Ex. D. 428; *San Paulo (Brazilian) Railway Co.* v. *Carter*, 44 W. R. 336, [1896] A. C. 31; *Blackstone Manufacturing Co.* v. *Inhabitants of Blackstone*, 13 Gray (Mass.) 488; *Ohio and Mississippi Railroad Co.* v. *Wheeler*, 1 Black (U.S.) 286; *Bank of Augusta* v. *Earle*, 13 Peters (U.S.) 519; *Goerz & Co.* v. *Bell*, [1904] 2 K. B. 136, 52 W. R. Dig. 91; *Erichsen* v. *Last*, 30 W. R. 301, 8 Q. B. D. 414; *La Bourgogne*, [1899] A. C. 431.

COLLINS, M.R.—This is an appeal from a decision of Phillimore, J., holding that the appellant company are chargeable with income tax under the terms of Schedule D of the Income Tax Act, 1853. Those terms are as follows: "For and in respect of the annual profits or gains arising or accruing to any person residing in the United Kingdom from any kind of property whatever, whether situate in the United Kingdom or elsewhere, and for and in respect of the annual profits or gains arising or accruing to any person residing in the United Kingdom from any profession, trade, employment, or vocation, whether the same shall be respectively carried on in the United Kingdom or elsewhere, and to be charged for every twenty shillings of the annual amount of such profits or gains; and for and in respect of the annual profits or gains arising or accruing to any person whatever, whether a subject of her Majesty or not, although not resident within the United Kingdom, from any property whatever in the United Kingdom, or any profession, trade, employment, or vocation exercised within the United Kingdom, and to be charged for every twenty shillings of the annual amount of such profits or gains." The learned judge held that the appellant company were resident within the United Kingdom, and he also held that they exercised their trade within the United Kingdom. On either one

ground or the other, therefore, he allowed the claim of the Crown that the appellants ought to be assessed to income tax on the profits of their trade.

The most material question, according to Mr. Cohen, is whether the appellants are resident within the United Kingdom. The Attorney-General, on the other hand, says that that question is not so important as Mr. Cohen contends, because, if the appellants carry on business within the United Kingdom, the effect in the circumstances of this case will be the same. His argument is that the appellants have only one business, and they carry on that business within the United Kingdom, and therefore, whether they are resident within the United Kingdom or not, the Crown is entitled to the tax claimed. I will deal with both points. In my opinion the inferences to be drawn are inferences of fact, and there is no real dispute, except with regard to one point, as to the principles of law applicable to the case.

First, then, is this company resident within the United Kingdom? Mr. Cohen met that question *in limine*. He cited certain American authorities in reliance on which he affirmed that a foreign company cannot have any residence outside the country under whose laws it is incorporated. The *dicta* to that effect seem to be based on the idea that a company can have only one domicil, but it is admitted that it is possible by the comity of nations for a foreign company to carry on business in a country other than its own, and to that extent to have its existence recognized outside its own country. Whether it ought to be said that this is merely by the comity of nations, or whether the foreign company ought to be called an entity having a real existence in the other country, the result seems to be that, according to the authorities relied on, a company can carry on business in a foreign jurisdiction. However that may be by American law, at any rate it is clear that by our law a foreign corporation can reside in this country. In *Carron Iron Co.* v. *Maclaren*, 3 W. R. 597, 5 H. L. C. 416, Lord St. Leonards laid it down that a corporation can have more than one domicil. At p. 449 he said: "I think that this company may properly be deemed both Scotch and English. It may, for the purposes of jurisdiction, be deemed to have two domicils. Its business is necessarily carried on by agents, and I do not know why its domicil should be considered to be confined to the place where the goods are manufactured. The business transacted in England is very extensive. The places of business may, for the purposes of jurisdiction, properly be deemed the domicil. The corporation cannot have the benefit of its place of business here without yielding to the persons with whom it deals a corresponding advantage. The claim of the company is in respect of dealings here. Service on one member of a corporation is good service. Upon general reasoning, I think that the company may, for the purposes of the suit in Chancery, be treated as within our jurisdiction." And further on, at p. 458, he said: "I have been unable to discover which is the particular residence of this company. The money of the appellants is made by returns coming from England. They manufacture in Scotland. The members of this corporation do not make the iron; they do not reside in the house. They are nobody; in fact, they are represented by their seller, but they are not, in other respects, persons dealing as individuals. Their business is carried on in London just as much as it is carried on in Scotland. It is not, therefore, a question of attacking the agent as agent. If the service upon the agent is right, it is because, in respect of their house of business in England, they have a domicil in England. And in respect of their manufactory in Scotland they have a domicil there. There may be two domicils and two jurisdictions; and in this case there are, as I conceive, two domicils and a double sort of jurisdiction, one in Scotland and one in England; and for the purpose of carrying on their business one is as much the domicil of the corporation as the other."

Those *dicta* establish that it is possible by our law for a foreign company to acquire a domicil—a residence—in this country. Though they are only *dicta* of Lord St. Leonards, and are not the decision of the House of Lords, they have been followed by this court in questions as to the service of writs. It is necessary to examine those cases and see what lies at the bottom of them, and what bearing they have on Mr. Cohen's contention that it is impossible for a foreign company to acquire a residence in this country. In those cases the question was whether service of a writ could be effected within the jurisdiction on a foreign corporation under ord. 9, r. 8. In order to establish the right to treat the foreign corporation as brought within the jurisdiction in those cases, it was necessary to show that a foreign corporation, none the less because it is a foreign corporation, came within the designation of those persons who under that rule can be served in the manner therein mentioned, and the first thing to be considered was whether it was resident in this country. This court decided that the rule covered a foreign corporation as well as a British corporation. They therefore decided this, that it is possible for a foreign corporation to be resident in this country. It may be that residence for the purpose of service need not be the same as residence for the purposes of the Income Tax Acts. Still, those authorities negative the existence of the hard-and-fast rule contended for by Mr. Cohen.

Assuming it is possible by our law for a foreign company to acquire a residence in this country, the question arises whether in all the circumstances of this case the appellant company can be deemed to have done so. That depends on many facts. I do not propose to go into all the facts in detail. Phillimore, J., has dealt with them, and has come to the conclusion that they show residence in this country. I will refer to a few of them. By the articles of association the head office shall be at Kimberley, in Cape Colony, or at such other place either in the said colony or in such other country as the directors shall from time to time consider advisable. That seems to me to show, not an intention that the residence of the company should be limited to the country under whose laws it had been incorporated, but an intention to allow it to be shifted. It is not inconsistent with an intention to place the head office of the company somewhere else. We are therefore justified in looking to see what has been done in fact. We find that another office has been established in London, that the majority of the directors reside in England, and that, though it is provided that a certain number of directors must reside in South Afrca, there is also a provision that enough to form a quorum must reside in England. The intention of the provisions as a whole seems to be to enable the directors in London to govern the company. In fact, the real business of the company is that of diamond merchants, and that business is conducted in London. The diamonds come from South Africa, but the real business is carried on by the directors in London, though in concert with the directors at Kimberley. The head and brains of the company are to be found in London. On all the facts of the case I come to the conclusion that the appellants are resident and carry on business in this country. I therefore think that the judgment of Phillimore, J., is right, and that the appeal must be dismissed.

MATHEW and COZENS-HARDY, L.JJ., concurred.

Appeal dismssed.

Solicitors for the appellants, *Hollams, Sons, Coward, & Hawksley.*

Solicitor for the Crown, *Solicitor of Inland Revenue.*

High Court of Justice.

Chan. Div. Buckley, J. } July 10, 11, 12, 1905.

MAY AND OTHERS v. BELLVILLE. (a.)

Vendor and purchaser—Right of way—Reservation in deed of grant—Deed not executed by grantee—"Rights of way hitherto exercised"—Unity of title.

Where, in a contract for the sale of freehold land, the sale was expressed to be subject to a reservation in favour of the vendor and others, the owners and occupiers of certain adjoining lands, of certain rights of way "hitherto exercised" over the land sold, and the conveyance contained words reserving such rights, but was not executed by the purchaser,

Held, that the purchaser could be compelled in an action for specific performance to carry out the terms of the contract by executing the conveyance.

Held, also, that the purchaser, or a person deriving title under him with notice of the terms of the deed of conveyance, is bound in equity to give effect to the rights intended to be reserved, and may be restrained by injunction from interfering with their exercise by the persons in whose favour the reservation was agreed to be made. This is so, notwithstanding that such rights at the date of the deed of conveyance were merely rights de facto, *and that, by reason of the unity of title to the dominant and servient tenements being in the vendor at the date of the conveyance, the rights had no existence in law.*

The principle of Kay *v.* Oxley, *L. R.* 10 *Q. B.* 360, *applied.*

On the 25th of March, 1902, the plaintiff May purchased an estate known as the Red Lodge Estate, which included three farms known respectively as White Lodge, Coxhill, and Middle Buryhill, which had been held under one title since 1867.

In the following month, May entered into negotiations with one Jay for the sale of White Lodge, and a price was agreed upon, but Jay went abroad before the contract of sale was signed, after giving a power of attorney to one F. Probyn Dighton, under which Dighton, on the 16th of May, 1902, signed a contract on Jay's behalf for the purchase of White Lodge. This contract was in the form of the printed particulars and conditions which had been prepared for a sale by public auction, and the following words were inserted in manuscript in the particulars and initialled by Dighton: "There is also reserved to the vendor, his heirs and assigns, the owners and occupiers for the time being of Lots 24 and 33, and their servants and others authorized by them, all rights of way hitherto exercised by them in respect of such lots over any portion of this Lot 27."

Dighton approved the title on Jay's behalf, and a conveyance of the property was executed by the vendor on the 24th of June, 1902. The parcels clause in this conveyance contained the words "except and always reserved unto the said Hubert May, his heirs and assigns, the owners and occupiers for the time being of two other farms forming part of the said Red Lodge Estate, and respectively known as Coxhill Farm and Middle Buryhill Farm, and their servants and others authorized by them, all rights of way hitherto exercised in respect of such farms over any portions of the hereditaments hereinbefore described and intended to be hereby conveyed." The deed was not executed by Jay, or by Dighton on his behalf.

Jay took possession under this conveyance, and obstructed the plaintiff Ponting, who was tenant of Coxhill Farm, in the exercise of an alleged right of way over White Lodge. The defendant Mrs. Bellville was the transferee of a mortgage of White Lodge by Jay, and was in possession as such mortgagee.

This action was brought by the plaintiff May as the owner, and the plaintiffs Ponting and William and George Price as the tenants, of Coxhill and Middle Buryhill Farms, for an injunction to restrain the defendant, her servants, tenants, and agents, from locking any gates and from otherwise hindering or obstructing the plaintiffs in the free use of the right of way which was described in paragraph 4 of the statement of claim.

As regards Middle Buryhill Farm the defendant acquired, pending the action, any rights the plaintiff had in respect of that farm, and the claim in respect of that farm was therefore abandoned.

The defendant counterclaimed for an injunction restraining the plaintiffs May and Ponting (as owner and tenant of Coxhill Farm) from entering or trespassing upon White Lodge and from asserting any right of way to or from Coxhill over White Lodge, and for damages.

Astbury, K.C., and *Greenwood*, for the plaintiffs.—The plaintiffs are entitled in equity to a right of way over White Lodge. It is admitted that a reservation operates at law by way of regrant and that you cannot get a legal clothing of your right without a legal grant, but in the present case the rights of way referred to must have been rights *de facto*; they could not have been rights *de jure* owing to the previous unity of title: *Kay* v. *Oxley*, L. R. 10 Q. B. 360; *Bayley* v. *Great Western Railway Co.*, 26 Ch. D. 434, 440, 32 W. R. Dig. 227. The words in the contract for sale and in the conveyance are evidence as against Jay of the existence in fact of some such rights. Although the conveyance was not executed by both parties, an agreement to execute a deed operates in equity to give the same rights as if the deed were executed: *Walsh* v. *Lonsdale*, 26 SOLICITORS' JOURNAL 346, 21 Ch. D. 9. The plaintiff May could have sued Jay for specific performance of his contract, and so compelled him to execute the conveyance, and the Statute of Frauds would not have afforded a defence because the taking possession by Jay was sufficient part performance of the contract.

They also referred to Sheppard's Touchstone, 80; *Wickham* v. *Hawker*, 7 M. & W. 63; and *Durham and Sunderland Railway Co.* v. *Walker*, 2 Q. B. 940, 967.

Buckmaster, K.C., and *Harman*, for the defendant.—There has been some user by the tenants of Coxhill of a way over White Lodge, but not constantly, and never as of right. The tenants of Coxhill had no such right under their tenancy agreements, and there is no evidence of any such agreement between the three tenants and their landlord. If the conveyance had been executed by Jay the rights which would have been reserved would be the rights, if any, previously exercised, but no such right had in fact been previously exercised, so that the reservation would have actually effected nothing. The plaintiffs cannot succeed unless they could successfully bring an action against the defendant

(a.) Reported by H. H. KING, Esq., Barrister-at-Law.

for specific performance of an agreement to grant rights of way, but such an action must fail because the defendant, Mrs. Bellville, had no knowledge or notice of any contract as to rights of way. She had no right to call for the contract for sale which was recited in and purported to be executed by the conveyance to Jay under which she derived title, and had she called for it the production might have been refused: *Leggott* v. *Barrett*, 28 W. R. 962, 15 Ch. D. 306, at p. 309.

Astbury, K.C., in reply.—The rights of way referred to in the conveyance of the 24th of June, 1902, need not be legal rights of way, but such as had been actually enjoyed, however permissive or precarious such enjoyment might have been: *International Tea Stores Co.* v. *Hobbs*, 51 W. R. 615, [1903] 2 Ch. 265.

BUCKLEY, J.—In this action the plaintiffs, as owner and tenants of two farms called Middle Buryhill and Coxhill, assert as against the defendant a right of way over certain lands known as White Lodge. As regards Middle Buryhill the evidence satisfies me that the way which was claimed existed, but no decision is asked for or required as regards that, because, pending the proceedings, the defendant has acquired the rights of Middle Buryhill; she has bought the rights of the owner, and the tenant, who joined as a plaintiff in the action, has ceased to be tenant by the expiration of his tenancy, so that nothing arises as regards that. The real contest in the case arises as regards Coxhill. Coxhill lies to the east, and the way which is claimed in respect of Coxhill is a devious one which is explained accurately, as far as I can see, in paragraph 4 of the statement of claim. It is shown upon the map A B C, and I may describe it as being a way which ran north of White Lodge and south of the railway, and ultimately found its way into the Minety-road. In its course it passed the level crossing in question, and at the bar the defendant has not denied that if the tenant of Coxhill could get as far the level crossing, then he had, over the White Lodge Estate a right to go on from the level crossing towards the westward down this way, which at that point joined the way from Middle Buryhill. I only state that for the purpose of saying that it shows that paragraphs 8 and 10 of the defence and the claim in the counterclaim cannot be sustained. But that does not decide the case at all.

The evidence in this case was conducted, until Mr. Jay got into box, upon the footing that the way I am going to describe next had no existence at all; I heard of it first from him. He said that Coxhill may have had, or had, a right when it got to Davenport Bridge to cross Davenport Bridge to the north, and then, passing over the land to the north of the railway, to come south again across the level crossing and then down the way which I have described. None of the plaintiffs' witnesses were cross-examined about that way at all; it was suggested for the first time in Mr. Jay's evidence. I do not think there is anything in the evidence establishing that there was any right in Coxhill to go that way—that is to say, to cross the railway to the north and then come to the south for the purpose of getting to the level crossing, and then going on. The question is whether the plaintiffs are not right in saying that they had a right to reach the level crossing keeping always south of the railway, and then go down from the level crossing westward by the way which it is admitted they had a right to use. That is the point I am going to decide.

First, as regards the title, the matter stands thus: Down to the year 1867 there was not unity of title as regards the three farms, Coxhill, White Lodge, and Middle Buryhill. On the 28th of March, 1867, there became unity of title, because at that date the owner of Middle Buryhill and White Lodge purchased Coxhill. What existed before 1867 I do not know with any certainty. However, after 1867 there was unity of title as between the three farms; of course there could be no acquisition of a right of way by one farm as against the other. On the 25th of March, 1902, the then owner sold all three farms to May. In the same year, a month or two later, May was minded to sell, and he offered the three properties under certain conditions of sale, and a contract to buy White Lodge was signed by a Mr. Probyn Dighton for Captain Jay on the 16th of May, 1902. There are inserted in manuscript into these particulars, and intialled by Dighton, these words: [His lordship read the words given above, and continued:] Now, it seems to me that this is admissible and valuable for this purpose, that May, the owner at that time of all three farms, was asserting that White Lodge was subject to some rights of way in favour of Middle Buryhill and Coxhill. Now, as I have said, rights of way in a legal sense cannot have existed, because there was unity of title as between the three farms. It has been suggested at the bar as possible that as between tenant and tenant, whether by the insistence of the common landlord or not, the one might have been compelled or compellable to allow the other to pass over his farm. That is a possible state of things. No doubt that would be a right of way in a sense—that is to say, the tenant of White Lodge might take White Lodge upon terms imposed by his landlord that he should let the tenant of Coxhill through his grounds. If that was so, then May was asserting that he had, by the words inserted in the particulars and contract of sale, imposed such terms on his tenant. Another suggestion was that the common landlord had not imposed any such obligation on the tenant, but that in point of fact as between tenant and tenant there always had been a user by the one of a right of way over the other. If that was so, then again May was asserting that, by these words which he introduced into the particulars and conditions of sale. In any case these words show that May, the common owner, was stating that at that time there existed a right of way in favour of Coxhill over White Lodge. Jay became the buyer. His contract was in point of fact carried through by Probyn Dighton on his behalf, but nothing arises upon that. The rights, whatever they are, arise from the fact that Jay accepted a conveyance and took possession upon certain terms. The conveyance, as executed by the vendor, contained these words: [His lordship read the words as above.] That deed was not executed by Jay. The agreement of the 16th of May, 1902, had been executed by Probyn Dighton on his behalf, and had incorporated the words reserving the rights referred to. Under the conveyance Jay took possession. Was Jay entitled to say that, inasmuch as the right of way could only be created by grant and he did not execute the deed, there existed no right of way, and the reservation effected nothing? In other words, if there were "rights of way hitherto exercised in respect of" such farms, can he say that by reason of his non-execution of the deed he is not bound? In my opinion he cannot. Suppose that Jay were the defendant in this action, he is a person who has taken possession under a conveyance which shows that he is to be a grantor to a certain extent. What right has he to say that he is not bound in equity to give effect to the terms upon which he has obtained the possession? The Statute of Frauds does not apply; there is part performance, and the bargain is shown by the terms of the conveyance. He can be called upon by the plaintiff

to give effect to the terms upon which he obtained possession—namely, the creation of those rights of way. The defendant is not Jay, but she derives title under Jay. She is a person who became transferee of a mortgage of the 13th of February, 1903, which was executed by Jay in favour of Donaldson for £4,500. Mrs. Bellville derives title under Jay and therefore necessarily has notice of the deed of the 24th of June, 1902, and of the reservation, which I have read, which it contained. How can she say she is not bound by the rights which existed against Jay? It has been argued that she had no notice of the contract of the 16th of May, 1902, which contained the words as to the rights of way, because that contract had been executed by the conveyance. But it seems to me that that is not so; the contract had not been executed by the conveyance, so far as it required the grant by Jay of rights of way reserved; it was still executory as regards that. She was put upon inquiry to ascertain what were the rights of way spoken of in the conveyance as being rights of way hitherto exercised in respect of certain farms. She cannot say that she took without notice of that; therefore there exists against the defendant the same rights as would have existed against Jay in respect of this matter.

That being so, I have got to see whether in point of fact there were rights of way hitherto exercised. As I have already said, no doubt there were no rights of way in the sense of legal rights of way, easements enjoyed by one property as against the other, because all these properties were in one hand. But on the principle of *Kay* v. *Oxley*, L. R. 10 Q. B. 360, and *Bayley* v. *Great Western Railway*, 26 Ch. D. 434, I am entitled to look and see whether there were rights of way exercised not as being legal rights of way, but rights of way enjoyed or exercised in fact by the one tenant over the land of the other. That is a question of fact upon which I have had a good deal of evidence, and I will state shortly how it appears to me to stand. [His lordship reviewed the evidence, and continued:] The result of all that evidence to my mind is that, whether they went by leave, whether permission was asked, or however it came about, the tenant of Coxhill did regularly and systematically use this way by the Davenport-gate always keeping south of the railway and passing White Lodge either by going north or south of it. That had gone on for thirty-five years. Then came the deed. Were there or were there not rights which in 1902 could be called rights of way hitherto exercised in respect of Coxhill over White Lodge? I think that there were. I think that this roadway from Davenport-gate by the level crossing and on to the Minety-road was a right of way in 1902 exercised in respect of Coxhill. It was not a legal right of way. Was it a right of way to which Jay under the deed of 24th of June, 1902, was bound to give effect? I answer, Yes, it was; that he could be compelled and the defendant taking under him could be compelled to give effect to it. It seems to me to follow that the plaintiffs are entitled to an injunction restraining the defendant from interfering with that right of way, and therefore I grant an injunction to restrain interference with that right of way, and the defendant must pay the costs.

Solicitors, *Gribble, Oddie, Sinclair, & Johnson*, for *Hewitt & Churchill*, Reading; *Lee & Pembertons*.

K. B. Div.
(Lord Alverstone, L.C.J., and Kennedy and Ridley, JJ.) April 5, 1905.

GUARDIANS OF WOOLWICH UNION v. GUARDIANS OF FULHAM UNION. (*a*.)

Poor law — Settlement — Unemancipated children — Acquisition of settlement—Divided Parishes Act, 1876 (39 & 40 *Vict. c.* 61), *ss.* 34 *and* 35.

A child under the age of sixteen cannot acquire an independent settlement, a legitimate child having the settlement of its parent and an illegitimate child the settlement of its mother.

Case stated.

On the 13th day of May, 1904, the respondents obtained an order adjudging that the parish of Charlton-next-Woolwich, in the Woolwich Union, was the place of the last legal settlement of the five children named Johnson, properly Turpin—viz., Alice, aged about fourteen, Maude, twelve, John, nine, Queenie, eight, and Dorothy, aged about six years, paupers chargeable to the parish of Fulham; and the appellants were ordered to provide for such paupers.

The following are the facts of the case:

In or about the year 1880 William Turpin married Rosa Clark. In or about the year 1884 Rosa Turpin left her husband William Turpin and cohabited with John Johnson, by whom she had the above-named children.

The above-named children lived with John Johnson and Rosa Turpin in the parish of Lambeth, where the child John was born on the 3rd of March, 1895, Queenie on the 28th of September, 1896, Dorothy on the 16th of December, 1898, and Mabel on the 12th of October, 1900.

The residence in the parish of Lambeth of John Johnson and Rosa Turpin continued without break and without relief from the guardians for a period exceeding three years. During the same period William Turpin resided for a term of three years in the parish of Charlton-next-Woolwich in the Woolwich Union in such manner and in such circumstances as made him irremovable therefrom and settled therein.

In the year 1903 the above-named paupers became chargeable to the Fulham Union, having resided there not quite a year.

It was contended on behalf of the appellants that the above-named paupers acquired a legal settlement in the parish of Lambeth by reason of their residence therein for upwards of three years prior to 1901 in such manner and under such circumstances as would, in accordance with the provisions of the several statutes in that behalf, render them irremovable therefrom.

On behalf of the respondents it was contended that the paupers took their mother's settlement, which was the settlement acquired as above stated by William Turpin in the parish of Charlton in the Woolwich Union.

The question for the opinion of the court was whether, upon the facts stated, the above-named children were settled in the Woolwich Union or not.

Rawlinson, K.C. (*Cox-Sinclair* with him), for the appellants.—The residence of the children in Lambeth enabled them to acquire a settlement: *West Ham Union* v. *Holbeach Union*, 52 W. R., pp. 30 and 513. If they did not acquire a settlement of their own they would take the settlement of their mother. That cannot be Woolwich, but the settlement of her

(*a*.) Reported by ALAN HOGG, Esq., Barrister-at-Law.

husband in 1884: *Retford Union* v. *Strand Union*, 3 B. & S. 122. Furthermore, the husband not having contributed to the wife's support, has deserted her: *Reg.* v. *Maidstone Union*, 5 Q. B. D. 31.

Macmorran, K.C., and *G. Humphreys*, for the respondents.—The wife in this case is not a deserted woman. She left her husband; she therefore has the settlement of her husband and of no one else. The judgment of Lord Watson in *Reigate Union* v. *Croydon Union*, 38 W. R. 295, 14 App. Cas. 465, is clearly in our favour. *Manchester Overseers* v. *St. Pancras Guardians*, 27 W. R. 885, 4 Q. B. D. 409, must now be taken to be overruled.

Rawlinson, K.C., replied.

Lord ALVERSTONE, L.C.J.—In this case an order has been made by justices for the removal of certain illegitimate children under the age of sixteen to the Woolwich Union, and the argument is that the order is wrong on the ground that the children have acquired a settlement elsewhere. I thought at one time that we might deal with the question under section 3 of 9 & 10 Vict. c. 66 (Poor Removal Act, 1846), but I now think that we really have to put a construction upon sections 34 and 35 of the Divided Parishes Act, 1876. I think it is clear from the judgment of Lord Watson in *Reigate Union* v. *Croydon Union* that the Divided Parishes Act did not mean to interfere with the settlement of children under sixteen; that so far as a legitimate child is concerned it has the settlement of its mother, and that under section 71 of 4 & 5 Will. 4, c. 76, an illegitimate child has its mother's settlement up to the age of sixteen. That being so, these children have the settlement of their mother, which, as she was not a deserted woman, was her husband's settlement. It was suggested in the course of argument that the wife in this case was a deserted wife, and had therefore acquired a settlement in Lambeth in her own right, but I think there are no facts from which we should be justified in assuming that there had been desertion by the husband. If, therefore, we are not satisfied that these children have acquired an independent settlement, this order is good.

The real question we have to decide is whether the effect of sections 34 and 35 of the Divided Parishes Act, 1876, is such as to enable children under the age of sixteen to acquire a settlement in the sense that the settlement so acquired will or may affect their status before they actually attain that age. There is no doubt that section 34 purported to give a settlement to persons who had become irremovable under certain circumstances, but whether it was intended to include the case of children living with a reputed father who could not himself give them a settlement seems to me to be extremely doubtful; at any rate it is sufficient for the present purpose to say that there was a very large class of persons who had become or would become irremovable as the result of previous legislation, and who would therefore be deemed to have acquired a settlement by virtue of the operation of section 34. Unless, therefore, the word "child" in section 35, sub-section 3, is to be construed as applying to children under sixteen, the main argument of the appellants is practically cut away. I agree that the statute itself, which begins by destroying and goes on to re-enact, is difficult to construe. There is no doubt that children under sixteen are referred to in paragraph 3 of section 35 and that illegitimate children are referred to in paragraph 2, and as a mere question of construction it is difficult to say why the expression "any child" should not include all classes of children; one argument, however, has been adduced which may possibly explain the reason for the use of that expression. The fact that the section has previously dealt separately with legitimate and illegitimate children is one reason for using the words "any child" in paragraph 3. But we have the distinct opinion of Lord Watson that the provisions of the last clause of section 35 "have no application to children under the age of sixteen, and do not qualify the preceding enactment of section 35, to the effect that a legitimate, or that of 4 & 5 Will. 4, to the effect that an illegitimate, child shall continue to retain its parentage settlement until it has reached that age. The clause assumes that the children whose settlements are the subject of inquiry are not unemancipated, but are paupers in their own right and capable of acquiring a settlement for themselves." Whether Lord Watson's judgment went further than this it is not necessary to consider, his extraordinary acumen and wonderful power of crystallizing the arguments presented to him are well known, and we have here his distinct opinion that this enactment relates to paupers who are emancipated and are capable of acquiring a settlement in their own right, together with a statement that the statute does nothing to qualify the clear existing statutory enactment as to the settlement of children living with their parents.

Reliance was placed on the decision in *Manchester Guardians* v. *St. Pancras Guardians*, but I think it is clear that that decision is inconsistent with the judgment of Lord Watson, and I think that he probably had that case, among others, in his mind when he said that he would not go through the cases as they were inconsistent. Therefore, upon the construction of the sections as interpreted by the judgment of Lord Watson I think that the respondents were right in their contention that section 35 does not enable children under the age of sixteen to acquire an independent settlement.

But it is contended by the appellants that we meant to decide this very question in the case of *West Ham Union* v. *Holbeach Union*, and certain passages in the judgments of myself and my brother Wills were relied upon which taken by themselves would no doubt warrant the placing of a wider interpretation on this section. But the present point was not suggested to us during the argument of that case and we were not then dealing with the case of children under sixteen at the date of the inquiry. The *West Ham case* went to the Court of Appeal, but the judgments there show that the decision of that court was confined to the question of the bearing of previous residence during the unemancipated period on the status of a person who at the time of the inquiry had become emancipated. [His lordship read passages from the judgments, [1904] 2 K. B., at pp. 128, 129, 131.]

In my opinion, therefore, section 35 was not intended to deal with the settlement of children, legitimate or illegitimate, under the age of sixteen, but only with the effect of previous residence for the period necessary to give a status of irremovability in the case of emancipated children; the cases support that view, and the positive enactment that illegitimate children are to retain their mothers' settlement up to the age of sixteen is still binding upon us. It being admitted that the mother had the settlement of her husband, it follows that the order appealed from was right.

KENNEDY, J.—I am of the same opinion. I will only say that notwithstanding the careful argument on behalf of the appellants their case is practically gone unless it can be made out that a child living with its parents for the period within the Act of 1876 can, even before the age of emancipation, acquire an independent settlement. Upon that point I will only

say that I entirely concur in the view expressed by my lord. In my opinion no authority compels us so to hold, and a decision to that effect would be both unreasonable and inconvenient. Accepting, therefore, the somewhat difficult explanation given by so great an authority as Lord Watson of the language which the Legislature has thought proper to adopt in the third clause of section 35, and treating that language as referring only to persons who have already attained the age of emancipation, I think that this appeal falls and should be dismissed.

RIDLEY, J.—I agree. It was contended that these children acquired a settlement for themselves by reason of their three years' residence with their parents in Lambeth. But all of them were unemancipated—all were under sixteen. The appellants' contention is wholly inconsistent with Lord Watson's judgment in *Reigate Union* v. *Croydon Union*, and I agree that the order appealed from was right.

Appeal dismissed.

Solicitors for appellants, *Callard & Vulliamy.*

Solicitors for respondents, *T. Blanco White.*

Prob. Div. & Adm. Div. Probate. } Feb. 27; March 9, 1905.

In the Goods of DIANAH HUBBUCK. (*a.*)

Will—Ambiguity—Admissibility of evidence of identification.

The testatrix appointed as executrix and legatee a person she described in her will as "my granddaughter," leaving a blank where the name should have been. At the date of the will and at the testatrix's decease the testatrix had three granddaughters.

The Court admitted evidence, the object of which was the identification of the person so intended, and admitted the will to probate.

The material part of the will of the testatrix, which was dated the 19th of September, 1900, was as follows: "I devise and bequeath unto my granddaughter my real and personal property . . . and appoint her sole executrix of this my will."

The testatrix died on the 29th of June, 1904, and at the date of the will and of the death of the deceased she had three granddaughters.

The only son and heir-at-law of the deceased moved for a grant of administration with the will annexed.

Barnard, for the applicant.—The will is void for uncertainty.

He cited *Hunt* v. *Hort*, 3 Bro. C. C. 311, and *Charter* v. *Charter*, L. R. 7 H. L. 364.

Middleton, for one of the granddaughters.—A "blank" in a will means a complete absence of description. Here there is only a partial blank, for the word granddaughter makes just the difference.

He cited *In the Goods of De Rosaz*, 25 W. R. 352, 2 P. D. 66, and *Doe* v. *Hiscocks*, 5 M. & W. 363.

Barnard, in reply.

GORELL BARNES, P., in the course of a considered judgment, said it was contended on behalf of the applicant that on the face of the will the gift was void, as the blank in the will was obviously left to be filled in, and that not having been so filled in the will was inoperative for uncertainty, as the testatrix had three granddaughters. On behalf of Miss Mary Anne Hubbock it was contended that the will was operative, inasmuch as she was sufficiently indicated. There was no difficulty in the law applicable to the case; the question was whether the court was entitled to admit evidence as to the "intention" of the testatrix. The question raised was a very old one, and had been repeatedly dealt with by the court. For Bacon's Maxims, No. 23, was as follows: "*Ambiguitas verborum latens verificatione suppletur; nam quod ex facto oritur ambiguum verificatione facti tollitur*"; and in *Doe* v. *Hiscocks*, 5 M. & W. 363, it was held "there is but one case in which it appears that this sort of evidence can properly be admitted, and that is where the meaning of the testator's words is neither ambiguous nor obscure; and where the devise is, on the face of it, perfect and intelligible, but from some of the circumstances an ambiguity arises as to which of two or more things or which of two or more persons, each answering the words in the will, the testator intended to express." Lord Hannen had dealt fully with this point in the case of *In the Goods of De Rosaz*, 2 P. D. 66, his judgment indicating the distinction between this case and those cited in support of the motion. In his judgment Lord Hannen said: "The whole of the testator's will must be in writing, and the court is therefore confined to putting an interpretation on words actually used by him; or, as the rule is expressed by Sir J. Wigram (par. 6), 'The judgment of a court in expounding a will should be simply declaratory of what is in the instrument.' In considering, therefore, whether a particular person or thing has been sufficiently indicated by a testator there must be some words to which the required meaning may be attached. A 'complete blank' cannot be filled up by parol testimony, however strong. Thus a legacy to Mr. —— cannot have any effect given to it (*Baylis* v. *Attorney-General*, 2 Atk. 239), nor a legacy to Lady—— (*Hunt* v. *Hort*, 3 Bro. C. C. 311). But if there are any words to which a reasonable meaning may be attached, parol evidence may be resorted to to show what that meaning is. Thus a legacy to a person described by an initial, as to 'Mrs. C.,' admits of explanation as by showing that the testator was accustomed to speak of a particular person by the initial of her name (*Abbott* v. *Massie*, 3 Ves. 148, and *Clayton* v. *Lord Nugent*, 13 M. & W. 207); and, where a blank was left for the Christian name, parol evidence has been admitted to show who was intended: *Price* v. *Page*, 4 Ves. 680." Now the words "complete blank" were precisely in point, and distinguished that case from the present one. Later in his judgment Lord Hannen said: "I have dealt with the case thus far on the supposition that evidence of a testator's declarations of intention are not admissible. But in the case of *Charter* v. *Charter*, L. R. 7 H. L. 377, Cairns, L.C., says: 'The only case in which evidence of this kind can be received is where the description of the legatee, or of the thing bequeathed, is equally applicable in all its parts to two persons, or two things.' Sir J. Wigram states the proposition thus (prop. 7, par. 194): "The only cases in which evidence to prove intention is admissible are those in which the description in the will is unambiguous in its application to each of several subjects.' If these expositions of the law are to be taken without any qualification, evidence of the testator's expressed intentions could not be given in this case (*In the Goods of De Rosaz*), for there is here only 'one' known subject, to which the testator's language can apply. It is possibly open to question whether such a case as this was in the contemplation of Lord Cairns and Sir J. Wigram."

The question here was a perfectly plain one, and there was no doubt as to the law on the subject. The

(*a.*) Reported by GWYNNE HALL, Esq., Barrister-at-Law.

question was—Did the description fit two or more persons, so as to let in evidence of "intentions"? That was the only question. Mr. Barnard had argued the case as though it entirely depended upon the blank, and had properly conceded that but for the blank his client's contention would be a difficult one. The cases showed that a "total blank" could not be supplied, but this was not a case of a "total blank," for the description fitted three granddaughters. If there had only been one, he (the President) would certainly have considered her sufficiently identified; but, as there were three, the question was whether the person "intended" was sufficiently identified. On the principles he had indicated he was satisfied that the evidence filed with the object of identification was admissible; and, having read that evidence, there was not the slightest doubt in his mind that the testatrix had intended to benefit and appoint her granddaughter Mary Anne, and no one else. The motion must, therefore, be rejected, and the will admitted to probate by the executrix named in it. All costs out of the estate.

Solicitors, *King, Wigg, & Co.*, for *Watson, Burton, & Corder*, Newcastle-on-Tyne; *Gribble, Oddie, Sinclair, & Johnson.*

Court of Appeal.

From K. B. Div. (Collins, M.R., and Mathew and Cozens-Hardy, L.JJ.) — June 9, 1905.

FITZROY *v.* CAVE. (*a.*)

Practice—Assignment of debt—Covenant by assignee to repay assignor—Intention to make debtor bankrupt—Maintenance—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-section* 6.

The plaintiff and the defendant were co-directors of a company. The plaintiff, being dissatisfied with the conduct of the defendant as a director, obtained from various creditors of the defendant an assignment of the debts owing from him to them, with the object of procuring an adjudication of bankruptcy against the defendant and of so getting him removed from the board of directors. The plaintiff covenanted with the creditors to pay over to them so much of the debts as he might be able to recover after payment of all costs necessarily incurred by him. This covenant was the only consideration for the assignment. The plaintiff having brought an action on the assignment, the defendant set up the defence that the conditions of the assignment and the purpose for which it was procured rendered it unenforceable, as evidencing a transaction which savoured of maintenance.

Held, that the plaintiff was entitled to judgment.

Comfort *v.* Betts, 39 *W. R.* 595, [1891] 1 *Q. B.* 737, *followed.*

Appeal by the plaintiff from the judgment of Lawrance, J., at the trial of an action without a jury.

The action was brought by the plaintiff to recover £90 11s. 5d., being the price of goods sold and delivered to the defendant by certain tradesmen in county Cork, the debts for which were, by deed dated the 13th of October, 1904, assigned to the plaintiff.

The deed of assignment stated that the assignment was made to the plaintiff in consideration of the covenant and agreement on the part of the assignee contained in the deed. The covenant was as follows: "And the assignee hereby covenants with the assignors, and with each of them, that, in case he shall be able to recover and realize the amount of the said debts from the said Arthur Oriel Singer Cave, he will immediately thereupon pay over to them, the assignors, their executors, administrators, and assigns, the said respective amounts, or so much thereof as he may be able to recover or realize, after payment of all costs necessarily incurred by him." Notice in writing of the assignment was duly given to the defendant.

The defendant's case was that the action savoured of maintenance, and, therefore, ought not to be allowed. He alleged that the assignment transferred no interest in the debts to the plaintiff, who merely obtained it with the object of making the defendant bankrupt, and thus removing him from his position as a director of a company of which the plaintiff was also a director.

It appeared that the plaintiff had invested £2,000 in the shares of a company called the Cork Mineral Development Co., and had been made a director. The defendant was also a director of the company and the local manager. According to the plaintiff's own evidence he visited the mines of the company, and found that in consequence of the action of the defendant as a director matters were not going on satisfactorily, and he therefore, on the advice of a local solicitor, obtained the assignment in question from the creditors for the purpose of procuring an adjudication of bankruptcy against the defendant and of so getting him removed from the board of directors. The plaintiff said that he did this for the good of the company and for his own protection, and that he had no animus against the defendant.

Lawrance, J., held, though with much doubt, that as the plaintiff, having no direct personal interest in the matter, procured the creditors to assign their debts to him solely for the purpose of getting the defendant out of his position as director, the case savoured of maintenance, and that therefore the contract was not enforceable as being against public policy. He accordingly gave judgment for the defendant.

The plaintiff appealed.

Roskill, K.C., and *Raymond Asquith*, for the plaintiff.—The plaintiff was justified in taking an assignment of these debts, and he is entitled to sue on the assignment: *Comfort* v. *Betts*, 39 W. R. 595, [1891] 1 Q. B. 737. Neither the assignment nor the action brought on it constitutes maintenance; nor do they savour of maintenance. Even if the plaintiff had been influenced by an improper motive in obtaining the assignment, the question of motive would be immaterial: *Mayor, &c., of Bradford* v. *Pickles*, 44 W. R. 190, [1895] A. C. 587. But he acted from a perfectly proper motive—viz., a desire to protect his own interest and that of other shareholders in the company.

They cited *Bradlaugh* v. *Newdegate*, 31 W. R. 792, 11 Q. B. D. 1; *Alabaster* v. *Harness*, 43 W. R. 196, [1895] 1 Q. B. 339; and *Prosser* v. *Edmonds*, 1 Y. & C. Ex. 481.

Holman Gregory, for the defendant.—The whole transaction savours of maintenance, though it has been made to assume the legal form of an assignment of debts. The defendant's creditors were not proposing to take any steps, when the plaintiff, a stranger, intervened with the object of making the defendant a bankrupt. If he had simply induced them to sue the defendant with that object and had undertaken to indemnify them against costs, that clearly would have been maintenance. That is really the essence of what he has done, and he cannot, by clothing the transaction in legal form, get rid of its essence.

(*a.*) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

He cited *Harrington* v. *Long*, 2 My. & K. 590; *Wallis* v. *Duke of Portland*, 3 Ves. 494; *De Hoghton* v. *Money*, 15 W. R. 214, L. R. 2 Ch. 164; *Rees* v. *De Bernardy*, [1896] 2 Ch. 437, 44 W. R. Dig. 43.

Cur. adv. vult.

June 9.—COLLINS, M.R., read the following judgment: This is an action originally started under order 14, but sent to be tried in the short cause list. Lawrance, J., has given judgment for the defendant, and the plaintiff appeals. The facts appear from the affidavits made under order 14 and from the evidence of the plaintiff given at the trial.

The plaintiff claimed as assignee of some small debts assigned to him by various creditors of the defendant on the terms of a deed which the plaintiff had caused to be prepared under the advice of a solicitor. The plaintiff explained that his object in taking these assignments was that he was desirous of getting rid of the defendant as co-director of a company in which they were both interested, being satisfied that it was for the best interests of the company that the defendant, with whose conduct he was thoroughly dissatisfied, should be removed from the board. The defence was that the conditions of the assignment and the purpose for which it was procured rendered it unenforceable as evidencing a transaction which savoured of maintenance. The learned judge was of that opinion, and gave judgment for the defendant. There is no dispute about the facts. The plaintiff's statement in cross-examination, as appears by the judge's note, was: "I want to get him off the board and I want to make him bankrupt, and he would have to leave the board. . . . Sole object was to get right of action to make him a bankrupt." It is necessary to scrutinize the terms of the assignment. The deed, which was between five tradesmen of the one part and the plaintiff of the other part, after reciting that the defendant was indebted to the five tradesmen in certain sums, and that the tradesmen had agreed to assign the said debts to the plaintiff upon the terms and for the considerations thereinafter set forth, witnessed that in pursuance of such agreement and for and in consideration of the covenant and agreement on the part of the plaintiff thereinafter contained, they, the tradesmen, thereby assigned to the plaintiff all the said debts to hold the same respectively to the plaintiff absolutely. The deed then proceeded: "And the assignee hereby covenants with the assignors, and with each of them, that, in case he shall be able to recover and realize the amount of the said debts from the said Arthur Oriel Singer Cave, he will immediately thereupon pay over to them, the assignors, their executors, administrators, and assigns, the said respective amounts, or so much thereof as he may be able to recover or realize, after payment of all costs necessarily incurred by him."

It is to be observed that no consideration is given by the assignee under the terms of this document except the undertaking to hand over so much as he may be able to recover after payment of all costs necessarily incurred by him. If nothing is realized, no costs will be payable by the assignors. It seems to me, therefore, that under this arrangement he acquired nothing but a bare right of litigation, giving him no interest in the proceeds, but enabling him to take collateral proceedings for an ulterior purpose. Had he, without taking an assignment, undertaken to find the money for the litigation to be followed up to bankruptcy, I think the case of maintenance would be quite clear in its simplest form, unless actions to recover debts are incapable of being the subject of maintenance. So long as the real transaction is the same, the form in which it is carried out ought not to alter the legal effect, and in the view of a court of equity it was not allowed to do so. Whether maintenance or not in the strictest sense, it savoured of maintenance: see *Wood* v. *Downes*, 18 Ves., at pp. 125, 126; *Prosser* v. *Edmonds*, 1 Y. & C. Ex., at pp. 496 *et seq.*; and *Harrington* v. *Long*, 2 My. & K. 590. The terms of the assignment in this case, by which the assignor pays no costs and has to submit to a deduction for them only in the case of a sum being realized from which such deduction can be made, seem to be equivalent in this respect to the deed of indemnity to which so much importance was attached in the last of the above cases. The illustrations given in argument in that case by the defendant's counsel, both on the hearing before the Master of the Rolls and on the rehearing before Lord Brougham, seem to cover the precise facts of this case.

Assuming, therefore, that actions of debt do not stand on a different footing in this respect from all other actions, and are capable of being made the subject of maintenance, in my opinion, but for the case of *Comfort* v. *Betts*, the argument for the defendant ought to succeed. That is a decision of the Court of Appeal, and binds us, unless there is such a difference in the terms of the assignment as to distinguish it from the assignment in this case. There is nothing mentioned in the report in the Law Reports as to the provision for costs. The effect of the transaction, however, was referred to in these terms by Lord Esher, M.R.: "Large numbers of debts were assigned to debt collectors without their having any interest in such debts and merely for the purpose of their being sued for"; and we were told by the appellant's counsel that the conditions of the assignment were the same as those in this case; and from the report in 64 Law Times Reports, at p. 685, this would seem to be so. If this be so, I see no reason why the transaction might not have been impeached on precisely the same grounds as those which were urged in this case. It is true that the point of maintenance was not distinctly raised, but some considerations of public policy were undoubtedly discussed, and the court held that the assignment was good under section 25, sub-section 6, of the Judicature Act, 1873. That decision is, therefore, an authority in this court that such an assignment can be enforced. No doubt there was no evidence in that case as there is here of a special collateral purpose for which the assignment was taken; but, if the transaction as described in the document was free from all taint of maintenance, the title of the assignee was absolute, and could not be impeached because he acted maliciously in contemplation of law in enforcing it: see *Stevenson* v. *Newnham*, 13 C. B. 285; *Mayor, &c., of Bradford* v. *Pickles*. Without, therefore, attempting to grapple with the broader question whether at the time when that case was decided actions to recover debts had ceased to be a possible subject of maintenance, I think it binds us, and I am constrained to differ from the conclusion of the learned judge below, and to hold that the plaintiff is entitled to judgment. The appeal must be allowed.

COZENS-HARDY, L.J., read the following judgment: This is an appeal from the judgment of Lawrance, J., in favour of the defendant. The plaintiff is the assignee of five debts amounting together to over £50 due from the defendant to five creditors resident in Ireland. The assignment is effected by a deed dated the 13th of October, 1904. It is in the common form of an absolute assignment, but there is no pecuniary consideration, and the assignee takes no beneficial interest, for he covenants

that, in case he is able to recover the amount of the debts from the defendant, he will pay over to the assignors the respective amounts or so much thereof as he may be able to recover or realize after payment of all costs necessarily incurred by him. Now the existence of the debts is not disputed, and unless the plaintiff can recover the amounts the defendant has been relieved from all responsibility. It has, however, been strenuously contended by Mr. Gregory in his very able argument that the plaintiff's action is open to the objection of maintenance, or is otherwise such that on grounds of public policy the court ought to refuse its assistance. This view was adopted by the learned judge.

It is desirable to consider the limits of the doctrine of maintenance as applied to *choses in action*. There are undoubtedly many *choses in action* which are not and never were assignable either at law or in equity. A right to set aside a deed on the ground of fraud is a typical instance. It is plain that no court would allow the assignee of such a right to maintain an action. The instrument would be equally void at law and in equity. And an agreement by which a third person (not being within the recognized exceptions, such as master and servant) undertakes to institute or prosecute or assist the litigation in the name of the claimant, and to indemnify him wholly or partly against the costs of the litigation, is a principle open to precisely the same objection. If not technically maintenance, it savours of maintenance. This is well illustrated by Lord Eldon's judgment in *Wood* v. *Downes* and by Lord Abinger's judgment in *Prosser* v. *Edmonds*. The case of *Harrington* v. *Long* is inadequately reported, but it seems to me to be only another instance of the same principle. For the supplemental bill, in which the assignee and assignor were co-plaintiffs, sought to set aside a deed of gift by the testator in favour of the defendant, and the assignment was executed and the deed of indemnity was given "solely for the purpose of enabling him" (*i.e.* the assignee) "to prosecute the original suit and to impeach the deed."

There are, however, other *choses in action* which, though not assignable at common law, were always regarded as assignable in equity. A debt presently due and payable is an instance. At common law such a debt was looked upon as a strictly personal obligation, and an assignment of it was regarded as a mere assignment of a right to bring an action at law against the debtor. Hence the assignment was with some exceptions which need not be referred to (see 1 Hawkins' Pleas of the Crown, p. 458), looked upon as open to the objection of maintenance. After a time the common law courts recognized the right of any one who had a pecuniary interest in the debt to sue in the name of the creditor. This, however, was the limit of their departure from the old strict rule, so far as I have been able to discover. But the courts of equity took a different view: *Row* v. *Dawson*, 1 Ves. sen. 331. They admitted the title of an assignee of a debt, regarding it as a piece of property, an asset capable of being dealt with like any other asset, and treating the necessity of an action at law to get it in as a mere incident. They declined to hold such a transaction open to the charge of maintenance. Thus, in *Prosser* v. *Edmonds*, Lord Abinger says, at p. 491: "With respect to the question as to the validity of an assignment of a right to file a bill in equity" (*i.e.* to set aside an alleged fraudulent deed), "I must distinguish between this sort of case and the assignment of a *chose in action*" (*i.e.*, a debt). And again, at p. 496: "It was urged . . . that the assignee of a *chose in action*" (*i.e.*, a debt) "may file a bill in equity to recover it, though he cannot proceed at law for that purpose. But where an equitable interest is assigned, it appears to me that, in order to give the assignee a *locus standi* in a court of equity, the party assigning that right must have some substantial possession, some capability of personal enjoyment, and not a mere naked right to overset a legal instrument. . . . So, where a person takes an assignment of a bond, he has the possession; and, though a court of equity will permit him to file a bill on the bond, it does not follow that he is obliged to go into a court of equity to enforce payment of it." A court of equity recognized not merely transactions which amounted to sales or mortgages of debts, under which the assignee took a beneficial interest in the debt, but also the creation of trusts, under which the trustee took no interest. Thus A., the creditor, might assign the debt to B., with or without a power of attorney, upon trust for C. Or A. might simply declare himself a trustee of the debt for C. In either case the trustee would take no beneficial interest, and would, by virtue of his position as trustee, be entitled to be indemnified out of the moneys recovered against all costs of the action brought in the name of A. against the debtor. If the debt was secured by a promissory note or bill or other negotiable instrument, A. might deliver the instrument to B. upon trust for C., and B. could sue at law on it. Or A. might create a trust in favour of himself by delivering the instrument to B. upon trust for himself. It would, I apprehend, in this case be no objection to say that B. had no interest in the debt. It has never, so far as I am aware, been suggested that a trustee to whom a debt is assigned is exposed to a charge of maintenance. Mortgages are every day dealt with in this fashion, including an assignment of the debt. From time to time particular classes of obligation have by statute been rendered assignable at law, and by the Judicature Act, 1873, s. 25, sub-section 6, any debt is made assignable at law by an absolute assignment in writing, of which notice is given to the debtor. Henceforth in all courts a debt must be regarded as a piece of property capable of legal assignment in the same sense as a bale of goods. And on principle I think it is not possible to deny the right of the owner of any property capable of legal assignment to vest that property in a trustee for himself, and thereby to confer upon such trustee a right of indemnity. It is not easy to see how the doctrine of maintenance can be applied to a case like the present. The decision of this court in *Comfort* v. *Betts* really proceeds upon this footing, and seems to me to be decisive of the present case. The court is not asked to exercise any discretionary jurisdiction. If the assignment is valid at all, it is valid in all courts, and the plaintiff is entitled to judgment *ex debito justitiæ*. The plaintiff is merely seeking by this action to recover payment of debts admitted to be justly due. It is said that the plaintiff does not really desire to be paid and can take nothing for his own benefit under the judgment. For the reasons above stated I think this is of no moment. It is further urged that his only object is to obtain a judgment which may serve as the foundation of bankruptcy proceedings, the ultimate result of which will be the removal of the defendant from his position as director of a company in which the plaintiff is largely interested. But I fail to see that we have anything to do with the motives which actuate the plaintiff, who is simply asserting a legal right consequential upon the possession of property which has been validly assigned to him. If the defendant pays, no bankruptcy proceedings will follow. If he does not pay, bankruptcy is a possible result. In my opinion this appeal must be allowed. Mathew, L.J., agrees with this judgment.

Appeal allowed.

Solicitor for the plaintiff, *Herbert Z. Deane.*

Solicitors for the defendant, *Leigh & Naish.*

From K. B. Div. (Vaughan Williams, Romer, and Stirling, L.JJ.) } May 19; June 9, 1905.

In re KEET.

Ex parte OFFICIAL RECEIVER. (*a.*)

Bankruptcy—Annulment—Payment in full—Release by creditors—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 35 (1).

In order to obtain the annulment of an adjudication in bankruptcy by proving to the satisfaction of the court that all debts have been paid in full under section 35 (1) *of the Bankruptcy Act,* 1883, *the payment in full must be a payment of money, and a debt which has been released by a creditor voluntarily, or for small consideration, is not paid in full within the meaning of the section.*

This was an appeal by the official receiver against the decision of a Divisional Court (Bigham and Darling, JJ.) sitting in bankruptcy.

An order was made by the registrar of the county court at Leeds annulling the bankruptcy of the above debtor in these circumstances:

The debtor was an outside stockbroker, and on the 24th of September, 1903, a receiving order was made against him on a creditor's petition, and on the 1st of October, 1903, he was adjudicated a bankrupt. His liabilities being £9,600 and his assets only £189, an order was made for the summary administration of his estate, and the official receiver became the trustee in the bankruptcy.

Only one dividend of 2d. in the pound was paid. All the creditors, except a few whose debts amounted to £41 and who were paid in full, being desirous of helping the debtor, executed a deed whereby they released the debtor from their debts and agreed to withdraw their proofs.

In September, 1904, the debtor applied to the county court to annul his adjudication and put in evidence the deed of release. The registrar made the order.

The official receiver appealed to the Divisional Court.

Section 35 of the Bankruptcy Act, 1883, provides that where in the opinion of the court a debtor ought not to have been adjudged bankrupt, or where it is proved to the satisfaction of the court that the debts of the bankrupt are paid in full, the court may, on the application of any person interested, by order annul the adjudication.

The Divisional Court dismissed the appeal, holding that the order of the registrar was right.

Bigham, J., said that what was equivalent to payment in full had occurred. The creditors had chosen to release their debts and withdraw their proofs. The court had a discretion and might look into the facts, but here there was no reason to suppose that anything improper had been done or to doubt the honesty of the transaction.

The official receiver appealed.

Sir R. B. Finlay, A.G., and *Lushington,* for the official receiver.—This case is distinguishable from *In re E. A. B.,* 50 W. R. 229, [1902] 1 K. B. 457, and from *In re Pilling,* 51 W. R. 465, [1903] 2 K. B. 50. Both those cases raised the question whether a scheme should go through, which is very different from the present case, as the court has control over a scheme. There has been no payment in full of the debts within section 35 of the Bankruptcy Act, 1883. Payment in full there means payment in cash, and a release by the the creditors is not equivalent to payment in full.

They cited *In re Burr. Ex parte Board of Trade,* [1892] 2 Q. B. 467, 40 W. R. Dig. 16; *In re Beer,* 51 W. R. 422, [1903] 1 K. B. 428; *Spargo's case,* 21 W. R. 306, L. R. 8 Ch. 407; *In re Burnett,* 42 W. R. 368; *In re Hester,* 22 Q. B. D. 632, 37 W. R. Dig. 20; *In re Gyll, Ex parte Board of Trade,* 37 W. R. 164; *In re Painter,* 43 W. R. 144, [1895] 1 Q. B. 85; *Hardwick* v. *Brown,* 21 W. R. 639; L. R. 8 C. P. 406.

Carrington, for the debtor.—The decision of the Divisional Court was right. There is no reason to doubt the *bona fides* of this transaction, and in the absence of any suggestion of wrongdoing, the court ought to sanction it. The debts have all been fully paid. If a part of the debts were released and the balance paid, the debt would be fully paid and it makes no difference that the entire debt has been released.

He cited *In re Taylor,* 49 W. R. 510, [1901] 1 K. B. 744.

Sir R. B. Finlay, A.G., replied.

Cur. adv. vult.

June 9.—VAUGHAN WILLIAMS, L.J.—The bankrupt applied in the county court for an annulment of his bankruptcy on the ground that all his debts which had not been released had been paid in full. The registrar made the order for annulment. The Divisional Court affirmed the order of the registrar. Not without some hesitation I have come to the conclusion that this appeal from the decision of the Divisional Court must be allowed. I cannot agree with Bigham, J., that the release of a debt is equivalent to or the same as "payment in full," which, by section 35 of the Bankruptcy Act, 1883, is the condition precedent to the jurisdiction to annul, a condition which the bankrupt contends has happened in the present case. I have had more doubt whether Darling, J., was not right when he treated section 35 as dealing with debts which continued to be debts throughout the bankruptcy until they were paid, that is, extinguished by payment in full, and does not apply to those which have been put an end to by release. I agree with him that the language of the Act is inaccurate and does not strictly describe what Parliament meant to say. The wording of section 36, which runs thus, "For the purposes of this part of this Act, any debt disputed by a debtor shall be considered as paid in full, if the debtor enters into a bond, in such sum and with such sureties as the court approves, to pay the amount to be recovered in any proceeding for the recovery of or concerning the debt, with costs, and any debt due to a creditor who cannot be found or cannot be identified shall be considered as paid in full if paid into court," rather supports the view of Darling, J. Suppose the debtor alleges that he has paid all his debts and disputes the right of a creditor, who has executed an unconditional release, to be paid anything, and suppose thereupon the debtor enters into the necessary bond to pay the amount to be recovered in any proceeding for the recovery of or concerning the debt, it is not easy to see how the creditor suing could succeed, unless the issue raised was whether, at the commencement of the bankruptcy, the debtor had a provable debt. An issue whether the creditor, at the moment of the application to annul, had a provable debt would, so far as I can see, let in a replication by the debtor of a release. Moreover, it is not the debtor only who is affected by a released debt being regarded as con-

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

tinuing for the purposes of section 35 as capable of payment. If a debt has been in truth and in fact unconditionally released, the proof ought to be expunged on the application of any creditor who, by reason of his proved debt, has a right to rank upon the debtor's estate. With regard to section 36, the only way out of the difficulty, in my opinion, would be to hold that, according to the true construction of that section, a bankrupt cannot dispute a proved debt, but is bound by the admission of the proof by the trustee administering his estate, and to read the words in section 35 "that the debts of the bankrupt are paid in full" as meaning that the proved debts are paid in full—that is to say, not the debts only of those still entitled to share in the distribution of the bankrupt's estate, but also all debts which, having been proved, have not been discharged by payment in full; and on the whole I think this, and not the view of Darling, J., is the right view. I believe, although I cannot find the case reported, I, when acting as judge in bankruptcy, expressed my approval of this construction. The section is not very clear, but I think that in practice it has always been construed as meaning that the condition of annulment is payment in full of all debts which have been admitted to proof, unless the proof has been expunged on the ground that it never ought to have been admitted.

In the present case it appears, by the report of the official receiver, that the bankrupt personally obtained all the signatures to the deed of release, and at the same time obtained the consents of the creditors to the proofs being expunged, which consents, together with the executed deeds of release, were exhibited to the bankrupt's affidavit, but no application to expunge the proofs, or any of them, has been made, and the proofs remain on the file. But, if the construction which I am putting on the section is right, the decision of the court would have been the same, even if the proofs of the released debts had been expunged and removed from the file. No one can doubt that the words of the section will support this construction, although another construction may be possible, and to construe the section in the way contended for on behalf of the bankrupt would undoubtedly open the door to arrangements with creditors under which the court, in ignorance of the true facts, might in the exercise of its discretion (for a bankrupt paying all his debts in full can only obtain an order for annulment if the court thinks fit, and not *ex debito justitiæ*) order annulment of a bankruptcy, when the court, if it had known the circumstances under which the releases were obtained, would have refused to annul. I have only to add that cases like *In re E. A. B.* and *In re Pilling*, which for the purposes of schemes of arrangement under section 3 of the Bankruptcy Act, 1890, treat, for the purpose of the sanction of the court to a scheme of arrangement, the "debts" as those debts of the debtor existing at the time of the application to the court for its sanction to the scheme, to the exclusion of debts unconditionally released under circumstances which the court considered did not preclude it from giving its sanction to the scheme, do not really affect the question of construction of section 35 at all. I think that the court ought to read "debts" in section 35 as meaning debts admitted to proof, because to hold "debts" to mean "provable debts" would make the payment in full by a bankrupt of debts for advances by relations and friends, who have not proved conditionally or otherwise, or in any way intervened in the bankruptcy, a condition precedent to the power of the court to annul.

ROMER, L.J.—I have come to the same conclusion, and I can state my reasons very shortly. In the first place I cannot agree with Bigham, J., that a debt which has been voluntarily released by the creditor can be said to have been paid in full. In the second place it is clear from the section that the word "debts" is a word referring to debts not existing as such at the date of the application for annulment; and without considering to what debts previously owing the section is referring, I think that it must at any rate be meant to refer to and cover debts which have been proved, and rightly proved, in the bankruptcy.

STIRLING, L.J.—I am of the same opinion. I think that section 35 of the Bankruptcy Act, 1883, must be read in connection with the other provisions of the Act. I refer particularly to those found in section 28, which has, no doubt, been repealed, but has been re-enacted in section 8 of the Act of 1890 with modifications and extensions. Section 28 provided that the court should refuse discharge in all cases where the bankrupt had committed any misdemeanour under that Act or the Debtors Act, 1869, or any amendment thereof; and also should, on proof of any of the facts therein mentioned, either refuse the order or suspend the operation of the order for a specified time, or grant an order of discharge subject to certain conditions. It follows from that, that in granting an order of discharge the court exercises discretion. Under the present legislation the court has to take into consideration, amongst other facts, that the bankrupt's assets are not of a value equal to 10s. in the pound on the amount of his unsecured liabilities. In the present case the bankrupt's debts amounted to £9,630, and the assets have been sufficient only to pay a dividend of 2d. in the pound, a very serious fact which would have to be taken into consideration if the bankrupt were applying for an order of discharge. He is not applying for an order of discharge, but for an order of annulment under section 35, under which, if it is proved to the satisfaction of the court that the debts of the bankrupt are paid in full, the court may wipe out the bankruptcy altogether and put the bankrupt in the same position as if there had been no adjudication. The question is whether such an order ought to be made in the present case. The first point to be considered is whether the bankrupt has satisfied the condition prescribed by the Legislature—namely, whether he has proved to the satisfaction of the court that his debts are paid in full. On that it has to be considered what are the debts meant, and I agree with my brethren that the debts there referred to include at least all the debts which have been actually and properly proved in the bankruptcy. The large mass of those debts has in this case been got rid of by means of releases from the creditors given without any consideration. To test the case, let us suppose that it had been proved that the releases had been given in consideration of a payment of 6d. in the pound, would that be a payment in full? I cannot think that that is the meaning of the Act at all, and I respectfully differ from Bigham, J., who appears to have been of that opinion. The language of the Act interpreted according to its natural meaning appears to me to require a payment in full—a payment of money—something which in an action of law could under the old practice have been pleaded as a payment. If the releases had been given in consideration of a small payment, in my judgment they would not have satisfied the requirements of the Act, and still less could releases given without any consideration at all. I think, therefore, that the bankrupt has not satisfied the requirements of the Act so as to be entitled to an order for annulment, but I desire to add that the jurisdiction which is conferred by section

35 is discretionary. The Act provides simply that the court may, on the application of any person interested, by order annul the adjudication, and in my judgment, in the absence of some more special circumstances, it would not be a good exercise of discretion that an order for annulment should be made in a case in which, if the bankrupt were applying for an order of discharge, the order would not be granted. For these reasons I think that the order which has been made cannot be supported, and that this appeal ought to be allowed.

Solicitors, *Solicitor to Board of Trade; Vincent & Vincent*, for *North & Sons*, Leeds.

From Chan. Div. (Vaughan Williams, Romer, and Stirling, L.JJ.) — April 12, 1905.

In re JONES & ROBERTS. (*a.*)

Solicitor—Lien—Country solicitor and town agent—Trustee in bankruptcy—Right to production of documents in order to vouch bill of costs—Waiver of lien.

This was an appeal from Joyce, J. (reported 53 W. R. 444), dismissing a motion to compel the London agents of country solicitors to produce certain documents which had come into their hands as agents in order to enable a bill of costs to be vouched and taxed.

Hughes, K.C., and *P. F. Wheeler*, for the appellants.

Younger, K.C., and *Macpherson*, for the respondents, offered to deliver the documents on an undertaking to pay the amount of the bill less any costs of taxation.

The offer was accepted, and no order was made upon the appeal except that the appellant should pay the costs of the appeal.

Solicitors, *Jacques & Co.*, for *W. T. Jones*, Bangor; *Robbins, Billing, & Co.*

From K. B. Div. (Collins, M.R., and Mathew and Cozens-Hardy, L.JJ.) — March 28, 1905.

HERMANN v. CHARLESWORTH. (*b.*)

Contract—Marriage brokage contract—Illegality—Contract to procure introductions to persons generally—Part performance—Right to recover back money paid under contract.

A marriage brokage contract is not confined to a contract for reward to procure an introduction to a particular person with a view to marriage, but includes a contract to procure introductions to persons generally with a view to marriage; and the court will order money paid under such a contract to be repaid, even though some step has been taken by the other party towards the performance of the contract.

Judgment of the Divisional Court (1905, 1 *K. B.* 24, 53 *W. R. Dig.* 97) *reversed.*

Appeal from the judgment of the Divisional Court (Lord Alverstone, C.J., and Kennedy and Ridley, JJ.), on an appeal from the Westminster County Court (reported in [1905] 1 K. B. 24).

(*a.*) Reported by J. F. STIRLING, Esq., Barrister-at-Law.

(*b.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

The action was brought in the county court to recover £52.

In response to an advertisement in a paper called the *Matrimonial Post and Fashionable Marriage Advertiser*, the plaintiff, Miss Hermann, who was thirty-three years of age, called on the defendant, the proprietor. In consequence of her interview with him she signed an agreement to pay him £250 if a marriage resulted through his exertions, and on the next day it was agreed verbally that she should pay him, as a "special client's fee," £52 in order that he should introduce her to gentlemen with a view to matrimony, of which £47 was to be repaid to her at the end of nine months if no engagement or marriage took place within that time. She sent a cheque for £52, and the defendant acknowledged it in the following terms: "I have to acknowledge the receipt of £52, less £47 to be returned in nine months should no engagement or marriage take place within that period." Introductions were made and photographs exchanged, but nothing resulted in consequence.

The plaintiff brought this action to recover the £52 within five months after the £52 was paid.

The county court judge found that the contract was a marriage brokage contract, that the defendant had undertaken to find the plaintiff a husband, and that the contract was therefore illegal; that the plaintiff had repudiated it before the illegal purpose of procuring the engagement or marriage had been carried into effect, and that the plaintiff was therefore entitled to have her money back.

The Divisional Court held that the agreement, not being an agreement to procure for the plaintiff a particular person as her husband, was not a marriage brokage contract, and was not illegal; and that, therefore, the claim as to £5 was in no circumstances maintainable, and as to the £47 was premature.

The plaintiff appealed.

Duke, K.C., and *Compton Smith*, for the plaintiff.—The distinction drawn by the Divisional Court between a contract to procure a marriage with a particular person and a contract to procure a husband or wife generally for another person is not supported by the authorities and cannot be maintained. Marriage brokage contracts were originally not illegal at common law, but courts of equity, being jealous of safeguarding marriage relations, and in order to prevent anyone from making a profit out of that relationship, refused to allow such a person to retain any money paid under such a contract, and ordered it to be repaid. The county court judge has found as a fact that this contract is a marriage brokage contract, and there was evidence to support that finding. The contract therefore is illegal and void, and the plaintiff can recover back the money paid under it. [They referred upon this point to *Scott* v. *Tyler*, 1 Wh. & T. L. C. (7th ed.), p. 535; *Hall* v. *Potter*, Show. P. C. 76; *Arundel* v. *Trevillian*, 1 Rep. Ch. 47; *Roberts* v. *Roberts*, 3 P. Wms. 66; *Cole* v. *Gibson*, 1 Ves. sen. 503; *King* v. *Burr*, 3 Mer. 693; *Drury* v. *Hooke*, 1 Vern. 412; *Taylor* v. *Bowers*, 24 W. R. 499, 1 Q. B. D. 291; *Wilson* v. *Strugnell*, 7 Q. B. D. 548, 30 W. R. Dig. 50; *Herman* v. *Jeuchner*, 33 W. R. 606, 15 Q. B. D. 561; *Kearley* v. *Thomson*, 38 W. R. 614, 24 Q. B. D. 742.] Further, the defendant was a mere stakeholder who held £52 to abide a certain event. The transaction having been repudiated before the event happened, the plaintiff can recover the money back: *Cotton* v. *Thurland*, 5 T. R. 405; *Tappenden* v. *Randall*, 2 Bos. & P. 467; *Aubert* v. *Walsh*, 3 Taunt. 277; *Hastilow* v. *Jackson*, 8 B. & C. 221. A party to the contract may be a stakeholder: *Universal Stock Exchange* v. *Strachan*, 44

W. R. 497, [1896] A. C. 166; *Barclay* v. *Pearson*, 42 W. R. 74, [1893] 2 Ch. 154. Even at law, therefore, the plaintiff could have recovered this sum as money had and received to the use of the plaintiff. The defendant cannot recover even for services rendered, as they were rendered under a void contract.

Montague Lush, K.C., and *Schiller*, for the defendant.—First, if this is a marriage brokage contract, and therefore illegal, the plaintiff cannot recover the money back because she cannot make out her cause of action without setting up the illegality: *Bensley* v. *Bignold*, 5 B. & A. 335; *Collins* v. *Blantern*, 1 Sm. L. C. (11th ed.), p. 369; *Hunt* v. *Silk*, 5 East 449; *Taylor* v. *Chester*, L. R. 4 Q. B. 309, 17 W. R. C. L. Dig. 28, 94; *Harse* v. *Pearl Life Assurance Co.*, 52 W. R. 457, [1904] 1 K. B. 558. There had been no total failure of consideration. If nothing has been done under the contract the plaintiff might recover back the money: *Symes* v. *Hughes*, L. R. 9 Eq. 475, 18 W. R. Ch. Dig. 139; *Simpson* v. *Bloss*, 7 Taunt. 246; *Smith* v. *Bruning*, 2 Vern. 392; *Keat* v. *Allen*, 2 Vern. 588; *Taylor* v. *Bowers*. But if a step has been taken under the contract, the plaintiff cannot rely upon a total failure of consideration and cannot recover: *Tappenden* v. *Randall*; *Herman* v. *Jeuchner*; *Kearley* v. *Thomson*; *Scott* v. *Brown*, 41 W. R. 116, [1892] 2 Q. B. 742. If the contract was not merely illegal, but immoral, the plaintiff could never recover—*ex turpi causâ non oritur actio*. Secondly, this is not a marriage brokage contract. It was not a contract to procure a marriage with a particular person, but to procure introductions generally: *King* v. *Burr*. That contract is not open to the objection of marriage brokage, and therefore not against public policy. A marriage brokage contract was against public policy, because it was made with a person who could influence the particular girl specified, as a parent exercising influence over his daughter. Such a contract would tend to interfere with the unbiassed advice which a parent ought to give to his daughter upon the subject of her marriage by reason of the money payment made to the parent. [COZENS-HARDY, L.J., said that he had obtained from the Record Office the bill in the case of *King* v. *Burr*, which was a case, not of a contract to introduce the defendant to a particular lady, but to introduce him to ladies generally, and the Lord Chancellor refused the assistance of the court in support of such an action, the bill being a bill of discovery in equity in support of an action at law to recover the expenses of entertainments given by the plaintiff with a view to carry out the contract.*]

* The bill was a bill in equity in support of an action at law to recover the expenses of entertainments given by the plaintiff under an agreement with the defendant to introduce him to some woman of fortune with a view to marriage, and the defendant demurred to the bill, and the demurrer was allowed, the Lord Chancellor saying that he would not give any assistance in support of such an action. The decision was in 1810. The bill set out the matrimonial advertisement which led to the agreement, and the defendant's promise in consequence. The advertisement was as follows: "Marriage Institution, No. 8, Margaret-street, Cavendish-square. The restrained and delicate condition which custom imposes on females subjects them to great disadvantages. By this institution all impediments are obviated. Ladies who have fixed their affections but never avowed the prepossession may be instructed how to effect their wishes. Any gentleman who has formed a predilection for a lady may be assisted in obtaining her. Those who have yet formed no attachment may have objects pointed out to them. The unions which have already been effected prove how secret and circumspect Mrs. Morris conducts her business, and that she uses means peculiar to herself and generally successful. The applicants pay in the first instance ten or twenty guineas. She rises or lowers her demand according to their condition and capacity, and gives them an immediate introduction. She requires their names, places of residence, and a particular description of their circumstances, without which she cannot serve them, and she attaches responsibility to her recommendations, and cannot introduce persons until she knows them thoroughly. The secrecy that has all along been observed is a pledge for her that she can never abuse their confidence placed in her. None are introduced except those whose characters are unexceptionable, but if they are rejected they are never exposed." The promise of the defendant, who was a general, was set out as follows: "Should the intercourse between me and the proprietors of the institution be instrumental to my marrying a lady to whom I have been introduced, I promise to pay £1,000 on the day of marriage. The general expects to be introduced to no lady who has not property the annual produce of which is less than £1,500 per annum, of unblemished character, and of respectable connections, her age from thirty-seven to fifty-seven."

Duke, K.C., replied.

COLLINS, M.R.—This is an appeal from the Divisional Court reversing the decision of a county court judge. The circumstances are shortly these: The plaintiff, a young lady, was desirous of getting married. She was attracted by an advertisement in the *Matrimonial Post*, of which the defendant was the proprietor, and she got into communication with him. He undertook to assist her to get married by means of introductions to gentlemen, and she agreed to pay him £250 in the event of a marriage resulting therefrom, and also, as a "special client," she handed to him £52, of which sum he was to keep £5 in any event, and the balance of £47 in the event of an engagement or a marriage taking place within nine months. The defendant gave her various introductions, and at the end of two months she thought better of it and demanded her money back. The county court judge, in an admirable judgment, came to the conclusion that the plaintiff was entitled to recover back the £52, the contract being a marriage brokage contract, and therefore one with regard to which the law would not assist in its accomplishment—that it was a contract which the law regarded with disfavour, and would give its assistance to a party to it who was seeking to undo it. The Divisional Court came to the conclusion that a contract to procure introductions with a view to marriage, giving the lady a choice, was not within the mischief of marriage brokage, which was confined to a contract to procure a marriage with one particular person. When one looks back at the principle upon which the law as to these contracts rests, I fail to find any foundation for that distinction. The principle seems to me to be violated just as much by a contract to bring about a marriage with any one of several persons as with one particular person. The principle is most clearly stated in *Cole* v. *Gibson*, 1 Ves. sen. 503, where Lord Hardwicke said: "To be sure, this court has been extremely jealous of any contract of this kind made with a guardian or servant, especially with a servant, in respect of the marriage of persons over whom they have an influence; (and has been justly so, nothing tending more to

introduce improper matches), and by rules established, not regarding whether the match is proper or no, if brought about by a marriage brokage contract, sets it aside; not for the sake of the particular instance or the person, but of the public, and that marriages may be on a proper foundation; therefore, though a proper match, as it was in *Hall* v. *Potter*, Show. P. C. 76, yet for the sake of the mischief that would be introduced, and to prevent that influence which servants more especially would gain over young ladies, the court sets it aside; and if that was the nature of the contract, I do not know that subsequent confirmations have been permitted to stand in the way of the relief sought. . . . Nor will the annuities being granted after the marriage alter the case; for in that great authority in Lord Coventry's time of *Arundel* v. *Trevillian*, 1 Rep. Ch. 47, the bond for performance was given after marriage, the husband having his hands free; yet the court even so long ago did not suffer it to prevail. In those cases, therefore, such a sort of confirmation or subsequent acts have not been considered; nor in other cases where there is remedy on like grounds; as in private, clandestine agreements in contradiction of the public marriage agreement; as by husband to return part of his wife's fortune without the privity of his own relations; for unless something released or barred his action the court will never suffer such subsequent acts to bar it." That case is important as showing that the cause of the mischief aimed at is not merely a contract to procure a marriage with one particular person, but that it exists equally in the case of a contract to procure a marriage generally. I can see no distinction in this respect between the one contract and the other. At the bottom of a marriage brokage contract was the marriage brokage itself, thereby introducing the consideration of a money payment into what should be free from any such taint. The case is frequently complicated by the fact that other elements intervene, such as undue influence on the part of a parent or guardian, but those are not essential elements in marriage brokage. It was clearly decided in the case of *King* v. *Burr*, 3 Mer. 693, a case which is indistinguishable in its facts from the present case, that the very mischief aimed at included the case of a contract for introductions generally with a view to marriage. Cozens-Hardy, L.J., has obtained the bill in that case from the Record Office, and the circumstances are practically identical with those in the present case. The plaintiff undertook to give to the defendant, who was desirous of getting married, introductions to ladies, and the plaintiff was to receive a sum of money if a marriage resulted. It involved expensive entertainments, and the plaintiff sued the defendant, who was a general, at law to recover the price of the entertainments, and the plaintiff filed a bill in the Court of Chancery for discovery in aid of the action at law. Therefore the very point as to the contract being one for introductions to ladies generally, and not a contract for an introduction to one particular lady, arose. The bill was met by a demurrer, and the demurrer was allowed. The coincidence between the methods employed in 1810, when that case was decided, and those employed now is singular. The Divisional Court had not the advantage of seeing the bill in that case, and therefore they had not the assistance which we are able to derive from it. With great respect, I am unable to agree with the judgment of the Divisional Court; and in my opinion, both upon principle and upon authority this transaction falls within the mischief of marriage brokage.

Then comes the next question, which was not discussed in the court below—namely, assuming the contract to be void, has there been such a part performance of it as to debar the plaintiff from getting relief. In other words, can the plaintiff insist upon the right to have the transaction undone. That is an important question It is said that the lady was a party to an illegal contract, and that she comes to the court setting up her own wrong and asks for relief. It is said that, though in modern times parties have resiled from an illegal contract before the illegal purpose has been accomplished, yet they cannot do so if any part of the illegal purpose is fulfilled, and that, as in the present case introductions have been given and trouble and expense incurred, it is now too late for the plaintiff to resile from the contract. The plaintiff places her case upon two grounds. First, she claims to recover back the money deposited to abide an event which never happened, and, standing upon her common law rights, she says that she has deposited with the defendant a sum of money to be kept by him only upon the happening of a certain event; that that is an illegal object, and there is no contract binding at common law, and that it is competent for her to revoke it at any time before the happening of the event; and that she has revoked it before the happening of the event and is therefore entitled to recover back the money. Upon this point I must refer to the judgment of Stirling, J., in *Barclay* v. *Pearson*, 42 W. R. 74, at p. 77, [1893] 2 Ch. 154, at p. 168, where he said: "*Hastelow* v. *Jackson* was an action in which the plaintiff and one Wilcoxon deposited money in the hands of a stakeholder to abide the event of a boxing match between them, and after the battle the plaintiff demanded the whole sum from the stakeholder, and threatened him with an action if he paid it over to Wilcoxon. This he nevertheless did by the direction of the umpire, and it was held that the plaintiff was entitled to recover from him his own stake as money had and received to his use. Littledale, J., stated the law very clearly thus: 'If two parties enter into an illegal contract, and money is paid upon it by one to the other, that may be recovered back before the execution of the contract, but not afterwards. In the case of persons entering into such a contract and paying money to a stakeholder, if the event happens and the money is paid over without dispute, that is considered as a complete execution of the contract, and the money cannot be reclaimed; but if the event has not happened, the money may be recovered. With respect to a stakeholder, there is a third case—viz., where the event has happened, but before the money has been paid over one party expresses his dissent from the payment. Under such circumstances he may recover it; and perhaps it may be said that, although the event has happened, yet the contract is not completely executed until the money has been paid over, and therefore the party may retract at any time before that has been done.'" Other authorities have been referred to, notably *Tappenden* v. *Randall*, 2 Bos. & P. 467. Put upon the naked ground of common law, the point is a good one. In terms the money was deposited to abide the happening of a particular event—namely, marriage. If the event took place the money was to remain with the defendant. If it did not take place, unless the plaintiff was prevented from claiming relief upon the ground of illegality, she can recover. The plaintiff has agreed to pay money upon the happening of a certain event, and she has a right to resile. She may say, in answer to the objection that something has been done under the illegal contract, that it was no part of this contract that the defendant should do what he did—viz., make the introductions—that he has taken steps outside the contract in order to bring about the fulfilment of the contract more easily, and that, that being so, as the event has not happened,

she can recover. That seems to me to be a good ground of decision. But I do not wish to rest my judgment upon that ground alone. I desire to put it also upon the other and wider ground taken by the plaintiff —namely, the doctrine and practice of the old courts of equity as to marriage brokage contracts. The particular mischief aimed at was marriage brokage. That was not a common law doctrine. Up to about 150 years ago there was no objection at common law to a marriage brokage contract. But courts of equity took a different view of the matter, and courts of law have since modified their view of the matter and have shaped their course accordingly. Equity did not measure its procedure by the narrow common law rule; for instance, the rule as to the necessity for a total failure of consideration when the contract was tainted with illegality was not applied. As was pointed out by Lord Hardwicke, a court of equity had a right to intervene even after the contract had been performed either wholly or in part; that is to say, even after the marriage has been brought about. A court of equity would still give relief to the party to the illegal contract, and in one reported case, at least, the court ordered the money to be repaid after the marriage. In *Arundel* v. *Trevillian*, 1 Rep. Ch. 47, the court set aside a bond even after the marriage had taken place. In *Drury* v. *Hooke*, 1 Vern. 412, again, a bond was ordered to be given up after the marriage. In *Smith* v. *Bruning*, 2 Vern. 392, not only was the bond ordered to be given up, but the money which had been paid was ordered to be refunded. There are other instances which might be quoted. That a court of equity would interfere in this particular branch of the law is apparent from the observations of the judges. In *Roberts* v. *Roberts*, 3 P. Wms. 66, Sir Joseph Jekyll, M.R., said that this was perhaps the only instance in which a court of equity would intervene after the matter had been consummated, and the courts had always shown a desire of keeping open a *locus pœnitentiæ* in this class of case. The contract being within the mischief aimed at, where a party was desirous of resiling from the contract the court refused to interpose a barrier in the way of the fulfilment of that desire which could only have the effect of indirectly giving effect to the contract. In *Tappenden* v. *Randall* Heath, J., said: "It seems to me that the distinction adopted by Buller, J., between contracts executory and executed, if taken with those modifications which he would necessarily have applied to it, is a sound distinction. Undoubtedly there may be cases where the contract may be of a nature too grossly immoral for the court to enter into any discussion of it; as where one man has paid money by way of hire to another to murder a third person. But where nothing of that kind occurs, I think there ought to be a *locus pœnitentiæ*, and that a party should not be compelled against his will to adhere to the contract." In *Reynell* v. *Sprye*, 1 De G. M. & G. 660, Knight-Bruce, L.J., said: "Where the parties to a contract against public policy, or illegal, are not *in pari delicto* (and they are not always so), and where public policy is considered as advanced by allowing either, or at least the more excusable of the two, to sue for relief against the transaction, relief is given to him." I cite these cases to show that the jurisdiction of courts of equity was wider than the old jurisdiction of the common law courts, and that they were not bound by the hard-and-fast rule that the court would not intervene if anything had been done under the contract.

I come now to the more modern authorities, *Taylor* v. *Bowers*, which was relied upon by the plaintiff, and *Kearley* v. *Thomson*. As to *Taylor* v. *Bowers*, that was undoubtedly a decision of this court, and as such is binding upon us. The effect of that case was this: The plaintiff, being in embarrassed circumstances, was desirous of defrauding his creditors, and in order to bring that about he arranged with a man named Alcock that the latter should take his furniture under a fictitious sale, and Alcock agreed to assist in the scheme by taking and warehousing the furniture. Alcock then made a fraudulent sale of the furniture to the defendant, who was a party to the fraud. The plaintiff brought an action to set aside the sale and to recover the furniture, and the court treated the defendant as having no better title than Alcock, and gave judgment for the plaintiff. Mellish, L.J., there said: "If money is paid or goods delivered for an illegal purpose, the person who had so paid the money or delivered the goods may recover them back before the illegal purpose is carried out; but if he waits till the illegal purpose is carried out, or if he seeks to enforce the illegal transaction, in neither case can he maintain an action; the law will not allow that to be done." Clearly some consideration had been given by Alcock, as he undertook to and did warehouse the furniture apparently at his own expense, but that was not allowed to interfere with the decision of the court. The court, upon the evidence, came to the conclusion that there had been no actual defrauding of the creditors, and having regard to the main object of the scheme they came to the conclusion that no part of that object had been accomplished. How far is that modified by *Kearley* v. *Thomson*? That was also a decision of this court, but the circumstances were very different. The head-note states that the defendants were solicitors to the petitioning creditor in certain bankruptcy proceedings, and had incurred costs which were to be paid out of the estate. The plaintiff, a friend of the bankrupt, offered to pay to the defendants a sum of money for these costs which had not been paid owing to want of assets, on their undertaking not to appear at the public examination of the bankrupt, and not to oppose his order of discharge. The defendants, with the consent of their client agreed to this, and received the money. They did not appear at the public examination of the bankrupt, and before any application for his discharge had been made the plaintiff brought an action to recover back the money from the defendants. Held, that though the contract was illegal, the partial performance of it prevented the plaintiff from recovering back the money paid under it. Fry, L.J., took exception to the statement of Mellish, L.J., quoted above. He said: "It is remarkable that this proposition is, as I believe, to be found in no earlier case than *Taylor* v. *Bowers*, which occurred in 1876, and notwithstanding the very high authority of the learned judge who expressed the law in the terms which I have read, I cannot help saying for myself that I think the extent of the application of that principle, and even the principle itself, may at some time hereafter require consideration, if not in this court, yet in a higher tribunal; and I am glad to find that in expressing that view I have the entire concurrence of the Lord Chief Justice." But it is to be observed that in that case the illegal purpose itself, which was to defeat creditors by suppressing information, had been largely accomplished. The solicitors, who knew all about the matter, had abstained from appearing on the public examination. Therefore the case is not upon all fours with the present case.

In the present case no part of the illegal purpose has been performed. Therefore, even assuming that the *dictum* of Fry, L.J., controls us, it is not in point, when one remembers that the object was to bring about a marriage, which could not be performed in part, whereas in that case the purpose could.

notice that Sir Frederick Pollock in his work on Contracts (7th ed.), p. 383, qualifies Mellish, L.J.'s, proposition by substituting for the words "the illegal purpose," the words "any material part of the illegal purpose." Therefore, whether we regard this case from the point of view of the common law, or from the larger point of view of a court of equity, we can give relief against this contract, which ought never to have been made, notwithstanding that the defendant has taken trouble and incurred some expense in doing something towards its accomplishment. In my opinion, therefore, the judgment of the Divisional Court was wrong, and the appeal ought to be allowed.

MATHEW, L.J.—I am of the same opinion. There are three questions which we have to consider. First, is the contract a marriage brokage contract? secondly, if it is, is it illegal? and thirdly, can a marriage brokage contract be rendered binding by part performance? With regard to the first question, in my opinion it is a question of fact. If there was reasonable evidence to justify the conclusion arrived at upon this point by the county court judge, we can not interfere. I think that there was reasonable evidence. The Divisional Court drew a distinction between a contract for reward to procure a marriage with one particular person and a contract to procure a marriage with some person generally, giving a choice to the person with whom the contract was made. In my opinion there is no such distinction. I am therefore obliged to differ from the decision arrived at upon this point by the Divisional Court, and in my opinion this is a marriage brokage contract. As to the second question, no doubt in many decisions marriage brokage contracts are referred to as illegal. But in what sense are they illegal? It is much too strong to apply the words *turpis causa* to a contract of this sort, or to speak of the plaintiff as *allegans turpitudinem*. The contract is not analogous to a contract in restraint of trade or a contract to stifle a prosecution. The real nature of the contract is, as it seems to me, that it is *nudum pactum*, and the law says that it imports no consideration and that no rights shall be permitted to arise under such a contract. The real position, where a contract is *nudum pactum* and executory, is that it may be rescinned. The position of the defendant is that of a stakeholder holding money which is to be paid over upon an engagement or marriage taking place. There was no consideration for such a contract, and the plaintiff had a *locus pœnitentiæ*. With reference to the third question, if part performance were to have the effect contended for, the rule of law would be rendered nugatory. It would be only necessary for the defendant to write some letters or do some other trifling act in order to render the rule of law useless. It is impossible to suppose that the law would allow itself to be frustrated in that way. In my opinion the appeal should be allowed.

COZENS-HARDY, L.J.—I am of the same opinion. The only point decided by the Divisional Court was that this was not a marriage brokage contract because it was not a contract to procure a marriage with a specified individual. They were led to that conclusion by a reference to *Drury* v. *Hooke*, 1 Vern. 412, where the Lord Chancellor spoke of the bond as "a sort of kidnapping." That was no doubt so in that case. But *Drury* v. *Hooke* was decided in 1686, at a time when there was a difference of opinion as to whether marriage brokage contracts could only be set aside when there was some fraud or illegal coercion. That question was disposed of by the House of Lords in *Hall* v. *Potter*, Show. P. C. 76, decided in 1695, where a marriage brokage contract was set aside, though the marriage had taken place and though there was no fraud. We have also had the opportunity of seeing the bill in the case of *King* v. *Burr*, and it shows that the ground upon which the Divisional Court based their judgment is not maintainable. We therefore start with this—that this is a marriage brokage contract. A great deal of discussion took place towards the end of the seventeenth century about those contracts. They were not then void at common law. Courts of equity, however, gave relief; and as late as 1735, in *Law* v. *Law*, 3 P. Wms. 391, Talbot, L.C., said that marriage brokage bonds were good at law. That was a case where A. by his interest with the Commissioners of Excise got an office in that branch of the Revenue for B., who in consideration thereof gave a bond to A. to pay him £10 per annum as long as B. enjoyed the place. It was held that equity would give relief. The Lord Chancellor said: "But supposing it to be a good bond at law, so are all marriage brokage bonds; which yet are justly condemned in equity, as introductive of infinite mischief." The court in that case gave relief to the executrix of one of the parties, and it ordered the bond to be delivered up to be cancelled, though the party to the bond had obtained the office, and the consideration moving from the other party had been performed. The matter did not stop there, because in the earlier case of *Smith* v. *Bruning*, 2 Vern. 392, which ought properly to be *Goldsmith* v. *Bruning*, the court ordered a repayment of money which had been actually paid on account of, and in anticipation of, the marriage. I have had an opportunity of seeing the record in that case. It was a decision of the Master of the Rolls, and he ordered not only that the bond should be delivered up to be cancelled, but also that the 50 guineas actually paid should be repaid by the defendant.

Upon these grounds, all courts having now the jurisdiction of courts of equity, there is jurisdiction to order this sum of £52 to be repaid. It is unnecessary for me to go further into the matter. I entirely agree with the other grounds dealt with by the Master of the Rolls.

Appeal allowed.

Solicitors for the plaintiff, *Coburn & Co.*

Solicitors for the defendant, *Kenneth, Brown, & Co.*

High Court of Justice.

Chan. Div. Kekewich, J. — July 8, 1905.

BROWN v. HAIG AND OXLEY. (a.)

Practice—Costs—Further security for costs—Application after trial—Summons for directions—Application by way of notice—Proper method by fresh summons—Ord. 30, rr. 2, 5; ord. 65, r. 6.

After trial and judgment the proper method to proceed in an interlocutory matter is by a fresh summons, and not by notice under the summons for directions.

The plaintiff in an action brought for a declaration of partnership and for an account had been ordered to give security for costs. At the trial it was ordered that the accounts between the parties should be taken by the official referee. The defendants applied by notice under the summons for directions that the plaintiff should be ordered

(a.) Reported by R. FRANKLIN STUBBING, Esq., Barrister-at-Law.

to give further security for the costs to be incurred in the inquiry before the official receiver.

Held, that the application must be refused, as the summons for directions, under which the notice was given, was put an end to by the trial and judgment.

This was an application by each of the two defendants in the above action for an order that the plaintiff might be ordered to give further security for their costs; and the question raised was as to whether such an order could be made upon a summons for directions under order 30, an order having been made when the action came on for trial for an account to be taken by an official referee.

The action was brought by A. K. Brown for a declaration of partnership and to have an account taken of all the dealings and transactions in connection with the partnership which he alleged existed between himself and the defendants in respect of certain concessions granted by the Egyptian and Soudan Governments for prospecting for minerals and precious stones, and which were referred to in a certain letter dated the 13th of September, 1901, signed and sealed by the defendant Haig, and which was in the following terms: "Gentlemen,—It is understood between us that the concessions I hold from the Egyptian and Soudan Governments for exclusive prospecting at this date are held by me for myself and yourselves and that all profits arising in connection with the sale or other dealing with the said two concessions shall be divided into three equal parts—one part for myself, one for A. K. Brown, and one for J. O. Oxley.—Yours faithfully, G. O. Haig."

The plaintiff was resident out of jurisdiction, and on the 11th of April, 1905, Kekewich, J., made an order directing the plaintiff to give security for costs to each of the two defendants.

The action came on for hearing on the 24th of May and the 8th of June. No witnesses were heard, but the plaintiff admitted that he was bound to contribute one equal third part of expenditure in connection with the concessions mentioned in the letter set out above, and Joyce, J., ordered that it be referred to the official referee to take an account of all the dealings and transactions in connection with the concessions before mentioned, and the official referee was to be at liberty to report to the court specially upon any point arising on the account. And it was also ordered that the further consideration of the action be adjourned, and any question as to costs be reserved with liberty to the parties to apply as they may be advised.

Both defendants then gave notice that they intended to apply for further directions in the action, under ord. 30, r. 5—viz., that the plaintiff be ordered to give further security for the costs of both defendants in respect of the proceedings before the official referee.

The summonses were adjourned into court on the question as to whether such an application could be made on a summons for directions after the trial had taken place and an order made for an account to be taken by the official referee.

Order 30 of the Rules of the Supreme Court provides as follows: Rule 1.—(*a*) Except in the cases mentioned in paragraph (*d*) the plaintiff in every action shall take out a summons for directions returnable in not less than four days; (*b*) such summons shall be taken out after appearance and before the plaintiff takes any fresh step in the action other than application for an injunction, or for a receiver, or the entering of judgment in default of defence under order 27.

Rule 2.—Upon the hearing of the summons the court or a judge shall, so far as practicable, make such order as may be just with respect to all the proceedings to be taken in the action, and as to the costs thereof, and more particularly with respect to he following mattters: Pleadings, particulars, admissions, discovery, interrogatories, inspection of documents, inspection of real or personal property, commissions, examination of witnesses, place and mode of trial. Such order shall be in the form No. 4*a*, Appendix K, with such variations as circumstances may require.

Rule 5.—Any application subsequent to the original summons and before judgment for any directions as to any interlocutory matter or thing by any party shall be made under the summons by two clear days' notice to the other party stating the grounds of the application.

Ord. 65, r. 6.—In any cause or matter in which security for costs is required the security shall be for such amount, and be given at such times and in such manner and form as the court or a judge shall direct.

P. O. Lawrence, K.C., and *Ashton Cross*, for the defendant Haigh.—The proper method to proceed was by notice under the summons for directions in accordance with ord. 30, r. 5. There is nothing in the rules to make a summons for directions inoperative as to proceedings after trial, although in most cases it would be exhausted by the trial. The words in ord. 30, r. 2, "in all proceedings to be taken in the action," are applicable to the present case and include those proceedings that take place after trial. As long as the action is alive there may be proceedings in it, and the validity of this mode of procedure under the summons for directions ought not to be cut down to the proceedings before trial. There was no final judgment given at the trial, but only directions for an inquiry to be held, and therefore the summons for directions is still alive.

G. C. Rankin, for the defendant Oxley, adopted this argument. Ord. 65, r. 6, was framed in the way it was because it was intended to apply to the King's Bench Division as well as to the Chancery Division. The substance and not the form of the proceeding must be looked at: *Tomlinson* v. *Land and Finance Corporation*, 14 Q. B. D. 539, 33 W. R. Dig. 59.

A. à B. Terrell, for the plaintiff, was not called upon.

KEKEWICH, J.—These are two applications, one by each defendant, for further security for costs, which are the costs to be incurred in an inquiry before the official referee. The case came on for trial on the 8th of June, but no witnesses were heard, and by arrangement an order was made by which it was referred to one of the official referees to take the account of the following matters—viz., an account of all dealings and transactions in connection with the concessions mentioned in the letter of the 13th of September, 1901, and the official referee was to be at liberty to report to the court specially upon any point arising on the account, and the further consideration of the action was adjourned and the costs reserved. This order, to my mind, is technically a judgment, even if it is not a final judgment. It is very like an order to refer to chambers something which has to be dealt with there. In that sense it is not a final judgment, but it is the judgment in this sense, that what takes place afterwards in court is a further consideration of the action. The materiality of this is that this order has disposed of the case as far as the court could dispose of it at the trial, the further consideration being reserved. Even if not technically a judgment, it is the same as the trial, and would be treated by the Court of Appeal as the final judgment and go into the final list.

Now, after the trial, an application is made for

security for costs. Before 1897—that is to say, before the summons for directions came into vogue—a litigant would have to issue a summons for this as for other things, and the question is, Do the rules as to the summons for directions alter the matter. Nothing much to help can be gathered from rule 1 of order 30, but in rule 2 there is a summary of what can be done. "Proceedings to be taken in the action" include proceedings before the official referee, and "the costs thereof" have been held to include security for costs. My own opinion is that on that rule the summons for directions comes to an end when you come to the trial. This view is strengthened by rule 5 of the same order as it now stands. That is the rule under which we dispose now of scores of applications weekly, but that rule provides that the applications made under it must be applications "subsequently to the original summons and before judgment." It is obvious that it may be necessary to make an application before the summons for directions has been issued—for instance, for the appointment of a receiver; in such a case the application must be made by a different summons. After the summons for directions has been issued, the application must be by notice under the original summons, and to issue a fresh summons when a notice would be sufficient would be to run the risk of being ordered to pay any additional costs incurred thereby. But the rule says further "and before judgment," which points to the conclusion that after judgment nothing can be done under that rule. The rule does not expressly say that notice must not be given after judgment, but it seems to me to be implied that notice is not then to be given.

It has been urged that the validity of this mode of procedure ought not to be cut down by restricting it to matters before the trial. I do not wish to cut down the validity of the summons, but I must deal with the practice under the rules as they stand. I have been supplied with a copy of the printed form of summons for directions which is now in universal use in all the chambers. It enumerates all the interlocutory proceedings specified in rule 2, and then the words "any other interlocutory matter or thing" have been added. Those words would no doubt include an application for security for costs, but it must be made in an interlocutory matter. It seems to me that, whether the defendants are entitled to an order for security for costs or not, they are not entitled to the order on these notices.

The court was then asked to decide as to whether an order for further security would be made, assuming that a fresh summons was taken out.

A. à B. Terrell, for the plaintiff.—Security for costs has never been ordered in the case of a plaintiff who has at the trial made good his right to what he claimed—viz., an account of the dealings and transactions between the parties.

KEKEWICH, J.—Upon this part of the case I may accede to the argument that the court ought not to cut down the utility of a useful provision. Rule 6 of order 65, which is the only rule dealing with the security for costs, speaks of "any cause or matter"; why should I say that "any cause or matter" does not mean any proceedings directed by the judgment to be taken before an official referee or before the judge in chambers. In my opinion the words are wide enough to include that, and one must remember that an application for security for costs does not preclude a second application if the costs mount up or if any further proceedings are directed. It is for the court to consider these matters from time to time. Why, if after judgment inquiries are directed, those proceedings should not be covered, I cannot see. It seems to me that, assuming that the plaintiff is resident out of the jurisdiction and that the security already ordered is insufficient to meet the costs of the proceedings before the official referee, a good case can always be made for an order for further security. If these applications are made by summons they will be in order and must be attended to.

Solicitors, *Hammond & Beningfield*; *Swann, Bradley, & Co.*; *W. H. Smith & Son.*

K. B. Div.
(Lord Alverstone, L.C.J., and Kennedy and Ridley, JJ.) June 20, 1905.

LOWE v. DORLING & SON. (a.)

Landlord and tenant—Lodger—Distress—Distraint of lodgers' goods—Action against bailiff—Lodgers' Goods Protection Act, 1871 (34 & 35 *Vict. c.* 79), *s.* 2.

Under section 2 *of the Lodgers' Goods Protection Act*, 1871, *an action lies against a bailiff for illegal distraint.* Page *v.* Vallis, 19 *Times L. R.* 393, *overruled.*

Appeal from the Bow County Court.

The plaintiff was a lodger in the house of which his mother was the tenant. Her rent being in arrear, the defendants, on the 22nd of June, 1904, acting as bailiffs, distrained on behalf of the landlord, and seized, besides the tenant's goods, goods belonging to the plaintiff, who served the defendants with a notice under section 1 of the Lodgers' Goods Protection Act, 1871. Notwithstanding this, the defendants on the 12th of August sold the plaintiff's goods. The plaintiff brought an action to recover damages for illegal distress, and judgment was given in his favour.

The defendants appealed.

By the Lodgers' Goods Protection Act, 1871, s. 2, "If any superior landlord, or any bailiff or other person employed by him, shall, after being served with the above-mentioned declaration and inventory, and after the lodger shall have paid or tendered to such superior landlord, bailiff, or other person the rent, if any, which by the last preceding section such lodger is authorized to pay, shall levy or proceed with a distress on the furniture, goods, or chattels of the lodger, such superior landlord, bailiff, or other person shall be guilty of an illegal distress, and the lodger may apply to a justice of the peace for an order for the restoration to him of such goods; and such application shall be heard before a stipendiary magistrate, or before two justices in places where there is no stipendiary magistrate, and such magistrate or justices shall inquire into the truth of such declaration and inventory, and shall make such order for the recovery of the goods or otherwise as to him or them may seem just, and the superior landlord shall also be liable to an action at law at the suit of the lodger, on which action the truth of the declaration and inventory may likewise be inquired into."

Ronald Walker (*C. E. Jones* with him), for the appellant.—No action lies against the bailiff. *Page* v. *Vallis*, 19 Times L. R. 393, is an authority in my favour. The only remedy is by action against the superior landlord. If the section was intended to give a right of action against the bailiff different language would have been used.

Schwabe, for the respondent.—*Page* v. *Vallis* was wrongly decided. The words "shall be guilty of

(a.) Reported by ALAN HOGG, Esq., Barrister-at-Law.

an illegal distress" would be rendered nugatory if the only right of action was one against the superior landlord.

Walker replied.

Lord ALVERSTONE, L.C.J.—This matter is no doubt capable of considerable discussion. My brother Darling took a different view to that which we entertain, but after having the matter argued more fully than is possible at *Nisi Prius* I have come to the conclusion that the county court judge was right in holding that in such a case an action will lie against the bailiff. The county court judge says in his judgment: "I hold that section 2 carries with it when duly proved a right to damages; an action can be brought against a bailiff for such damages unless the statute says it must not."

It is said that the effect of the section is to limit the right of action for an illegal distress to the remedy against the superior landlord. I cannot think that is so. I think we must look at the statute as a whole. The preamble says: "Whereas lodgers are subjected to great loss and injustice by the exercise of the powers possessed by the superior landlord to levy a distress on their furniture, goods, and chattels for arrears of rent due to such superior landlord by his immediate lessee or tenant." That shows the object of the legislation. The Act then, after safeguarding the interest of the superior landlord in section 1 by providing for the payment to him by the lodger of any rent due to his immediate landlord, and by providing for a correct inventory of the lodger's goods, goes on in section 2 to say: "If any superior landlord or any bailiff or other person employed by him shall, after being served with the before-mentioned declaration and inventory, and after the lodger shall have paid or tendered to such superior landlord, bailiff, or other person, the rent, if any, which by the last preceding section such lodger is authorized to pay, shall levy or proceed with a distress on the furniture, goods, or chattels of the lodger, such superior landlord, bailiff, or other person shall be deemed guilty of an illegal distress." I do not think that it can be seriously contended that if the section had stopped there, no action would lie against the bailiff who had levied the distress. I confess that at first I did not quite see why the superior landlord was included in that part of the section, considering the language of the latter part of the section, but, as it has been pointed out, it is possible for a landlord to distrain himself and not to employ a bailiff, and that seems to be the reason of the insertion of the name of the superior landlord in this part of the section. An illegal distress is an expression well known to the law, and *primâ facie* a bailiff is responsible if he enters a house and seizes another man's goods, and the landlord who employed him would only be responsible if he authorized the bailiff to do so. Section 2 proceeds: "and the lodger may apply to a justice of the peace for an order for the restoration to him of such goods." I do not think that these words were only intended as a preamble to enable the lodger to make an application to the magistrate for the restoration to him of his goods. He goes to the magistrate because he has served a declaration and inventory of his goods, and this part of the section is not, in my opinion, merely a description of the state of things in which he can apply to the magistrate for an order. The section goes on to say: "Such magistrate . . . shall inquire into the truth of such declaration and inventory . . . and shall make such order for the recovery of the goods or otherwise as to him . . . may seem just." In my opinion the words "or otherwise" cannot possibly be held to give the magistrate power to make anyone pay damages for the illegal distress. Then come the last words of the section: "and the superior landlord shall also be liable to an action at law at the suit of the lodger, in which action the truth of the declaration and inventory may likewise be inquired into." It is contended that these words are inserted to give a remedy merely against the landlord in which the landlord can question the truth of the lodger's declaration and inventory, and that they by implication negative any right of action against the bailiff or any other person except the landlord. But I think those words were inserted to make the superior landlord liable even when he had not authorized the bailiff to seize the goods of the lodger, and they cannot be used to cut down the remedy given by the earlier part of the section against the bailiff.

KENNEDY, J.—I am of the same opinion. During the course of the argument I have felt doubts as to the proper construction of the section, and those doubts have been enhanced by the view taken by my brother Darling. I think, however, that we ought to require clear and definite words to make us hold that a bailiff who by the language of the section is to be deemed guilty of an illegal distress should not be held liable for that tortious act to the person whom he has injured. I agree that the words at the end of the section are difficult to construe, but I think that the juster view of them is that which has been expressed by my lord—namely, that if the section had stopped earlier it might have been said that if the notice had been served only on the person actually making the distress the superior landlord would not become liable to an action, and that this was a statutory provision in favour of the lodger which did not make a superior landlord legally responsible if all that he had done was to authorize the bailiff or other person to make a distress which only became illegal after the service upon the bailiff of the declaration and inventory. I think that to prevent any argument of that sort these words were added, in order to make it clear that the superior landlord is liable whether he has expressly and after notice authorized the acts constituting the illegal distress or not.

RIDLEY, J.—I agree, and I only add a word because of the decision of my brother Darling from which we are dissenting.

In my opinion, section 2 of the Lodgers' Goods Protection Act, 1871, deals with three sets of persons—the superior landlord, the bailiff, and the other person employed by him. Any one of those may make the distress, and if any one of the three does so after being served with the declaration and inventory he is to be deemed guilty of an illegal distress. So far the section only deals with the person actually making the distress. Any person who makes an illegal distress is liable to an action in respect of it by the general law, because he has committed a tortious act. The superior landlord, however, who had instructed a bailiff or other person to distrain would not be liable unless he had specially authorized the acts constituting the illegal distress. The words at the end of the section, therefore, are meant, in my opinion, to make him liable whether he has authorized those acts or not. It is said that they show that the only remedy is by action against the superior landlord, and that they take away any right of action against the bailiff. If so we can give no effect to the words in the earlier part of the section as to being deemed guilty of an illegal distress. It seems to me that the only way of giving effect to the whole of the section is to hold that the words do not cut down the remedy against the bailiff, but give a remedy against a landlord who

has not authorized what by the earlier words of the section is to be deemed an illegal distress.

Appeal dismissed; leave to appeal granted.

Solicitor for the appellant, *C. C. Sharman.*

Solicitor for the respondent, *A. E. Tudor.*

K. B. Div.
(Lord Alverstone, L.C.J., and Kennedy and Ridley, JJ.) June 7, 8, 1905.

DAVIS *v.* PETRIE. (*a.*)

Bankruptcy — Deed of assignment for the benefit of creditors—Bankruptcy proceedings instituted within the next three months—Effect of payment made to trustee of assignment deed—Protected transaction—Right of the trustee in the bankruptcy to enforce payment of the debt—Relation back of trustee's title—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *ss.* 43, 49 (2).

The defendant being indebted to a builder for work done, and the builder having made an assignment of his property in favour of all his creditors, the defendant paid the amount of her debt to the trustee of the assignment deed, having been notified by the trustee of the execution of the deed and required to pay the debt to him. Within three months of the execution of the assignment deed a bankruptcy petition was presented against the builder founded on the act of bankruptcy occasioned by the execution of the deed, and he was adjudicated a bankrupt. The assignment trustee having failed to pay over to the trustee in bankruptcy the money received from the defendant, the trustee in bankruptcy sued the defendant.

Held, that, as the defendant had notice of the act of bankruptcy when the debt was paid to the assignment trustee, the payment was not a protected transaction, and the trustee in the bankruptcy was entitled to recover the amount from the defendant for the benefit of the bankrupt's creditors.

Appeal from a decision of his Honour Judge Stonor, sitting at Brompton County Court.

The plaintiff was the trustee in bankruptcy of one William Watson, and he sued the defendant Mrs. Petrie for the sum of £21 in respect of work done for her by Watson. The defendant pleaded payment of the amount by cheque dated the 12th of June, 1903, to one Afford, the trustee under a deed dated the 5th of June, 1903, executed by Watson, whereby Watson assigned all his property to Afford for the benefit of all his creditors. Afford by letter dated the 6th of June, 1903, informed the defendant he had been appointed trustee of the deed of assignment, and required payment from the defendant of the debt due by her to Watson.

One of Watson's creditors filed a petition in bankruptcy against Watson on the ground that the execution of the deed of assignment of the 5th of June, 1903, was an act of bankruptcy, and Watson was adjudicated a bankrupt on the 9th of September, 1903.

The plaintiff Davis having been appointed trustee in the bankruptcy, applied to Afford for an account and claimed payment of any money in his hands. Afford failed to pay over the £21 he had received from the defendant, and the plaintiff as trustee in bankruptcy accordingly sued the defendant, who pleaded that, having paid Afford the amount of her debt, her liability to the bankrupt in respect of it was discharged.

The county court judge held that the defendant was not liable to pay twice and entered judgment for her with costs.

The plaintiff appealed.

S. R. Earle, for the plaintiff.—The county court judge was wrong in holding that payment by the defendant with full knowledge to the assignment trustee was a protected transaction, where, within three months of the execution of the deed, a receiving order is made against the grantor. In such a case section 49 (2) of the Bankruptcy Act affords no protection, for the title of the trustee in the bankruptcy relates back by section 43 to the date of the act of bankruptcy, and the liability for the debt still exists unless it can be shown that there had been such an adoption or ratification by the trustee in the bankruptcy of the acts of the assignment trustee as to make the latter his agent: see per Lord Esher, M.R., in *In re Pollitt, Ex parte Minor*, 41 W. R. 89, 276, [1893] 1 Q. B. 455. The object of section 43 is to preserve the whole of the bankrupt's property for his creditors: see per Fry, L.J., in *In re Burdett, Ex parte Byrne*, 36 W. R. 128, (1888) 20 Q. B. D. 310, at p. 314. The trustee in bankruptcy was entitled to treat what was done by Afford as the acts of a trespasser, if he elected to do so and to call upon him for an account: *Ex parte Vaughan, In re Reddeough*, 33 W. R. 151, (1885) 14 Q. B. D. 24. That was all the trustee did; he received no money and did no other act that could be suggested as ratification.

Ex parte Snowball, In re Douglas, 20 W. R. 786, (1872) 7 Ch. App. 534, and *Stein* v. *Pope*, 50 W. R. 374, [1902] 1 K. B. 595, were also referred to.

Frank Mellor (*Giveen* with him), for the defendant.—The county court judge's decision is right, for it was never intended that the Act of 1883 should work such an injustice as to make a person who had paid under an assignment deed, which was perfectly good at the time of payment, pay a second time owing to the defalcations of the trustee. Until the deed of assignment was upset it was valid, and all that was done under it before it was avoided is protected by section 49 of the Bankruptcy Act, 1883. The assignment trustee could have sued the defendant, and the defendant would have had no answer to the question. Moreover, here there has been ratification by both the official receiver and the trustee by asking for an account and payment of all moneys received under the deed from the assignment trustee and an actual payment on account by him.

Lord ALVERSTONE, L.C.J.—The county court judge says in terms that the language of section 43 of the Bankruptcy Act, 1883, is opposed to the view he has taken in this case, and it is plain that the literal construction of that section is in favour of the contention of the plaintiff. None of the authorities referred to in the judgment of the county court judge appear to me to support the view that a payment such as that in the present case, with notice, is protected. We were pressed by Mr. Mellor to say that if Afford, the assignment trustee, had brought an action against the defendant for the £21 she would have had no defence to it. Afford was only an assignee, under a title which *ex hypothesi* would come to an end if an act of bankruptcy took place, and the deed was in itself an act of bankruptcy. I fail, therefore, to see that there could be no answer to such an action. It was said also that payment to Afford was a protected transaction. As to that I would point out this—that the payment to a bankrupt is not protected if the person making the payment has notice of an act of bankruptcy; and I am of opinion that payment with notice to the assignee of the bankrupt stands in no better position.

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

KENNEDY, J.—I am of the same opinion. It is curious that there is no decision on the point raised in this case. What are the facts. Afford took a deed of assignment from Watson which, in itself, was an act of bankruptcy on which Watson could be, and was, adjudicated a bankrupt. Afford then wrote to the defendant saying that as she was indebted to Watson she would have to pay the debt to him—Afford—as he had been appointed trustee under the deed of assignment executed by Watson. It was suggested that although there was no antecedent contract between Afford and the defendant, yet that the defendant would have been in law bound, if sued by Afford under the deed, to pay the debt to him, and that although both knew that the execution of the deed was an act of bankruptcy on the part of Watson, the payment made by the defendant to Afford was not void by section 43 of the Bankruptcy Act, 1883. If such a payment is protected the protective section—section 49—as to payments made without notice would appear to be unnecessary. A distinction was sought to be drawn between a payment to the trustee under the deed of assignment and one made to the bankrupt himself. I am unable to see any distinction.

RIDLEY, J.—I agree and have nothing to add.

Appeal allowed.

Solicitors for the plaintiff, *Braby & Macdonald.*

Solicitors for the defendant, *Gerald & Arthur Marshall.*

House of Lords.

From C. A. (England). July 3, 1905.

NORTHUMBERLAND (DUKE) AND ANOTHER *v.* ATTORNEY-GENERAL. (*a.*)

Inland revenue—Succession duty—Alienation of succession—Disentailing deed—Conveyance to purchaser in fee—Devise by alienee—Death of tenant for life—Liability of devisee to duty on original succession—Succession Duty Act, 1853 (16 & 17 *Vict.* c. 51), *s.* 15.

A tenant for life of settled real estate, and the tenant in tail in remainder, having executed a disentailing deed, joined in conveying a parcel of land, part of the estate, in fee to a purchaser. The purchaser devised the parcel of land to his wife, who devised it to their daughter, who paid succession duty in respect thereof on her mother's death. Subsequently the tenant for life died.

Held, that succession duty was payable by the daughter on the death of the tenant for life also, the duty to be calculated with reference to the life of the daughter.

In re Cooper and Allen, 25 *W. R.* 301, 4 *Ch. D.* 802, *overruled.*

Solicitor-General *v.* Law Reversionary Interest Society, 21 *W. R.* 854, *L. R.* 8 *Ex.* 233, *discussed.*

Decision of the Court of Appeal (52 *W. R.* 518, [1904] 1 *K. B.* 762) *affirmed.*

Appeal from an order of the Court of Appeal (Collins, M.R., and Romer and Mathew, L.JJ.) affirming the judgment of Ridley, J., in favour of the Crown, upon an information by the Attorney-General claiming that succession duty at the rate of 6½ per cent. became payable by the appellants on the death of the sixth Duke of Northumberland, and that the same was payable on the value of the succession considered as an annuity on the life of the appellant Caroline Frances Murray.

By an indenture of settlement dated the 19th of April, 1817, the manor of Redesdale, in the county of Northumberland, was (together with other hereditaments) under and by exercise of a joint power of appointment which was vested in Hugh, second Duke of Northumberland, and Hugh, third Duke of Northumberland, appointed and limited to certain uses which have either failed or have otherwise determined, with remainder to the use of the sixth duke for life without impeachment of waste, with remainder to the use of trustees during his life to preserve contingent remainders, with remainder to the use of his first son in tail male, with divers remainders over.

By an indenture dated the 19th of December, 1868 (duly enrolled as a disentailing assurance), the sixth duke and the present duke (then Earl Percy) disentailed the estates and conveyed them to such uses as the sixth duke and the present duke should by deed jointly appoint, and in default thereof as therein mentioned.

By an indenture of settlement dated the 21st of December, 1868, the said manor was (together with other hereditaments) appointed to such uses as the sixth duke and the present duke should by deed jointly appoint, and in default of appointment to the use of the sixth duke for life, with remainder to the use of the present duke for life, with divers remainders over.

By an indenture dated the 1st of December, 1870, certain hereditaments being a portion of an allotment made to the lord of the manor of Redesdale upon the inclosure of a certain common parcel of such manor, were, under the joint power contained in the settlement of the 21st of December, 1868, appointed (but subject to the exceptions and reservations mentioned) by the sixth duke and the present duke to the use of Lord James Murray in fee simple. Lord James Murray died on the 3rd of June, 1874, and his wife, Lady Elizabeth Marjory Murray, became, under his will dated the 8th of May, 1868, beneficially entitled to such hereditaments for an estate in fee simple in possession. Lady Elizabeth Marjory Murray died on the 11th of October, 1888, and her daughter, the appellant, Caroline Frances Murray, became under her mother's will beneficially entitled (subject to a certain mortgage and further charge) to the hereditaments comprised in the indenture of the 1st of December, 1870, for an estate in fee simple in possession.

On the death of Lady Elizabeth Marjory Murray succession duty at the rate of 1½ per cent. became payable, and was paid on the value of the interest of the appellant Caroline Frances Murray (considered as an annuity for her life) in the hereditaments comprised in the indenture of the 1st of December, 1870, and deduction was taken in the succession duty account from the annual value of all the hereditaments so mortgaged for interest on the principal sums secured by the mortgage and further charge.

In the year 1902 Caroline Frances Murray sold the hereditaments comprised in the said indenture of the 1st of December, 1870, to Charles William Bell.

The Crown claimed succession duty upon the death of the sixth duke in respect of the hereditaments comprised in the said indenture of the 1st of December, 1870, as on the death of the said sixth duke, at the rate of 6½ per cent.—that is to say, 5 per cent. under section 10 of the Succession Duty Act, 1853 (the present duke being a descendant of a brother of the father of the third Duke of Northumberland), and 1½ per cent. under section 21, subsection 1, of the Customs and Inland Revenue Act, 1888.

(*a.*) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

The appellants refused to deliver an account or to pay the duty claimed, contending that in the circumstances no such duty was payable.

Haldane, K.C., and *Danckwerts, K.C.* (*Austen-Cartmell* with them), for the appellants.

Sir R. B. Finlay, A.G., and *Vaughan Hawkins* (*Sir E. Carson, S.G.*, with them), for the respondent.

THE HOUSE took time for consideration.

Earl of HALSBURY, L.C.—I have read and have nothing to add to the judgment of my noble friend Lord Macnaghten in this case. Two observations I wish to make, because I have made them before and I have no desire to alter them. One is that a succession within the Act once established, no manipulation of the parties can get rid of it; and the observation is equally true whether there be one or two successions. The other is that since the decision of this House in *Lord Wolverton's case*, 47 W. R. 97, [1898] A. C. 535, the judgment of Sir George Jessel in *In re Cooper and Allen*, 25 W. R. 301, 4 Ch. D. 802, cannot be relied upon as an authority.

Lord MACNAGHTEN.—Besides the question as to the effect of a disentailing assurance in the case of property chargeable with duty under the Succession Duty Act, 1853, this appeal involves the consideration of two reported decisions—*Solicitor-General* v. *Law Reversionary Interest Society*, 21 W. R. 854, L. R. 8 Ex. 233, and *In re Cooper and Allen*.

The question as to the effect of a disentailing assurance is not, as it seems to me, reasonably arguable, and if it were it would be concluded, I think, adversely to the appellants by the decision of this House in the case of *Lilford* (*Lord*) v. *Attorney-General*, 15 W. R. 595, 2 L. R. H. L. 63.

In many ways the Succession Duty Act, 1853, is a remarkable piece of legislation. Drawn with consummate skill, it avoids all technical expressions, and yet there is not a single word misused or out of place, nor any expression which would be easy to improve. The Act was fortunate in its passage through Parliament. It was not mangled, or marred, or amended. The result is that it is consistent throughout, and as clear as the nature of the subject and the novelty of treatment which it required would permit. But to understand the Act thoroughly it is necessary to lay aside all preconceived notions and to follow patiently and persistently the clue which the Act itself provides.

The key to the Act is found in section 2, which defines the terms "successor" and "predecessor," and explains the relation between predecessor and successor.

The Attorney-General argued that the word "successor" was a word of flexible meaning, and occasionally used rather loosely in the Act. With the utmost deference I protest against that view. It has been the cause, and I think the sole cause, of all the difficulties that judges have discovered in the Act.

There are two things plain on the face of the Act. In the first place, it is clear that the terms "disposition" and "devolution" must have been intended to comprehend and exhaust every conceivable mode by which property can pass whether by act of parties or by act of the law. In the next place it is to be borne in mind that a "successor" must be beneficially entitled. When a person takes a succession he may not have actual possession. A husband, for instance, may have possession in right of his wife, a guardian on behalf of an infant. But a successor, to be a true successor within the meaning of the Act, must have the beneficial interest in the property subject to duty, whoever may have the actual possession or the right of management. These are obvious considerations. But they are frequently lost sight of, and then all sorts of difficulties arise. Let me put this case: A limitation after a death to A. for life, remainder to B. for life, remainder to C. in fee. In the lifetime of A. and B., C. sells his reversionary interest to X. Does X. become a successor? The Act says Yes. But the learned judges in *Solicitor-General* v. *Law Reversionary Society* answer No. In that case the court said, "The language of the second section does not deal with the position of an alienee of a succession. . . . The position of an alienee is a matter of legal consequence from the second section, and not touched by the words of it." I must confess I cannot follow that observation. It seems to me that the position of an alienee is within the very words of section 2. That section declares that "Every . . . disposition of property," by reason whereof any person becomes beneficially entitled to property upon death, either immediately or after an interval, shall be deemed to confer on the person so entitled a succession, and it adds, "the term 'successor' shall denote the person so entitled." Now, in the case I have supposed X. undoubtedly becomes entitled to property answering the description contained in section 2 under the circumstances there mentioned, if the sale to him be a "disposition of property" within the meaning of the Act. In many cases the purpose of the Act would be defeated unless you give to the term "disposition" the largest possible signification; not only so, but the Act shows on the face of it that the term "disposition" includes a sale. Section 7 speaks of "any disposition of property not being a *bonâ fide* sale"; and section 17 is more significant still. It is to be inferred from it that the framers of the Act thought the expression "disposition of property" wide enough even to include contracts for the payment of money on *post obits* and under policies of insurance. Now if an alienee be a true successor the difficulties with which the Court of Exchequer struggled in the case of the *Law Reversionary Interest Society* vanish altogether. The rate of duty and the time of payment are fixed by section 15. The value of the annuity on which the duty is to be computed is determined by section 21. There is no difficulty left, except the difficulty, such as it is, which has been suggested in the construction of section 44. And that vanishes, too, if the alienee be a true successor within the meaning of the Act. The difficulty suggested was that section 44 declares that "besides the successor" certain persons shall be accountable to the Crown for succession duty, and reckons among the persons accountable "every person" in whom any property or the management of any property subject to duty "shall be vested by alienation or other derivative title at the time of the succession becoming an interest in possession." It was said that an alienee cannot be a successor within the meaning of the Act, for here you have the alienee distinguished from the successor and placed in a different class. But there is no substance in that objection. Beneficial interest is the badge of a true successor and a necessary qualification in his case, while the management of the property or the right to receive the rents may be vested in some other person and so vested by alienation or other derivative title. It may be observed that unless an alienee coming into possession be a successor within the meaning of the Act, he would be in a different position from a successor not taking by alienation. He would not be under the liability of section 42, but only under the limited liability of section 44—that is, under the liability attaching to persons who have not the beneficial interest—a result which could hardly have been contemplated by the framers of the Act.

In the case of the *Law Reversionary Interest Society* the learned judges of the Court of Exchequer got over

the difficulty which they had themselves created by considering the inconvenience that might arise if a successor, after having parted with his succession, were still to be treated as the successor for the purpose of ascertaining the value of the annuity on which duty is to be computed. And so they arrived at a right conclusian, but not, I think, by the most direct road.

I now come to the case of *In re Cooper and Allen*. The question there turned on section 15. That section is in my view the natural and necessary outcome of the position which the Act assigns to the alienee of a succession. He becomes a "successor" within the meaning of the Act, though the succession conferred on him is not a new succession. Who, then, is the "predecessor"? The predecessor must be the original successor who has parted with his succession, and so the duty on a succession by alienation could never be less than 10 per cent. when the alienee is not of kin to the person from whom title is derived. To prevent a result so unreasonable and inconvenient, a special provision is introduced which declares that in the case of a succession becoming vested by alienation or by any other title not conferring a new succession in any person other than the original successor, before he becomes entitled thereto in possession, neither the rate of duty nor the time of payment is to be altered. Section 15 says nothing about the value of the succession, simply because, according to the view which I have ventured to present to your lordships, the value of the succession is dealt with expressly by section 21. Then in section 15 occasion is taken to deal with the kindred subject of "acceleration" by the surrender or extinction of a prior interest. In the case of acceleration, but for the provision introduced at the end of the section, it might have been open to contention that duty would become payable at once on the surrender or extinction of the prior interest. The rate of duty, of course, would not be altered, nor the value of the succession. And so the section says quite properly that the duty is to be payable at the same time and in the same manner as if no such acceleration had taken place—and it says no more.

Some difficulty seems to have been created in some cases by the words "or by any title not conferring a new succession in any other person" which follow the words "vested by alienation" in section 15. In the case of *In re Cooper and Allen* Sir George Jessel appears to have been pressed by the difficulty and perhaps misled by it. But a little consideration will show that a succession may be transferred without conferring a new succession, not merely by alienation pure and simple, but also by a title which is either not alienation at all, strictly speaking, or alienation combined with something else. Take the case of escheat as the law stood when the Succession Duty Act was passed, or the case of leaseholds (which are real estate under the Act) seized under a *fi. fa.*, or the case of a husband alienating his wife's reversionary interest in a term of years. These and other cases would come under the words in question and under the words "or other derivative title" which are used as their equivalent, if held not to fall under the word "alienation." The judgment of Sir George Jessel, M.R., in *In re Cooper and Allen* was disapproved of in *Wolverton* v. *Attorney-General*. Your lordships have heard an ingenious argument intended to set it up again. Can it be supported? I think not. The language of the Succession Duty Act, 1853, is too plain. In section 15 it declares that "where . . . any succession shall before the successor shall have become entitled thereto or to the income thereof in possession have become vested by alienation . . . in any other person, then the duty payable in respect thereof shall be paid at the same rate and time as the same would have been payable if no such alienation had been made. . . ." That is an enactment of general application. There is no exception to be found in the Act. But Sir George Jessel introduces an exception. He says, in effect, that the rule does not apply if there be a disposition or devolution conferring a new succession in respect of which duty is payable before duty becomes payable in respect of the succession transferred by alienation. In the present case it is not disputed that the succession of the seventh duke was transferred to Lord James Murray, and that if the sixth duke had died in the lifetime of Lord James duty would have been payable in respect of the seventh duke's succession, and again on Lord James's death, if on the death of Lord James the property had passed by disposition or devolution to Miss Murray. Why should payment of duty on the property left by Lord James discharge the duty with which the property was chargeable when he bought it? For such a vicarious exoneration there is no warrant in the Act. Nor is there in reason. When there is a sale of property chargeable with succession duty provision is ordinarily made to meet the claim for duty when it arises. The commissioners have power to commute the duty; the vendor may covenant to bear it, or it may be left to fall on the purchaser. In any case, the duty is, or ought to be, taken into consideration in arriving at the price, and the money which goes into the pocket of the vendor so much the less. Why should the vendor, or it may be the purchaser's estate, get a windfall, and why should the Crown lose because the vendor happens to outlive the purchaser?

I think the appeal fails on all grounds, and ought to be dismissed with costs.

Lord DAVEY.—The Succession Duty Act, 1853, dealt for the first time with a difficult and complicated subject of legislation, but a careful consideration of the scheme and language of the Act will render the solution of the questions submitted to your lordships for decision on this appeal free from any extraordinary difficulty.

By the disentailing deed of the 19th of December, 1868, estates comprising the lands in question were conveyed by the sixth duke (tenant for life) and the present duke (then Earl Percy and tenant in tail in remainder) to such uses as they should jointly appoint, and in default to the subsisting uses. By a deed dated the 1st of December, 1870, the sixth duke and the present duke in exercise of the power appointed the lands in question to Lord James Murray in fee.

The joint power created by the first deed was but the appropriate machinery for enabling the parties to make a conveyance of their respective interests by a simultaneous act and so as to create one estate. Mr. Danckwerts, however, argued that the effect of the exercise of the joint power was to destroy the succession which previously existed in the present duke, and therefore no duty under this Act became payable on the death of the sixth duke. I am of opinion that the exercise of the power in favour of Lord James Murray had precisely the same legal effect as if the sixth duke had conveyed his life estate, and the present duke having disentailed had conveyed the fee simple directly to the appointee by the deed of the 19th of December, 1868, and he had been named as grantee in that deed, or as if the present duke had conveyed the fee simple in remainder and the sixth duke had surrendered his life estate so as to pass the fee simple in possession. While I agree that the subject is not to be taxed by implication or unless he comes within the letter of the taxing Act, I think that the forms of

conveyancing make no difference where the legal effect and substance is the same.

The principal point on this appeal depends on the construction of section 15 of the Act. By section 1 the term "succession" denotes "any property chargeable with duty under this Act," which, I think, would be more accurately expressed as any estate or interest in property which is chargeable with duty, though this is probably covered by the definition of "property." By section 2 every disposition by reason whereof any person becomes beneficially entitled to any property upon the death of any person, and every devolution by law of any beneficial interest in property upon the death of any person, confers on the person entitled "a succession," and the term "successor" denotes the person so entitled. The cardinal fact to be borne in mind in the construction and application of sections 14 and 15 is that in the case of real estate the successor, although entitled in fee simple, is charged only on an annuity commensurate with his personal enjoyment—that is, in most cases, for his life. Consequently, section 14, which prescribes the rule in case of a succession passing by reason of death, can have no application to real estate, and is in terms confined to personal property. Section 15 deals with a different class of cases, and applies both to real estate and personalty. Grammatically, the words "not conferring a new succession" apply only to the word "title," and should be so construed; but whether they are or not applied to the word "alienation," I think that word in itself *primâ facie* means and should be construed as meaning only transfers *inter vivos* (either gratuitous or for value). The word is not apt to describe the passing of property from the dead hand, either by will or by intestacy. I think that a new succession can only be conferred by a new disposition or devolution by law to take effect on death, and conversely every derivative title by reason of death confers a new succession under section 2 of the Act. The section therefore applies only to a title acquired by transfer or otherwise in the lifetime of the successor. It is not necessary to define how such other derivative title can be created. The words may only be intended to bring such title within the operation of the section, if any such title there be. Lord Herschell, however, has pointed out one instance of such title—namely, by bankruptcy—and there may conceivably be other circumstances and events in which the interest of the successor might become divested in favour of another. I am further of opinion that the transferee or person otherwise acquiring title thereby becomes the "person entitled" under the disposition or devolution conferring the succession within the meaning of section 2, and "the successor" for the purposes of the Act, unless the context shows that the word is used in a different sense. And as at present advised (though it is unnecessary to decide it in the present case) I think that if the transferee of a succession in real estate were to die before he became entitled in possession to the property comprised in the succession, his devisee or heir would be a person holding by a title conferring a new succession in the same position exactly as the devisee or heir of an original successor so dying. So far I agree with Sir George Jessel.

But the present case is not one of a transfer of the succession only. I have already expressed my opinion as to the effect of the appointment under the joint power to Lord James Murray. I am disposed to think he became thereby in the position of a successor whose title in possession has been accelerated by the surrender or extinction of the prior interest, and, apart from the provision at the end of section 15, would have been presently liable to pay the duty, but by that provision for the benefit of the successor the duty is made payable only at the same time and in the same manner as such duty would have been payable if no acceleration had taken place.

The words "in the same manner" are a little puzzling, but I think that they mean that the Crown is not to lose the duty by reason of the estate of the successor having become an estate in possession or the limitations of the existing settlement being exhausted, and the duty is to be paid on the happening of the same event as it would if there had been no surrender of the prior interest, although nothing passed and no title in possession was acquired on that event. In an any case the transferee became entitled to a fee simple in possession, which became the subject of other dispositions and devolutions conferring successions depending on other events on which duty was properly payable, but that was not a satisfaction of the duty payable in the event of the death of the sixth duke, which became a charge on the property; and all that can be said is that Lord James Murray purchased a property subject to an incumbrance. I am therefore of opinion that by the combined effect of the provisions in section 15 of the Act a duty became payable to the Crown on the death of the sixth duke at the same rate as it would have been payable if no transfer had been made.

It remains to inquire on whose life the duty is to be calculated under section 21. It is argued that the opinion which I have expressed, that the transferee becomes the successor for the purpose of the Act, is inconsistent with subsequent sections, and that the word denotes only the original successor or transferor. I do not think so, and I think that such a construction would introduce confusion into the scheme of the Act. In section 20 the words are: "The duty imposed by this Act shall be paid at the time when the successor or any person in his right or on his behalf shall become entitled in possession to his succession." Those words are not apt language in which to describe the transferee of the original successor. Bearing in mind that the Act applies to personalty as well as realty, and only to beneficial interests, I think the words relied on mean only any trustees, executors, husband entitled in right of his wife (as the law stood at the date of the Act) guardian of an infant successor, committee of a lunatic successor, and so forth, and in subsequent parts of the section the word "successor" must include a person having a derivative title to the succession. Passing by section 21 for the present, I think that in sections 23 to 26 the word must from the context mean the person entitled to the succession at the date when it becomes an interest in possession. In section 28 you again have the words "successor or any person on his behalf," and the succession is spoken of as his—that is, the successor's—succession, which it would not be if the "successor" meant only the "original successor." Section 42 is not inconsistent with the construction I have placed on the Act, but in section 44 it must be admitted that the word "successor" appears from the context to be used of the original successor.

Returning to section 22, I think the word "successor" is used in the sense which I have attributed to it. It is, however, sufficient for the present purpose to say that the word is capable of either sense; but the context of this section shows that the "successor" means the person entitled to the succession at the date when it becomes an interest in possession. The appellant, Miss Murray, is in the position of such a successor, and I am of opinion that the duty should be assessed on the value of an annuity according to the tables for the residue of her

life. I agree with the judgment of Cleasby, B., in *Solicitor-General* v. *Law Reversionary Interest Society.*

I am therefore of opinion that this appeal should be dismissed with costs.

Lord LINDLEY (whose judgment was read by Lord MACNAGHTEN).—The judgment of the Master of the Rolls and of Romer and Mathew, L.JJ., upon two out of the three questions raised by the appellants are so obviously correct that I feel unable usefully to add anything to them. Succession duty clearly became payable on two successions, and not upon one only; and the contention that the disentailing deed and conveyance to Lord James Murray extinguished or otherwise got rid of the duty payable on the death of the sixth Duke of Northumberland is, in my opinion, quite untenable.

The third question—namely, whether the duty now payable should be calculated on the life of the seventh duke or on that of Miss Murray—is much more difficult, and turns upon sections 2, 15, and 21 of the Succession Duty Act, 1853. The Court of Appeal considered this question settled by the decision of the Court of Exchequer in the case of *Solicitor-General* v. *Law Reversionary Interest Society.* This case has been acted upon ever since, and the Court of Appeal did not think it ought to be now overruled, even if wrongly decided, which they did not think it was. I quite concur with the Court of Appeal in the view thus taken.

Until I had the advantage of reading the judgment of my noble and learned friend Lord Macnaghten, I felt more difficulty than I do now in dealing with some of the arguments addressed to your lordships by the counsel for the appellants. But that judgment has put the matter so clearly that I will not trouble your lordships with any additional observations on the construction of the Act. I am satisfied that his view of it is the true one, and that the appeal should be dismissed with costs.

Appeal dismissed.

Solicitors for appellants, *Bell, Steward, May, & How.*

Solicitor for respondent, *Solicitor of Inland Revenue.*

Court of Appeal.

Appeal.
(Collins, M.R., and Romer and Mathew, L.JJ.) — Oct. 27.

ROGERS *v.* MAYOR, &C., OF CARDIFF. (*a.*)

Master and servant—Employers' liability—Accident—Compensation—Engineering work—Repair of tramway—Area of the undertaking—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 7.

In an arbitration under the Workmen's Compensation Act, 1897, *it appeared that the applicant was employed by a municipal corporation, who were the owners of an electric tramway, in the work of repairing the overhead wires when necessary. Having done some repair at a point on the tramway, he was proceeding with a machine which he used in the work to another point on the tramway about three-quarters of a mile distant for the purpose of doing some repair there. When he was about* 200 *yards away from the first point, and while he was either on or in close proximity to the tramway, he was accidentally injured.*

Held, that, inasmuch as there was evidence on which the county court judge could find that the obligation of the corporation to repair extended to the whole area of the tramway, he was justified in holding that at the time of the accident the applicant was employed on, in, or about engineering work—viz., the repair of the tramway.

Appeal from an award of the judge of the Cardiff County Court in an arbitration under the Workmen's Compensation Act, 1897.

The applicant for compensation was a workman who was injured by an accident whilst in the employment of the Corporation of Cardiff. The corporation were the owners of a system of electric tramways laid in the streets of Cardiff. The motive power by which the tramcars were driven was supplied by overhead wires carried on iron standards about thirty feet in height. The applicant was employed by the corporation in the work of repairing the overhead wires when necessary. For this purpose he was supplied with a movable scaffolding upon wheels, called a tower wagon, which was drawn by a horse from place to place as required.

On the 5th of September, 1903, the applicant was working with the tower wagon, and in pursuance of orders given to him drove to a place on the tramline where repairs to the overhead wires were required. Having done these repairs he proceeded to drive along the street in which the tramlines were laid to another place about three-quarters of a mile distant, where the wires also required repairing, for the purpose of doing the necessary repairs there. When he was about 200 yards from the place where he had effected the repairs, the horse became restive. The applicant got down from the tower wagon, and tried to take hold of the horse's head to prevent him running away, and while so doing his foot slipped, and he was thrown down and seriously injured. The place where the accident happened was either on or in close proximity to the tram lines.

The applicant claimed compensation under the Workmen's Compensation Act, 1897, upon the ground that the accident happened while he was employed "on or in or about engineering work" within section 7, sub-section 1, of the Act. Section 7, sub-section 2, defines engineering work as "any work of construction or alteration or repair of a railroad, harbour, dock, canal, or sewer. . . ."

In *Fletcher* v. *London United Tramways (Limited),* 50 W. R. 597, [1902] 2 K. B. 269, it was decided that a tramway was a "railroad" within the above definition.

It was contended by the employers before the county court judge that the employment of the applicant at the time of the accident was not employment "on or in or about engineering work" within the meaning of the Act, because the applicant was then employed not on any work of repair of the tramway, but in merely driving the tower wagon to a place where repairs were required to be done.

The county court judge was of opinion that, as the tower wagon was part of the plant required for and used by the corporation in the repair of the tramways, the applicant was employed in the repair of the tramways, and that he did not cease to be so employed because at the time of the accident he was driving the tower wagon from the place where repairs had been done to another place where repairs were about to be done. He therefore held that at the time of the accident the applicant was employed on or in or about engineering work, viz., the repair of a railroad, and he made an award of compensation in the applicant's favour.

The employers appealed.

Bailhache, for the employers.—The applicant was

(*a.*) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

not at the time of the accident employed on or in or about engineering work. It has been clearly settled that "engineering work" means a physical area, a locality: *Chambers* v. *Whitehaven Harbour Commissioners*, 47 W. R. 533, [1899] 2 Q. B. 132; *Pattison* v. *White & Co.*, 20 Times L. R. 775; *Back* v. *Dick, Kerr, & Co. (Limited)*, 53 W. R. 615, [1905] 2 K. B. 148. The words "on, in, or about" allow a certain zone around the actual place of work. The question in each case is whether the workman was within or without the zone. The nature of his occupation is not the test. The engineering work in this case was the repair of the electric wires of the tramway system at a particular point. The accident happened not at or about that particular point, but at a considerable distance from it, at a point which was clearly outside the zone. No doubt the applicant was entitled to the benefit of the Act while he was at the place where he effected the first repairs, and he would have been again entitled to the benefit of the Act if he had reached the place where the further repairs were to be done. But while he was going from the one place to the other, and was a great distance from either, he was not entitled to the benefit of the Act. In *Middlemiss* v. *Middle District Committee of Berwick*, 2 F. 392, and also in *Atkinson* v. *Lumb*, 51 W. R. 516, [1903] 1 K. B. 861, it might fairly be said that the physical area of the work extended to the place where the accident happened. But the mere fact that some work of repair is being done on part of a railroad does not bring the whole railroad within the area.

A. Parsons, for the applicant.—The authorities show that an engineering work, as well as a railway, factory, mine, or quarry, is a locality. But in the case of an engineering work it is not so easy to ascertain the actual locality and its physical boundaries as in the case of a railway, factory, mine, or quarry. Therefore the nature of the work must be taken into consideration. The work here was that of repairing defects in the overhead wires of a tramway. The workman was employed to do whatever repairs might be necessary throughout the whole length of the tramway. He was only told of defects at two points, which were at a considerable distance from one another. But if there had been defects at intermediate points it would have been his duty to repair them also. At the time of the accident he was performing part of his task, which was one continuous task to be done over continuous premises. This case is more similar to *Atkinson* v. *Lumb* than to *Chambers* v. *Whitehaven Harbour Commissioners*, and the cases which followed it.

COLLINS, M.R.—This case has been well argued, and no doubt the points raised by counsel for the corporation in support of the appeal must be faced. But I have come to the conclusion that the question in this case turns on the facts, and, the county court judge having found the facts, unless we can point to some misdirection which led to his finding as he did, we cannot interfere. The question in this case is as to engineering work, and it is only by pointing to engineering work undertaken by the corporation that the applicant can make out that the corporation are to be held liable for this accident. Therefore we have to ascertain whether he was employed in such engineering work. Engineering work does embrace a certain physical area, the expression pointing to there being local limits to the work; and the applicant must be shown to have been employed on, in, or about that area. The word "about" has been discussed in several cases, both with regard to engineering work and also with regard to railways and factories. It appears to be common to all these cases that the work on which the applicant was engaged must be concerned with the business of the undertaking; that is one element. But there is also the element of physical proximity; the work must have been done within the physical area of the undertaking or such latitude as has been allowed by previous decisions. That brings us to this—what were the physical limits of the work undertaken in this case? If the applicant at the time of the accident was within those limits, it cannot be said that he was not employed on or about the engineering work. The county court judge defined for himself the geographical limits, and found that the limits included the point where the accident happened. If it was not on the tramway itself, it was at any rate in close proximity to it. But it was argued that the engineering work was not co-extensive with the tramway, and that the only physical area of engineering work was the particular parts of the tramway where the work of repair had to be done. In my opinion, there was evidence which justified the county court judge in taking the view that the area of the engineering work was co-extensive with the tramway itself. He could not define the area without taking into consideration what the undertakers had undertaken to do. He found as a fact that the area as to which the obligations of the undertakers extended was the whole area of the tramway. This is what he says: "I think that, as the tower wagon was part of the plant required for and used by the respondents in the repair of their tramways, the applicant was employed in the repair of the tramways, and that he did not cease to be so employed because at the time of the accident he was driving the tower wagon from the place where repairs had been done to another place where repairs were about to be done." That seems to me to be a finding that the obligation of the undertakers extended to the whole area of the tramway, and that the applicant was employed by them to do such work as was necessary and obligatory on them as such undertakers. The whole work of repairing the wires of the tramway included the business of inspecting and ascertaining where the defects existed, and it was the duty of the applicant to ascertain defects and amend them. It seems to me that the county court judge, without any misdirection, arrived at the conclusion that the accident happened within the physical area of the engineering work. I therefore think that the appeal fails.

ROMER, L.J.—In my opinion, the county court judge acted on a right principle of law, and came to a right conclusion on the facts. The Workmen's Compensation Acts ought not to be applied in a narrow or technical spirit. I think we should be so applying them if we gave effect to the contention put forward on behalf of the corporation. It is important to consider what was the work undertaken by the undertakers in this case. The work was to repair and keep in repair a tramway. That was the area of the undertaking, to keep in repair the tramway as a whole. The applicant was employed for the purpose of this undertaking, and in the course of his work he had to repair a particular part of the tramway line with a machine, and having done that repair, he had to proceed with the machine along the street to repair another part of the tramway line. While he was so proceeding he was accidentally injured. In the circumstances I think that the applicant was injured while he was employed on, in, or about engineering work within the meaning of the Act. In my opinion we ought not to sever the acts of repair and treat each act of repair as a separate engineering work. I therefore think the appeal should be dismissed.

MATHEW, L.J., concurred.

Appeal dismissed.

Solicitors for the applicant, *Windybank, Samuell, & Lawrence*, for *Lewis Morgan & Box*, Cardiff.

Solicitors for the employers, *Smith, Rundell, & Dods*, for *J. L. Wheatley*, Cardiff.

From K. B. Div. (Collins, M.R., and Romer and Mathew, L.JJ.) — July 13, 1905.

MIDWOOD & CO. (LIMITED) *v.* MAYOR, &c., OF MANCHESTER. (*a.*)

Electric lighting—Nuisance—Leakage of electricity—Explosion—Damage to premises—Electric Lighting Orders Confirmation (No. 11) Act, 1890 (53 & 54 *Vict. c. cxcvii.*), *s.* 70.

By a provisional order confirmed by statute the defendants were constituted the undertakers for the supply of electrical energy for lighting purposes in the city of Manchester, and as such undertakers they were under a duty to lay down mains in the streets and to supply electrical energy to persons requiring it. Section 70 of the order provided that "nothing in this order shall exonerate the undertakers from any indictment, action, or other proceeding for nuisance in the event of any nuisance being caused by them." A leakage occurred in one of the defendants' mains opposite the plaintiffs' premises, which caused an explosion and injured the premises.

Held, that this was a nuisance to the plaintiffs for which the defendants were liable.

Application by the defendants for judgment or a new trial in an action tried before Lawrance, J., and a special jury.

The action was brought to recover £677 4s. 6d. for damage to the plaintiffs' stock-in-trade and other property at 81, Fountain-street, Manchester.

The defendants were, by sections 4 and 5 of a provisional order made by the Board of Trade under the Electric Lighting Acts, 1882 and 1888, and confirmed by the Electric Lighting Orders Confirmation (No. 11) Act, 1890 (53 & 54 Vict. c. cxcvii.), made the undertakers for the supply of electricity for lighting purposes in the city of Manchester. By section 6 of the order the system and mode of supply were to be approved by the Board of Trade. Section 8 gave the defendants power to break up streets. By section 17 the defendants were bound to lay down and maintain suitable distributing mains in the streets; by section 21 they were under an obligation to give a supply of electrical energy within their district to persons requiring it; and by section 23 they were subject to a penalty of 40s. a day if they made default in so doing. Section 67 was as follows: "The undertakers shall be answerable for all accidents, damages, and injuries happening through the act or the default of the undertakers or of any person in their employment by reason of, or in consequence of, any of the undertakers' works, and shall save harmless all authorities, bodies, and persons by whom any street is repairable, and all other authorities, companies, and bodies collectively and individually, and their officers and servants, from all damages and costs in respect of such accidents, damages, and injuries." The word "works" was interpreted in the Electric Lighting Act, 1882, s. 32: "The expression 'works' means and includes electric lines; also any buildings, machinery, engines, works, matters, or things, of whatever description, required to supply electricity and to carry into effect the object of the undertakers under this Act." By section 70 of the provisional order it was provided as follows: "Nothing in this order shall exonerate the undertakers from any indictment, action, or other proceeding for nuisance in the event of any nuisance being caused by them."

The defendants' mains were laid in a trough and covered with bitumen for the purpose of insulating them. The entire system in Manchester was linked together as one system, and in order to obtain a constant pressure in the mains over the whole area of supply—which was a requirement of the Board of Trade and was necessary for the proper supply of electricity to consumers—electricity was supplied to the mains by means of feeders at as many points in the system as possible. In consequence of a leakage of electricity in one of the mains in the street opposite to the plaintiffs' premises the main became fused, which caused the bitumen to be volatilized and inflammable gas was given off which caused an explosion and a fire in the plaintiffs' premises, doing the damage complained of.

The plaintiffs based their cause of action on the grounds (1) that the defendants' system of electric lighting constituted a nuisance as being a dangerous system; and (2) that the defendants were guilty of negligence in not discovering and dealing with the fault in the main sooner than they did. With regard to the question of nuisance, the plaintiffs alleged that owing to the linked system it was more difficult and would take longer to locate and to deal with a leakage of electricity than if the system were divided up into smaller circuits, and that therefore the system was a dangerous one and constituted a nuisance; and further, that the leakage of electricity and consequent explosion constituted a nuisance to the plaintiffs.

The defendants denied that their system was a nuisance; they said that their system was the best system, and was approved by the regulations of the Board of Trade, and that it was as easy in the linked system to locate and deal with a leakage as in any other system. They also denied that they had been guilty of negligence.

The learned judge left the following questions to the jury: (1) Did the system adopted by the defendants constitute a nuisance by causing danger to persons having premises adjacent to the mains? Answer, Yes. (2) Were the defendants guilty of negligence in their adoption of the method of localizing and dealing with faults? Answer, Yes. (3) When the defendants became aware of the fault, did they deal with it for the purpose of preventing fire in a reasonable and proper manner? Answer, No. Upon those findings the learned judge entered judgment for the plaintiffs for the agreed amount of damages.

The defendants now applied for judgment on the ground that there was no evidence to support the findings of the jury; or in the alternative for a new trial upon the grounds that the verdict was against the weight of the evidence and that there was misdirection.

Fletcher Moulton, K.C., Macmorran, K.C., and *J. W. Gordon*, for the defendants.

Sir Edward Clarke, K.C., Bousfield, K.C., and *Wood Hill*, for the plaintiffs.

The following cases were referred to: *Rylands* v. *Fletcher*, L. R. 3 H. L. 330, 17 W. R. H. L. Dig. 17; *Hammond* v. *St. Pancras Vestry*, 22 W. R. 826, L. R. 9 C. P. 316; *Geddis* v. *Proprietors of Bann Reservoir*, 3 App. Cas. 430, at pp. 455, 456, 26 W. R. Dig. 260; *Powell* v. *Fall*, 5 Q. B. D. 597, 28 W. R. Dig. 99; *Brocklehurst* v. *Manchester, Bury, Rochdale, and Oldham*

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

Steam Tramways Co., 34 W. R. 568, 17 Q. B. D. 118; *National Telephone Co.* v. *Baker*, 41 W. R. Dig. 255, [1893] 2 Ch. 186; *Stretton's Derby Brewery Co.* v. *Mayor, &c., of Derby*, 42 W. R. 583, [1894] 1 Ch. 431; *Green* v. *Chelsea Waterworks Co.*, 10 Times L. R. 259; *Shelfer* v. *City of London Electric Lighting Co.*, 43 W. R. 238, [1895] 1 Ch. 287; *Jordeson* v. *Sutton, Southcoates, and Drypool Gas Co*, [1899] 2 Ch. 217, 48 W. R. Dig. 133; *Batcheller* v. *Tunbridge Wells Gas Co.*, 84 L. T. 765, 49 W. R. Dig. 131; and *Eastern and South African Telegraph Co.* v. *Cape Town Tramways Companies*, 50 W. R. 657, [1902] A. C. 381.

COLLINS, M.R.—This is an action against the Manchester Corporation, who are the undertakers for the supply of electricity in the city of Manchester, to recover damages sustained by the plaintiffs, who are householders in the city, by reason of an explosion caused by the escape of electricity from one of the mains adjoining the plaintiffs' premises. The escape of the electricity fused the bitumen in which the electric mains were laid, and the bitumen becoming volatilized gave off considerable quantities of gas which exploded and damaged the plaintiffs' premises. The first question is whether the defendants have a statutory protection from liability for the damage thus caused, their mains having been laid in accordance with the requirements of the Board of Trade. The plaintiffs rely upon section 70 of the provisional order, which was confirmed by the Act of 1890, and from which the defendants derive their powers to lay the mains and to supply electricity in the city. That section provides that "nothing in this order shall exonerate the undertaker from any indictment, action, or other proceeding for nuisance in the event of any nuisance being caused by them." That raises the principal point—namely, whether what happened here was a nuisance to the plaintiffs for which the defendants are liable. There is a further question of negligence. The jury have found a verdict against the defendants on both points.

First, with regard to the question of nuisance. It is, no doubt, technically disputed that what occurred here was in fact a nuisance to the plaintiffs, but it is obvious that where the owner of premises finds his premises blown up by an explosion that amounts to a nuisance to him. Whether the defendants are liable for that nuisance is another matter. It is clear beyond all controversy that it was a nuisance to the plaintiffs, and that nuisance was brought about by the carrying on of the electric lighting of the city. If the defendants are protected, the protection must be found in the statute authorizing them to carry on the undertaking. It is ingeniously argued that, notwithstanding the clear language of section 70, that section must be read subject to the right of the defendants to lay the mains in the streets, and to keep the pressure of electricity in the mains up to a certain standard; that they have done this, and nothing more; and that section 70 must not be read so as to make them liable where they have simply laid the mains and sent electricity along them without any negligence on their part. The answer to that contention seems to me to be that, upon reading all the sections together, there is only a qualified permission to the defendants to lay the mains and to send electricity along them. The defendants are entitled to lay the mains, and are under an obligation to keep up a certain pressure of electricity, but, underlying the whole matter comes section 70, which is enacted for the protection of the public. The privilege of laying down mains and supplying electricity is conferred upon the defendants, and for the reasonable protection of the public the section imposes upon them the obligation of bearing the consequences if in the exercise of that privilege they cause a nuisance. They are not given *carte blanche* to create a nuisance. If they cause a mischief to third persons by a nuisance in the course of carrying on their undertaking, they are made liable by the section. The authorities lay that down clearly. I will only refer to one case. In *Shelfer* v. *City of London Electric Lighting Co.* the particular nuisance complained of was not the same as that in the present case. In that case the nuisance was caused by vibration and noise from the working of the electric lighting engines. Precisely the same answer was set up in that case to the claim in respect of the mischief caused by the nuisance as is set up here. Lord Halsbury said: "The nuisance being established, it is said, first, that the defendant company are authorized by law to carry on their business, and that, as they have done all that skill and care can effect to prevent any nuisance, they are in the same position as a railway company, and are entitled to do what they have done under the authority of the Legislature. If the analogy were a correct one I should think the defendants had fallen very far short in their proof that they had done all that was possible to prevent a nuisance. A railway company has a definite line of operation within which it may make its works, and, if it does all that can be done to prevent a nuisance in that place, the things having to be done in that place and by locomotive engines with the necessity of fire being carried along the railway, the Legislature is taken to have sanctioned that proceeding. No such considerations apply here, quite apart from the differences in the legislative enactments, with which I will deal presently. . . . The main question turns on the construction of the Electric Lighting Act, 1882, and the provisional order, which has become an Act of Parliament. It was boldly contended by Mr. Moulton that the provisional order protected the undertaking, and that, if a nuisance were necessarily created by the carrying on of the company's undertaking, such nuisance was authorized and even imposed as a duty on the undertakers." Lord Halsbury then referred to section 10 of the Electric Lighting Act, 1882, and to a clause in the provisional order in that case which was identical in its terms with section 70 of the provisional order in the present case, and proceeded: "The general Act only gave them power subject, therefore, to the restrictions of the particular order, and the particular order makes them liable for nuisance." The present case comes within the principle laid down in that case. The defendant corporation, having introduced that which the jury have found to be a nuisance, are liable. That is sufficient to dispose of the case.

At the same time it would be wrong not to give expression to the opinion which I have formed upon the other question which has been argued. In my opinion the learned judge would not have been justified in withdrawing the question of negligence from the jury. [His lordship then dealt with the evidence upon the question of negligence, and proceeded:] I am only dealing with the alleged negligence of the defendants in dealing with this particular explosion, and not with any alleged negligence or nuisance in respect of the system of supplying electricity. The question is, Was there evidence of negligence causing this particular damage? In other words, Was the particular mischief brought about by the negligence of the defendants? That is the question; and that is what was intended to be left to the jury and what the jury found, and not whether the system itself was a negligent system or a nuisance. For these reasons the appeal should be dismissed.

ROMER, L.J.—I am of the same opinion. There was clearly a nuisance caused by the defendants. The electricity stored in the mains leaked considerably, and caused an accumulation of gas and a consequent explosion, which damaged the plaintiffs' premises. It was a clear case under section 70 of the provisional order for throwing liability on the defendants in respect of that nuisance. I can find nothing in the provisional order to protect the defendants from liability in these circumstances. I agree that the provisional order expressly authorized certain special works, and I also agree that those works could not be treated as a nuisance within section 70. For instance, there is power to break up streets for the purpose of laying the mains, and there is power to lay down mains and to store electricity in the mains. But I can find no express authority conferred by the provisional order upon the defendants authorizing them to allow a leakage of electricity from their mains so as to cause an explosion and to injure the plaintiffs' premises, as they have done. That is sufficient to decide the case. There is nothing in the authorities to afford any reason why the defendants' liability should not be given effect to. That being so, it is not necessary to consider the findings of the jury. I am not, however, satisfied that the first finding can be supported, if it means that the system itself is a nuisance. I think it right to say that, on account of the great liability that would be thrown upon the defendants if it were thought that this court approved of that finding in that sense.

MATHEW, L.J.—I am of the same opinion. The defendants are authorized to carry on a dangerous business to which mischief is incidental. It seems to me to be reasonable to say that the defendants, who have power to carry on that dangerous business, should pay for any loss from a nuisance caused by their carrying it on. The escape of electricity may cause a nuisance, and it is reasonable to make the defendants liable to pay for any loss consequent therein. I also agree upon the question of negligence.

Appeal dismissed.

Solicitors for the plaintiffs, *Bower, Cotton, & Bower*, for *Janion & Hall*, Manchester.

Solicitors for the defendants, *Austin & Austin*, for *Thomas Hudson*, Manchester.

From K. B. Div. (Collins, M.R., and Mathew and Cozens-Hardy, L.JJ.) — June 8, 1905.

In re BOSWORTH AND THE MAYOR, &c., OF GRAVESEND. (a.)

Burial-ground—New burial-ground—Addition to existing burial-ground—Disused burial-ground—"Set apart for the purposes of interment"—Ground set apart without statutory authority—Burial Act, 1853 (16 & 17 *Vict. c.* 134), *s.* 1—*Metropolitan Open Spaces Act*, 1881 (44 & 45 *Vict. c.* 34), *s.* 1—*Disused Burial-grounds Act*, 1884 (47 & 48 *Vict. c.* 72), *s.* 3—*Open Spaces Act*, 1887 (50 & 51 *Vict. c.* 32), *s.* 4.

For the purposes of the provisions of the Burial Act, 1853, *which prohibit the opening of any new burial-ground within the limits there specified without the approval of a Secretary of State, an addition to an existing burial-ground stands on the same footing as the opening of an entirely new burial-ground.*

A piece of land which has once been set apart for the purposes of interment, and in which interments have taken place, but which is no longer used for interments, is, by virtue of section 4 *of the Open Spaces Act*, 1887, *a disused burial-ground within the meaning of the Disused Burial-grounds Act*, 1884, *and therefore incapable of being used for building purposes, although by reason of a failure to obtain the approval of a Secretary of State the original setting apart was not lawful.*

Appeal from the judgments of Wright, J., and Bray, J., upon a special case stated by an arbitrator for the opinion of the court.

By an agreement in writing dated the 2nd of October, 1901, between Emily Lucy Bosworth and Helen Pauline Bosworth, the vendors, of the one part, and the Corporation of Gravesend, the purchasers, of the other part, it was agreed that the vendors should sell and the purchasers should purchase a cemetery called the Gravesend and Milton Cemetery, in the parish of Gravesend, at a price to be settled by arbitration, and to be fixed on the basis of the fair value of the property as between willing seller and willing buyer.

The arbitrator to whom the question of the price was referred made his award in the form of a special case, in which he found that the following facts had been proved:

Part of the Gravesend and Milton Cemetery was the original cemetery belonging to the Gravesend and Milton Cemetery Co., which was incorporated by a special Act of Parliament in 1838.

On the 11th of August, 1854, an Order in Council was passed under the provisions of the Burial Act, 1853, whereby it was ordered that no new burial-ground should be opened in (amongst other places) Gravesend without the previous approval of one of her Majesty's Principal Secretaries of State.

In 1859 one John Robert Hull, one of the predecessors in title of the vendors, who was then the owner of the cemetery, acquired an additional piece of land adjoining thereto.

On the 22nd of November, 1884, a letter was written by the registrar of the diocese of Rochester to the Home Secretary stating that the Bishop of Rochester had been requested to consecrate an addition to the proprietary cemetery at Gravesend, and asking whether, having regard to the Order in Council of the 11th of August, 1854, the approval of the Home Secretary was necessary to such addition being used for burials.

The reply from the Home Office, dated the 11th of December, 1884, was that the sanction of the Secretary of State to the proposed addition to the cemetery was not required.

The additional piece of land was not used as a cemetery before the 11th of December, 1884, but subsequently thereto the whole of it was set apart and consecrated as a burial-ground enclosed by a wall, and part of it had been used as a burial-ground. A portion of the part which had not been so used could conveniently be separated from the part which had been so used by a fence so as to be available for building.

It was contended before the arbitrator on the part of the purchasers—

(1) That the additional piece of land had been enclosed within the cemetery walls in violation of the aforesaid Order in Council and the provisions of the Burial Act, 1853.

(2) That having regard to the matters in the last paragraph contended, and to the judgment of the Court of Appeal in *Ward* v. *Portsmouth Corporation*, 46 W. R. 610, [1898] 2 Ch. 191, in so far as it decided that an addition to an existing burial-ground is within the provisions of section 6 of the Burial

(a.) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

Act, the additional piece of land could not legally be buried in.

(3) That the additional piece of land, having been enclosed as aforesaid and having been used as a burial-ground, could not now by reason of the decision of the Court of Appeal in *In re Ponsford and Newport District School Board*, 42 W. R. 358, [1894] 1 Ch. 454, be used for building land.

(4) That the additional piece of land ought not to be valued either as ground in which interments could be made or as building land, but ought to be valued on the basis that it could not be put to either of such uses.

It was contended on the part of the vendors—

(1) That by reason of section 5 of the Burial Act, 1853, the said Act did not apply to the Gravesend and Milton Cemetery or to additions thereto.

(2) That the case of *Ward* v. *Portsmouth Corporation* did not affect the law as it was in 1884, and that in 1884 an addition to an existing burial-ground was not under the Act a new burial-ground.

(3) That if the Burial Act, 1853, and the Order in Council of the 11th of August, 1854, applied, the letter of the 11th of December, 1884, constituted such approval as was required under the Act and Order in Council.

(4) That if the additional piece of land could not be legally used as a cemetery, that portion of it which had not been already used for graves could be thrown into the adjoining fields and utilized and valued as building land.

The questions for the opinion of the court were: (1) Whether the additional piece of land could be used as a burial-ground; (2) whether, if not, that part of it which could conveniently be separated from the part actually used for interment could be used for building purposes.

If, in the opinion of the court, the answer to the first question should be in the affirmative, then the arbitrator awarded and adjudged that the total price to be paid by the purchasers to the vendors was £9,711. If, in the opinion of the court, the answer to the first question should be in the negative, but to the second in the affirmative, then he awarded and adjudged that the price was £9,015. If, in the opinion of the court, the answer to both questions should be in the negative, then he awarded and adjudged that the price was £8,305.

The argument on the special case was heard before Wright, J., who answered the first question in the negative, on the grounds that the Order in Council of the 11th of August, 1854, applied to the additional piece of ground, notwithstanding section 5 of the Burial Act, 1853, which provided that that Act should not operate to prevent burials "in any cemetery established under the authority of any Act of Parliament," and that the reply of the Home Office to the Bishop of Rochester of the 11th of December, 1884, did not amount to an approval by the Secretary of State.

With regard to the second question, Wright, J., remitted the case to the arbitrator, in order that he might define more clearly upon a plan the portion of the additional piece of land to which that question related.

The case subsequently came on for hearing before Bray, J., who answered the second question in the negative, on the ground that the prohibition contained in section 3 of the Disused Burial-grounds Act, 1884, against the erection of buildings upon any disused burial-ground applied to any land which had been "at any time set apart for the purposes of interment" within section 1 of the Metropolitan Open Spaces Act, 1881, even though it had been so set apart in violation of an Order in Council or of the provisions of the Burial Act, 1853. The result of this decision was that the price awarded was the sum of £8,305

The vendors appealed.

Danckwerts, K.C., and *Eustace Hills*, for the appellants.

Freeman, K.C., and *Colefax*, for the respondents.

COLLINS, M.R.—Wright, J., has held that the additional piece of land cannot be used as a burial-ground; and Bray, J., has held that it cannot be used for building purposes. If these decisions are correct, the result is that the third alternative sum mentioned in the special case is the price awarded.

First, as to whether the additional piece of land can be used as a burial-ground. It is said on the part of the vendors that this is not a case of opening a new burial-ground, but of adding to one already existing. But it is obvious that the reasons which must have influenced the Legislature in prohibiting the opening of a new burial-ground without the approval of the Secretary of State apply just as much to the addition of a piece of land to an existing burial-ground as to the opening of an entirely new burial-ground. There is no difference between the two cases from the point of view from which the Legislature passed the enactment—viz., the evil of the appropriation of fresh ground to the purpose of burial in populous places. I think that Wright, J., was correct in holding, as he did, that for this purpose an addition to a cemetery was the same thing as a new cemetery; and I also think that the point was decided in *Ward* v. *Portsmouth Corporation*. It is said that the opinion expressed in that case on this point was *obiter*; but the reasons given for the decision in that case support the view that I should be prepared to take apart from authority—viz., that for the purpose of the Burial Act, 1853, an addition to an existing burial-ground is on the same footing as the opening of an entirely new burial-ground.

Secondly, as to whether any part of the additional piece of land can be used for building purposes. That question depends on the legislation on the subject, which is as follows: By the Metropolitan Open Spaces Act, 1881, s. 1, "the term 'burial-ground' shall include any ground, whether consecrated or not, which has been at any time set apart for the purposes of interment, and in which interments have taken place since the year 1880." By the Disused Burial-grounds Act, 1884, s. 3: "After the passing of this Act it shall not be lawful to erect any buildings upon any disused burial-ground, except for the purpose of enlarging a church, chapel, meeting-house, or other places of worship." By section 2: "In this Act a 'disused burial-ground' shall mean a burial-ground in respect of which an Order in Council has been made for the discontinuance of burials therein in pursuance of the provisions of the said recited Acts." By the Open Spaces Act, 1887, s. 2, sub-section 1: "The Metropolitan Open Spaces Act, 1881, is hereby repealed to the extent mentioned in the schedule to this Act." The schedule mentions as follows: "In section one . . . the following words occurring in the definition of a 'burial-ground,' viz., 'and in which interments have taken place since the year 1880.'" By section 4, "In the Disused Burial-grounds Act, 1884, and this Act, the expression 'burial-ground' shall have the same meaning as in the Metropolitan Open Spaces Act, 1881, as amended by this Act, and the expression 'disused burial-ground' shall mean any burial-ground which is no longer used for interments, whether or not such ground shall have been partially or wholly closed for burials under the provisions of

any statute or Order in Council." It seems to me that the definition of "disused burial-ground" in the last section covers this case. This piece of land was set apart for the purposes of interments, interments took place there, and it is no longer used for interments. It is argued that the words "set apart" mean lawfully set apart, and that this land was not lawfully set apart, because the approval of the Secretary of State was not obtained. I see no ground for reading the word "lawfully" into the definition, and I think that this piece of land comes within the definition of "disused burial-ground" and cannot be used for building purposes. I am therefore of opinion that Bray, J., answered the second question rightly, and that the appeal must be dismissed.

MATHEW and COZENS-HARDY, L.JJ., concurred.

Appeal dismissed.

Solicitors for the appellants, *Harries, Wilkinson, & Raikes*, for *C. E. Hatten*, Gravesend.

Solicitors for the respondents, *Nicholson, Patterson, & Freeland.*

From K. B. D.
(Collins, M.R., and Mathew and Cozens-Hardy, L.JJ.) June 8, 1905.

LLOYD'S BANK (LIMITED) *v.* MEDWAY UPPER NAVIGATION CO. (*a.*)

Practice—Equitable execution—Summons for appointment of receiver — Form of summons — Injunction restraining judgment debtor from dealing with property —R. S. C., 1883, *Appendix K, Form* 61 (a).

Where a judgment creditor applies for leave to issue a summons for the appointment of a receiver of the rents and profits of the judgment debtor's property by way of equitable execution, the summons ought not, as a matter of course, to contain an injunction, as in Form 61 (a) *of Appendix K to the Rules of the Supreme Court, restraining the judgment debtor from dealing with the property. Such an injunction ought only to be granted where there is evidence of danger that the property may be made away with before the hearing of the summons.*

Appeal from an order of Jelf, J., at chambers refusing to dissolve an injunction granted on the application of the plaintiffs for a summons for the appointment of a receiver.

The plaintiffs obtained judgment for the sum of £2,585 13s. 7d. against the defendants, who were a company incorporated under a special Act of Parliament for the improvement and maintenance of the navigation of the Upper Medway.

The judgment being unsatisfied, the plaintiffs applied *ex parte* to the judge at chambers for leave to issue a summons for the appointment of a receiver of property of the defendants by way of equitable execution.

The affidavit filed by the plaintiffs in support of the application stated that, with the exception of office furniture and other goods of the value of about £50, the defendants had no goods or chattels on which the plaintiffs could levy legal execution, but that the defendants were entitled to the tolls and rents arising from the navigation of the upper portion of the River Medway and to the profits of the business of carriers carried on by them, and were also possessed of freehold land and premises and the rents arising therefrom.

The affidavit did not contain any allegation that there was any danger that any of the property of the defendants would be made away with or removed from the jurisdiction of the court before the hearing of the summons.

On the hearing of the *ex parte* application the following order was made for a summons for a receiver with an interim injunction, in accordance with Form No. 61 (*a*) in Appendix K to the Rules of the Supreme Court: "Let the defendants attend the judge in chambers . . . on the hearing of an application on the part of the plaintiffs for the appointment of S. W. Burgess, the manager of the plaintiffs' branch bank at Tonbridge, as receiver in this action without security or remuneration, plaintiffs being answerable for his acts or defaults, to receive the rents, profits, and moneys receivable in respect of the defendants' interest in the following property—namely, the tolls and rents arising from the navigation of the River Medway, and also in the profits of the business of carriers carried on by the defendants, and in other rents and profits of and incident to the defendants' undertaking; also certain freehold lands and premises, and rents and increment arising therefrom, which said lands are situate at Tonbridge and other places on the River Medway and elsewhere, in satisfaction of the sum of £2,585 13s. 7d. and costs, due under the judgment in this action; and, the plaintiffs by their solicitors hereby undertaking to abide by any order the court or a judge may make as to damages in case the court or a judge should hereafter be of opinion that the defendants shall have sustained any by reason of this order which the plaintiffs ought to pay, it is ordered and directed that the said defendants, their agents and servants, and every of them be restrained, and an injunction is hereby granted restraining them and every of them, until after the hearing of the above application, from selling, charging, or otherwise dealing with the said property."

The defendant applied to Jelf, J., to dissolve the injunction. The learned judge refused the application.

The defendants appealed.

Upjohn, K.C., and *J. G. Wood*, for the defendants.—There is no power to grant equitable execution by the appointment of a receiver and an injunction under the Judicature Act, except in cases in which it was the practice of the Court of Chancery to grant such equitable execution before the Act: *Holmes* v. *Millage*, 41 W. R. 354, [1893] 1 Q. B. 551. The Court of Chancery did not grant injunctions on applications for the appointment of a receiver unless there was evidence of danger that the property might be done away with or removed from the jurisdiction of the court.

Holman Gregory, for the plaintiffs.—Evidence that the property is in danger of being removed is not necessary: see the statement of the usual practice given in the Annual Practice of 1905, at p. 712. The learned judge had a discretion to make an order in the form of No. 61 (*a*) of Appendix K, and he exercised it.

COLLINS, M.R.—I am of opinion that this appeal should be allowed. The practice of granting equitable execution was not known in the courts of common law till the passing of the Judicature Act. It may be that judges then took too wide a view of the jurisdiction conferred on them by that Act, and sometimes appointed receivers where the court of Chancery would not have done so. They were in the habit of appointing receivers on *ex parte* applications, but, as this was found to be attended with difficulties and drawbacks, the practice was changed, and under the present practice notice of the intention to apply for

(*a.*) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

a receiver is required, and an order to show cause is obtained in the first instance. This gives an interval during which there may be some danger of the property in respect of which the receiver is to be appointed being made away with or removed from the jurisdiction of the court. Accordingly a form of summons has been adopted containing an injunction which may be treated as ancillary to the summons itself. In so far as that involves the idea that such an injunction is a necessary ancillary to the summons, it appears to be a departure from the practice of the court of Chancery. By that practice it was requisite before an injunction could be granted, to aver and give evidence of some danger that the property might be removed from the jurisdiction of the court. This form No. 61 (*a*) of Appendix K, if it is to be treated as a common form, seems to be contrary to that practice. Here there is no allegation of any believed intention on the part of the defendants to remove the property, which is the subject-matter of the application, out of the jurisdiction of the court. In the absence of any statement to that effect on affidavit I see no ground for an injunction in this case. I therefore think the learned judge was wrong in refusing to dissolve the injunction. He seems to have followed the form in the appendix without sufficiently considering the facts of the particular case. The appeal must be allowed.

MATHEW, L.J.—I am of the same opinion. Form 61 (*a*) is applicable where there is danger of the property being made away with. But in the absence of any evidence of such danger I think that an injunction ought not to be granted.

COZENS-HARDY, L.J.—I am of the same opinion. I should be sorry to say that Form 61 (*a*) is not a good form in a proper case. But I do not think that in every case of an application by a judgment creditor for the appointment of a receiver such an injunction as is contained in that form should be granted as a matter of course without evidence that the property is in danger of being made away with.

Appeal allowed.

Solicitors for the plaintiffs, *Church, Adams, & Prior.*

Solicitors for the defendants, *Tarry, Sherlock, & King.*

High Court of Justice.

Chan. Div. } Buckley, J. } Oct. 26.

In re ADAMS.
ADAMS *v.* DOWNS. (*a.*)

Power—Appointment—Execution—"To E. R. A. and his issue"—Construction.

A power was given enabling the donee in the events which happened to appoint certain real estate to his, the donee's, sons for an estate not exceeding a life estate with remainder to their issue in tail. The donee by a codicil to his will, referring to the power, appointed one part of the estates "to E. R. A. and his issue." E. R. A. was one of the donee's sons.

Held, a valid appointment to E. R. A. for life with remainder to his issue as joint tenants in tail.

Summons.

By his will dated the 29th of April, 1853, E. R. Adams (the grandfather) devised all his freehold estates to his son, E. R. Adams (the son), during his life, and after his decease to the children of E. R. Adams (the son) and their issue (not including the issue of any child which should come into *esse* after the testator's decease) in such manner, subject to the proviso thereafter mentioned, as E. R. Adams (the son) should by will or codicil appoint. The will contained a proviso that with regard to any child of the testator's son who might be living at the testator's decease, his son should not under the power appoint to any such child any estate larger than an estate for life, but the estate appointed to any such child for life might be appointed in remainder subject to the life or less estate of any such last-mentioned child to or among all or any of the children of such child in tail.

E. R. Adams (the grandfather) died the 22nd of July, 1856, and at that date E. R. Adams (the son) had three sons alive—namely, E. R. Adams (the grandson), J. W. R. Adams, and C. R. Adams.

By a codicil to his will E. R. Adams (the son), after reciting that "by the last will of his father he was empowered to appoint amongst his children and their issue all his real estates," appointed "to his eldest son, E. R. Adams, and his issue" an estate called the Elmer Estate; "to his son J. W. R. Adams and his issue" an estate called the Penge Estate; and "to his son C. R. Adams and his issue" an estate called the Butcher Hill Estate, being the real estates devised by his father's will.

The question which arose upon this summons was whether the codicil was an effectual exercise of the power of appointment, and, if so, what interests the parties took under it.

Buckmaster, K.C., and *Warlters Horne* cited Sugden on Powers (8th ed.), 521, and *Pawcy* v. *Bowen*, 1 Ch. Cas. 23.

Dighton Pollock cited Theobald on Wills (6th ed.), 421.

Astbury, K.C., and *E. Ford* cited Farwell on Powers (2nd ed.), 298, and *Rucker* v. *Scholefield*, 1 Hem. & Miller 36.

BUCKLEY, J.—Under the will of Edward (the grandfather), Edward (the son) had a certain power power of appointment amongst his children and their issue, but the class of issue that could take under the power was limited, and properly limited, by the will of Edward (the grandfather) so as not to countervail the rule as to perpetuities. Therefore he could only appoint in favour of issue to a limited extent. Further, as regards the issue themselves, the estate which under the power could be given to the issue varied according to whether the particular issue in question was born before or after the death of Edward (the grandfather). If the issue was born before his death, that child could only take a life estate under the power. Thus it was a complicated power extending to children of Edward (the son), to grandchildren of Edward (the son), and any more remote issue, but limited as regards the remoteness of the issue and as regards the quality of estates which could be given to the issue according as to whether they were born before or after the death of Edward (the grandfather). The testator died in July, 1856, and on the 25th of August, 1856, Edward (the son), the donee of the power, executed an appointment. Now, in dealing with this appointment I conceive that I ought to apply these two principles. In the first place, when you are determining whether and how a power has been exercised the true rule is to ascertain the intention of the donee of the power and to give effect to that intention. Of course, you must find it from the words he has used, but you do not

(*a.*) Reported by T. PAKENHAM LAW, Esq., Barrister-at-Law.

read the instrument for the purpose of declining to give effect to it, because it is in inartificial language provided the language is such that you can accurately ascertain the intention which the donee of the power had. And secondly, this principle—that the estates taken by the appointees under the power are really taken, not under the instrument which executes the power, but under the instrument which creates the power. The instrument executing the power is but a schedule or appendix, so to speak, to the instrument which creates the power. And you have only to read into the instrument creating the power the relevant provisions, which are introduced by the instrument executing the power, and then the estate arises by virtue of the original will and not of the instrument which executes the power under the will.

Now with that I look at the instrument which executed the power. It begins with this recital: "Whereas I am empowered to appoint amongst my children and their issue all my father's real estates." Now what does that language under these circumstances mean? He had not power to appoint amongst his children and their issue in so many fractions or so many acres to each. What he had power to do was to create estates of quality varying according to the character of the persons to whom the appointment was to be made. One person amongst the class of children and issue could take a life estate and nothing more. Another person amongst the class of children and issue could take an estate tail. And therefore this donee in using that language must have meant: "Whereas I am empowered to create certain estates, varying according to the quality of the person, in my children and issue in my father's real estates." Having said that, what he goes on to do is this; he appoints "to my eldest son, Edward Richard Adams, and his issue" a certain part of that real estate. I agree that without the context, without knowing the circumstances, the result would be to create an estate tail in Edward Richard Adams, the son of the donee of the power. But is that the meaning and intention of the donee? I answer, certainly not. His intention was this, as I gather it from his words. He has said, as I have shown, if I understand his language: I have power to create in my son Edward Richard Adams a life estate, and in a certain class of his issue certain other estates—estates in tail; now I am going to exercise that power, and I appoint to my son Edward Richard Adams and his issue certain real estate. I think he meant by that: I appoint to these persons for the several estates which, having regard to the power which I hold, I can give those persons in that real estate. The result of that, of course, is that you get a life estate given to the person to whom he could give a life estate and an estate tail to the person to whom he could give an estate tail. There are two other similar gifts to the other two children. Let me point this out: that inasmuch as the class of persons to whom he could give a life estate only were dependent upon the question whether the grandchildren of Edward (the grandfather) had been born in his lifetime or not, it would have been important to the donee of the power to make the matter elastic as regards the class of estate that the issue were to take if, as might have been the case, he was not certain whether his remoter issue had or had not been born in the lifetime of Edward (the grandfather). In point of fact Edward (the grandfather) being dead, the event was determined—they were either born or not born, but it does not follow that the donee of the power personally knew it, and by expressing his gift in this form he left that to be determined according to the state of facts as they matured. I understand in point of fact that there were no great grandchildren born in the lifetime of Edward (the grandfather), and therefore really the power was to give life estates to the grandchildren and estates tail to the more remote issue. I think under this codicil that the result was to create in Edward Richard Adams and in each other child and their issue such estates as under the power could be given to those respective persons. The result is that the children of Edward (the son) would take for life, and the issue would take as joint tenants in tail.

Solicitors, *Pollock & Co.; Edridge & Newnham.*

Chan. Div. } June 7, 8; July 17, 18;
Joyce, J. } Aug. 11, 1905.

ELSDON v. MAYOR, &c, OF HAMPSTEAD. (a.)

Metropolis—Local government—New road—Frontage—Apportionment of expenses—Metropolis Local Management Acts, 1855 *and* 1862.

Where the local authority by resolution, in pursuance of the powers vested in them by the Metropolis Local Management Acts, 1855 *and* 1862, *apportioned the expenses of paving a new road among all the owners of the frontage, and subsequently revoked such apportionment and, by a fresh resolution, apportioned such expenses among a certain number of owners, making a merely nominal charge in respect of the remaining owners,*

Held, that such subsequent apportionment was wrong in principle and invalid.

The plaintiff was the owner of certain houses in Gondar-gardens in the borough of Hampstead. On the west side of Gondar-gardens was land belonging to trustees upon which houses had been erected facing a road, parallel to Gondar-gardens, called Sarre-road. This land was separated from Gondar-gardens by a fence. The trustees had granted leases of the houses in Sarre-road and were in receipt of rent in respect of the same.

In October, 1901, the defendants determined to pave a portion of Gondar-gardens, which was a new road and unpaved, and on the 10th of October, by resolution under the Metropolis Local Management Act, 1855, s. 105, and the Metropolis Local Management Act, 1862, s. 77, apportioned the estimated expenditure, amounting to £2,040, among the owners of the houses and land bounding or abutting on Gondar-gardens, including the houses fronting on Sarre-road, such apportionment being at the rate of £1 3s. per foot of frontage.

On the 3rd of March, 1904, the defendants rescinded the said apportionment of the 10th of October, 1901, and on the 14th of April, by a fresh resolution apportioned the expenses among the owners of frontage abutting on the part paved, but excluding the owners of houses in Sarre-road, and making a nominal apportionment of 10s. in respect of the strip of land on which the fence stood which separated the premises of the houses in Sarre-road from Gondar-gardens.

The effect of this was to increase the amount payable by the remaining owners to £1 18s. per foot of frontage.

The plaintiff, one of the remaining owners, brought this action claiming a declaration that the apportionment of the 14th of April, 1904, was invalid.

The defendants alleged that the said trustees were not owners of land in Gondar-gardens and that the

(a.) Reported by H. WOLCOTT WARNER, Esq., Barrister-at-Law

apportionment of the 14th of April, 1905, properly apportioned the expenses and was valid.

Younger, K.C., and *Martelli*, for the plaintiff.—The second apportionment is no apportionment at all—everybody must be charged. If any owner of frontage is left out the apportionment is bad. The court will not interfere with the discretion of the local authority except in the case of *mala fides*, but here the court ought to declare that no valid apportionment has been made.

The following cases were cited: *Grand Junction Waterworks* v. *Hampton Urban District Council*, 46 W. R. 644, [1898] 2 Ch. 331; *Vestry of Mile End* v. *Whitechapel Guardians*, 24 W. R. 364, 1 Q. B. D. 680; *Paddington Vestry* v. *North Metropolitan Railway and Canal Co.*, 42 W. R. 223, [1894] 1 Q. B. 633; *Bishop* v. *Wandsworth Board of Works*, 82 L. T. 766, 48 W. R. Dig. 124; *Livingstone* v. *Mayor of Westminster*, 52 W. R. 395, [1904] 2 K. B. 109; *Hampstead Corporation* v. *Midland Railway*, [1904] 2 K. B. 802, 53 W. R. Dig. 108; *Nesbitt* v. *Greenwich Board of Works*, L. R. 10 Q. B. 465; *Barlow* v. *Kensington Vestry*, 32 W. R. 966, 27 Ch. D. 362.

Macmorran, K.C., and *Munroe*, for the defendants.—Inquiry as to ownership of adjoining land is not put upon the local authority. The corporation rightly or wrongly have come to the conclusion that the lessees of the Sarre-road houses are not frontagers, and their discretion is absolute: *Metropolitan District Railway* v. *Fulham Vestry*, 44 W. R. 53, [1895] 2 Q. B. 443.

JOYCE, J., in giving judgment, after reviewing the facts, said: The apportionment of the 10th of October, 1901, having been made, the inhabitants or owners of the houses in Sarre-road started the ingenious theory that their tenements did not abut upon Gondar-gardens, by reason that, as they alleged, the narrow strip of ground, really less than a foot in width, upon which the old wooden fence stood, or used to stand, did not belong to them but to someone else—viz., to the Grand Junction Waterworks Co. Thereupon, that is to say, on the 14th of April, 1904, the borough council rescinded the resolution of October, 1901, and affected to make another apportionment. That, it is asserted by counsel, the defendants are entitled to do so long as any work remains uncompleted. I have been referred to the case of *Bishop* v. *Wandsworth Board of Works*, and the plaintiff's counsel did not argue to the contrary, but assumed that I would follow that decision.

Of course, if an apportionment made by the authority were determined to be invalid a fresh one could be made. No one questioned that. The new apportionment omitted all mention of houses in Sarre-road and inserted instead "land upon which old fence stands," purporting to charge the owner or owners of the land, whatever it might be, so referred to with the nominal sum of 10s. The difference between this and the aggregate sum of more than £500 charged by the original apportionment on the houses in Sarre-road was thus thrown on the owners of other properties in Gondar-gardens, some of which belonged to the plaintiff, who very naturally objected to have the assessment on his property materially increased in this manner.

After investigation I am satisfied that there is no foundation in fact for the theory that the gardens or grounds of the houses in Sarre-road are cut off from the new street called Gondar-gardens by any intervening strip of land whatsoever, either belonging to the Grand Junction Waterworks Co. or to any other person other than the owners of the houses in Sarre-road, and I hold as a matter of fact that if the houses in Sarre-road are not houses "forming the new street," still the lands of the trustees demised to the lessees of the houses in Sarre-road do, within the meaning of the term in the statute "bound" or "abut" upon the new street, and so are liable to have, and ought to have, some portion of the expense of paving apportioned upon them in common with the other owners in the new street.

It was contended before me that if the corporation could not discover, or found difficulty in ascertaining who the owners were of some of the houses or lands forming or abutting upon the new street, they might apportion the whole expense, or all but a nominal sum, upon the owners who they did know. That appears to be a somewhat startling proposition, and having regard to the terms of the Act cannot be supported. It then was said that the court could not question or revise the principle upon which the apportionment was made if it was made *bonâ fide*. That may be as between the several persons liable, but the apportionment, whatever be the principle, if any, adopted in making it, must be made upon the right people, including all those liable, none can be left out. If the properties of the lessees in Sarre-road abut upon the new street, as in my opinion they do, some portion of the expense must be apportioned upon them. In my opinion the last apportionment was illegal and invalid.

Under the peculiar circumstances, notwithstanding what was said by Stirling, J., in *Grand Junction Waterworks Co.* v. *Hampton Urban Council*, I think this is a case in which an action can be maintained for a declaratory judgment or order, whether any consequential relief is claimed or not. I accordingly declare that the apportionment of the 14th of April, 1904, is invalid, the plaintiff to be at liberty to apply for an injunction if the apportionment is sought to be enforced. The defendants must pay the costs of this action.

Solicitors for the plaintiff, *Last & Son*.

Solicitor for the defendants, *Arthur Palmer Johnson*.

Chan. Div. Warrington, J. } July 28, 1905.

PEDLAR v. ROAD BLOCK GOLD MINES OF INDIA (LIMITED). (a.)

Company—Memorandum of association—Objects—Construction—Subsidiary or substantive—Ultrà vires.

One of the objects of a company, as stated in the first paragraph of clause 3 of the memorandum of association, was to acquire the undertaking of an older company and certain gold mines in Mysore. The object in the second paragraph was to acquire gold mines "in Mysore and elsewhere." The language of both these paragraphs, allowing for a change of name of the company in the first paragraph, was identical with, and the language of the remaining twenty-three paragraphs was to all intents the same as, that of the objects of the defendant company in Stephens v. Mysore Reefs (Kangundy) Mining Co. (Limited), 50 *W. R.* 509, [1902] 1 *Ch.* 745. *One object was to promote new companies for the company's benefit. The company resolved to enter into an agreement to acquire certain gold mines in India just outside Mysore, and to pay for them partly in cash and partly in their own shares or in shares of a new company to be promoted by them for the purpose.*

Held, that the objects in paragraph 2 were not sub-

(a.) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

sidiary to those in paragraph 1, *and that consequently the agreement was authorized by paragraph* 2, *and was not* ultrà vires.

Stephens *v.* Mysore Reefs (Kangundy) Mining Co. (Limited) *distinguished, and* dictum *of* Eady, J., *as to construction of objects clause in a memorandum of association dissented from.*

Motion.

This was a motion by a shareholder in the Road Block Gold Mines of India (Limited) for an injunction to restrain the company until judgment from entering into a certain agreement with another company for acquiring a new gold mine which the company had sanctioned by special resolution.

The company was incorporated in July, 1893, with a capital of £180,000 divided into £1 shares, of which 122,349 had been issued. The objects for which the company was established, as stated in clause 3 of the memorandum of association, which consisted of twenty-five paragraphs, were (among others):

3.—(1) To acquire and take over as a going concern the undertaking of the Road Block Gold Mining Co. of India (Limited) (incorporated in 1900), and all or any of the assets and liabilities of that company, and with a view thereto to enter into and carry into effect, with or without modification, the agreement referred to in article 3 of the articles of association of this company.

(2) To acquire gold mines, mining and other rights, and land, auriferous, metalliferous, or otherwise, or any interests in the same respectively, in Mysore and elsewhere, and to work, exercise, develop, and turn to account the said mines, rights, and land, or interests therein respectively.

(11) To enter into partnership or into any arrangement for sharing profits . . . with any person or company carrying on . . . any business . . . which the company is authorized to carry on. . . .

(12) Generally to purchase . . . or otherwise acquire any real or personal property, and any rights or privileges which the company may think necessary or convenient with reference to any of these objects . . .

(15) To promote any company or companies for the purpose of acquiring all or any of the property, rights, and liabilities of this company, and for any other purpose which may seem directly or indirectly calculated to benefit the company . . .

(25) To do all such things as are incidental or conducive to the attainment of the above objects . . . so that the objects specified in each paragraph of this clause shall, except where otherwise expressed in such paragraph, be in no wise limited or restricted by reference to or reference from the terms of any other paragraph or the name of the company.

The company acquired the Road Block mining property, but after spending considerable sums in exploring it, the directors came to the conclusion that it was not wise to spend any more money upon it. They accordingly prepared an agreement between a company called the Sangli Gold Mines (Limited) and their own company for the acquisition of another property called "Yelishirur," not in Mysore, but just over the border in the Presidency of Bombay. The terms of this agreement were, shortly, that the Road Block Co. were to have an option of purchase during two years, for which the company were to pay £50, and were to spend in prospecting and testing the property not less than £5,000. In the event of the option being exercised the company were to pay the Sangli Gold Mines Co. £1,250 in cash, and were either (1) to increase their share capital, and procure the same to be subscribed to an amount sufficient to provide a cash working capital of £45,000, and to allot to the Sangli Gold Mines (Limited) as fully paid up 15 per cent. of the nominal capital, or (2) to form a new company with a subscribed share capital sufficient to provide a cash working capital of £45,000, and were to allot to the Sangli Gold Mines (Limited) as fully paid up 15 per cent. of the share capital of such new company. At an ordinary general meeting of the company, held on the 26th of July, 1905, the draft agreement with the Sangli Gold Mines (Limited) was produced and a resolution was passed approving of the agreement, and the directors were directed to enter into the agreement on behalf of the company.

The plaintiff, who was a shareholder, brought this action against the company asking for a declaration that the scheme embodied in the agreement was *ultrà vires*, and that the company could not lawfully enter into it, and he claimed an injunction to restrain the company from entering into the agreement or giving effect to it; and he now moved for an injunction until the trial to the same effect.

Rowden, K.C., and *S. Dickinson*, for the plaintiff.—The principal object for which the company was established was to acquire and work the Road Block Gold Mines of the old company in Mysore. The rest of the objects stated in clause 3 of the memorandum of association are subsidiary to this object. The agreement to buy and work the Yelishirur Mines was consequently *ultrà vires*, and should not have been entered into; and the plaintiff is entitled to an injunction to restrain the company proceeding with it. *Stephens* v. *Mysore Reefs (Kangundy) Mining Co. (Limited)*, 50 W. R. 509, [1902] 1 Ch. 745, is an authority exactly in point, for the objects of that company as stated in the memorandum of association were exactly the same as those here with one or two unimportant alterations. That decision was based upon the decisions of the Court of Appeal in *In re Haven Gold Mining*, 30 W. R. 389, 20 Ch. D. 151, and *In re German Date Coffee Co. (Limited)*, 30 W. R. 717, 20 Ch. D. 169. Merely general statements of the objects of the company do not comply with the Companies Acts: *In re Crown Bank (Limited)*, 38 W. R. 666, 44 Ch. D. 634.

Eve, K.C., and *Frank Wright*, for the defendant company.—The agreement in question is expressly within sub-clause 2 of the objects of the company. We do not need to rely upon sub-clause 25. The decisions of the Court of Appeal cited for the motion were upon winding-up petitions, and only decided that the substratums of the companies in those cases were gone. The decision in *Stephens* v. *Mysore Reefs (Kangundy) Mining Co.* ought not to be followed.

WARRINGTON, J. (after stating the facts): Now what is the true effect of the agreement in question? First an option is given to the company, to be converted at the company's will into an absolute contract, to purchase this property, but with a further option to the company that if it thinks fit it may direct that the property, instead of being conveyed to itself, shall be conveyed to the purchasing company, but it is to be borne in mind that the second option is merely for the sale to a company to be promoted by the present company. It does not involve the present company in any financial liability to any such new company, or involve it in any liability to subscribe for the shares of that new company. That is important, as will appear hereafter. Now is that agreement *ultrà vires* of the company? First, what is the true way of construing a memorandum of association containing such wide words as this contains? We are guided by the judgment of the Court of Appeal in *In re*

German Date Coffee Co. In that case the patents which the company was formed to acquire had not been granted, and consequently the objects specified in the first seven paragraphs failed altogether. But the company propose to acquire another patent in another country for the same or a similar invention. The matter came to court on a winding-up petition, it being alleged that the substratum of the company had gone. Lindley, L.J., said: "General words construed literally may mean anything, but they must be taken in connection with what is shewn by the context to be the dominant or main objects. It will not do under general words to turn a company for manufacturing one thing into a company for importing something else, however general the words are." Now, applying the principle laid down by Lord Lindley to the present case, and for the moment treating it as uncovered by any authority except that, for what ought I to say that this company was framed? Its name tells one nothing except that it is formed for gold mining, and that in order to distinguish it from other gold mining companies it is called the Road Block Co. The first paragraph of the objects shows why the name was selected. The next clause provides that the company may acquire gold mines "in Mysore and elsewhere." For my present purpose I need read no more of these sub-clauses of clause 3, because they certainly do not conflict with the construction which I am about to put upon those first two sub-clauses. Treating it as unfettered by authority, I should say that the object of the company was gold mining generally, not gold mining in a particular mine. Otherwise I cannot imagine what force is to be given to the words "and elsewhere" in the second paragraph, for to say that the object of the company is gold mining in the Road Block mines only and other gold mining incidental to the working of these gold mines is to reduce the clause to an absurdity. To say that the company is to work the Road Block mines and to acquire gold mines elsewhere than in Mysore as incidental to the working of the Road Block mines seems ridiculous. I therefore treat this as a company formed for the purpose of gold mining, not only in Mysore but elsewhere; but whose main object is gold mining. Now, is this agreement with the Sangli Gold Mines (Limited) one which such a company may properly enter into? As far as it provides for the working and purchasing of the gold mines mentioned in it, it comes within the very objects for which a company for gold mining is established. But the agreement goes farther, and under sub-clause 6 the company may promote a company to acquire the rights it has under the agreement. It has power under its memorandum of association to promote a company for this purpose. Unfettered by authority then I should come to the conclusion that the agreement was within the objects of the memorandum. I say nothing about sub-clause 25, upon the very wide words of which it is not necessary to rely for the purpose of this case. But am I at liberty to act upon the view I have stated. A very similar question came before Eady, J., in *Stephens* v. *The Mysore Reefs (Kangundy) Mining Co. (Limited)*. The memorandum of association of the company in that case was to all intents and purposes the same as here. But the proposed transaction which was held to be *ultrà vires* was very different, and the view which the learned judge expressed must be regarded as bearing to some extent upon, and as being influenced by, the nature of the question he had to decide. It was not necessary for him to decide whether the primary object of the company was gold mining generally or mining in a particular mine, because whether the true construction was that its object was gold mining generally or mining in a particular mine, I think that the agreement in question in that case did not come within the objects of the company. I think, therefore, that that case is distinguishable from this. In construing a document, in my view, one judge is not bound by the decision of another in another case. He must express his view of the construction of the document before him. I remember hearing Sir George Jessel, M.R., say that he should not regard himself bound by the previous decision of another judge on the construction of the same passage in the same document as that which he had to construe. Now Eady, J., does not refer in his judgment to sub-clause 2 of clause 3 of the memorandum as it was not necessary for him to say whether the company was formed for gold mining generally or not. In that case the company proposed to obtain an option over a mine in West Africa, but not with a view of purchasing it themselves. If they thought worth while a subsidiary company was to be formed, in the shares of which the whole purchase price was to be paid. The company were to embark on a financial operation pure and simple. They were to subscribe to this new company, but were not to acquire the property over which they were to have an option; they were to embark the money of the shareholders in another company framed for the purpose of acquiring this gold mine. I heartily concur, if I may say so, in the principle laid down by Eady, J., that it is not right to adopt a construction which would virtually enable a company to carry on a business of any kind whatever; but with respect I venture to differ from him when he says: "In my opinion, the right way to construe the memorandum of association is to take the first paragraph of clause 3 as stating the principal or primary object for which the company is formed—*i.e.*, 'to acquire and take over as a going concern the undertaking of the Mysore Reefs (Kangundy) (Limited).' Then the remaining paragraphs of clause 3 must be read as conferring on the company full and ample powers for carrying out that object." I think in saying that he passed over the effect of paragraph 2, which it was not necessary for him to consider. For that reason, and without relying on the principle that one judge is not bound in construing a document by the decision of another judge, I think this case does not come within that decision, and I am not bound by it or by the expression of opinion as to the construction of the objects of the memorandum given by Eady, J. I think that here the real object of the company was gold mining, and that the agreement they entered into was for that purpose and incidental to it, and comes within the incidental paragraphs of the memorandum of association.

Motion refused.

Solicitors, *Petch & Co.; Francis & Johnson.*

K. B. Div.
(Lord Alverstone, L.C.J., and Wills and Darling, JJ.) Oct. 31.

PERRING & CO. v. EMERSON. (a.)

Landlord and tenant—Distress—Waiver of illegal levy—Owner of goods — Uncertificated bailiff — Law of Distress Amendment Act, 1888 (51 & 52 *Vict. c.* 21), *s.* 7.

Section 7 *of the Law of Distress Amendment Act,* 1888, *enacts : "From and after the commencement of this Act no person shall act as a bailiff to levy any distress for rent unless he shall be authorized to act as a bailiff by a certificate in writing under the hand of a county court judge. . . . If any person not holding a certificate under this section shall levy a distress contrary to the provisions of this Act, the person so levying and any person who has authorized him so to levy shall be deemed to have committed a trespass."*

Held, that the section constitutes a distress by an uncertificated bailiff an illegal act which inures for the benefit not only of the tenant but of third parties whose goods are on the demised premises.

Appeal from the decision of the county court judge sitting at Brentford.

By an agreement dated the 7th of November, 1904, the defendant, Robert Emerson, let to Alexander Pierce for a term of three years, rent payable quarterly, a flat situated on the ground floor of a block of mansions known as Sutton-court, Chiswick.

The tenant was in default with the quarter's rent due on the 25th of December, 1904, and in due course the defendant signed a warrant of distress on the 21st of February, 1905, which was placed in the hands of one Baker, a certified bailiff.

By a hiring agreement dated the 26th of November, 1904, the tenant had hired on the hire system certain articles of furniture from Perring & Co., the plaintiffs, upon the condition (*inter alia*) that the plaintiffs should have power to retake possession of the goods upon the default by the tenant in the payment of any instalment due under the agreement.

The tenant being in default on the 22nd of February, 1905, the plaintiffs sent their foreman and three men to take possession of the goods. In the course of removing the goods to a van which they had provided for the purpose, which was at the time upon land exclusively the property of the landlord with rights of his tenants to use it, the manager of the defendant, one Milnes, entered upon the premises. The manager thereupon forbade the men to remove any more goods as he distrained on them for rent, stating that he had complete authority from the landlord to do so. The tenant stood by and did not object. In the afternoon the certified bailiff, Baker, distrained on the goods which had been already removed to the van, and eventually sold them to satisfy the rent, the sale of the goods in the house not proving sufficient for that purpose.

In an action by Perring & Co. against Emerson for illegal distress, the county court judge gave judgment for the plaintiffs both as regards the goods on the premises and the goods which had been removed.

The defendant appealed.

P. B. Morle, for the appellant.—With respect to the goods on the premises distrained by Milnes, who was not a certificated bailiff, the distress was a good one. It would have been perfectly good at common law, and before a statute can be held to derogate from common law rights the language must be very clear. The Law of Distress Amendment Act, 1888, only concerns landlord and tenant, and section 7 whilst protecting the tenant affords no protection to a third party. Assuming, however, that the distress was irregular, yet the irregularity was waived by the tenant, which would inure for the benefit of the landlord against third parties on the authority of *Werth* v. *London and Westminster Loans Discount Co.*, 5 T. L. R. 521. In that case the landlord distrained between the hours of sunset and sunrise, and the tenant waived the irregularity. It was held that this waiver bound third parties. Secondly, as regards the goods in the van which was at the time upon the landlord's property, I cannot contend in this court that the distress was legal, as the court is bound by the decision of the Exchequer Chamber in *Capel* v. *Buzzard*, 6 Bing. 150.

Henlé, for the respondents, the plaintiffs.—I submit this was no distress at all. The requirements of section 7 of the Act were not fulfilled—that is to say, Milnes had not a certificate, and therefore all his acts were null and void: *Fergusson* v. *Norman*, 5 Bing. N. C. 76. But assuming that there was a distress, which was illegal, the true owner of the goods is still entitled to bring his action at common law to replevy the goods: *Gibbs* v. *Cruikshank*, 21 W. R. 734, L. R. 8 C. P. 454. The Act of 1888 certainly does not refer only to relations between landlord and tenant; section 6, which deals with the extension of time to replevy directly contemplates third parties; "within which the tenant or *owner*," &c. The tenant could not waive the illegality. *Werth* v. *London and Westminster Loan and Discount Co.* was not decided under this Act at all; the Act was not in force at the time; moreover, Manisty, J., treated the act complained of as an irregularity, not an illegality. [He was stopped by the court.]

Lord ALVERSTONE, L.C.J.—This case raises a question of difficulty which, if it were thought necessary, might well be submitted to the consideration of a higher tribunal. There is a great deal to be said in favour of the view that this statute was passed mainly to amend the law as between landlord and tenant, and it has been argued that the provision as to certificated bailiffs was inserted for the protection of tenants rather than for third persons. I do not think it was limited to tenants, as section 6 certainly contemplates third parties. [His lordship read the section.] This brings us to the facts of this case. The words of section 7 are: [His lordship read the section set out above.] That section undoubtedly relates in the main to the relations between landlord and tenant, because it creates a new liability upon the person who authorized the uncertificated bailiff to levy the distress, even though the party authorizing does not know that the party authorized has no certificate. I am unable to come to the conclusion that the statute meant that the protection should only apply as between landlord and tenant; in other words, it was contemplated, in my opinion, that the right to levy distress upon goods which might or might not be the goods of third persons should only be exercised if the persons who levied the distress fulfilled the requirements of the statute. On general principles of construction you require different language than is to be found here to make an act legal as between the owners of the goods and the landlord where it is not a legal act as between the tenant and landlord. [His lordship stated the facts of the case.] I think the intention of the statute went further than to protect the tenant. The Act complained of should have been performed by a certificated bailiff, and it inures for the benefit

(a.) Reported by MAURICE N. DRUCQUER, Esq., Barrister-at-Law.

of the owner of the goods. I was at first impressed by the decision in *Werth* v. *London and Westminster Loan Co.*, but it seems the statute was not under the consideration of the court. It was merely a case where the landlord having acted illegally by levying at an improper time and the tenant having waived it, third persons could not avail themselves of the irregularity. Therefore that case is not an authority. The other point taken by Mr. Morle was that some of the goods distrained upon were upon part of the property of the landlord over which the tenant had certain rights. But the authority of *Capel* v. *Buzzard* is clear—namely, that the landlord cannot distrain upon the tenant's goods which are not upon the demised land but only upon the landlord's property over which the tenant has an easement. The main point of this appeal was upon the construction of section 7 of the Act. The appeal must be dismissed.

WILLS, J.—I am of the same opinion. The landlord has no title to the property of the goods of third persons which are upon the premises demised until their effective seizure under distress. Until that is made he has no right to interfere with the right of the owner to take the goods away. Now comes the critical question: What is the effect of section 7 of the 1888 Act? I confess that I fail to see how an act which is expressly forbidden by statute can inure to a person who admits to be guilty of an illegal act. It seems to me that, a seizure by an uncertificated bailiff having been forbidden in terms, no effect ought to be given to it. Therefore the right of the owner to take away his goods remains. It is not, to me, beside the mark to remind oneself of the fact that the year 1888 is only seventeen years ago and by that time the question as to the propriety of allowing the seizure of the goods of third persons had come into much consideration, and it was about that time that protection was afforded to lodgers. I cannot help thinking that if it was intended that, notwithstanding such distresses were forbidden by Act of Parliament, still the common law right of the landlord to take the property of third persons should be preserved, some adequate words would have been used to meet the case. We have been pressed by the decision of the Divisional Court in the *Werth case*. I confess that until Mr. Henlé pointed it out to me I was under the impression that it was a decision given under the statute of 1888. It is contended that in that case the court treated the act under consideration as a mere irregularity, and upon that view they decided it might be waived by the tenant, and the evidence showed it was waived by the tenant. To the best of my opinion I think that Mr. Henlé is correct in saying that the act of levying distress after sunset was an illegal act and not a mere irregularity, in which case different considerations would apply. But I fail to see on any point of view how an act forbidden by statute could be treated as an irregularity. Mr. Morle would have us carry the well-known doctrine of construction too far. He contends also that section 7 only creates an irregularity for which the concluding part of the section provides a remedy. As I understand it, it is this, where you have an act forbidden by the enacting words of the clause which makes the act wrong, and you have in the same clause or in some way connected with it a specific penalty provided, that that gets rid of the penalty which otherwise would be applicable—namely, the penalty for a common law misdemeanour. I think the effect of the concluding clause of section 7 is to render the landlord liable to an action for trespass and to prevent him from being prosecuted for a common law misdemeanour. I think that the landlord had no right to take these goods.

DARLING, J., concurred.

Appeal dismissed with costs.

Solicitor for appellant, *W. H. Lane.*

Solicitor for respondent, *P. Rutland.*

Prob. Div. & Adm. Div. Probate. (Bargrave Deane, J.) — March 13, 1905.

In the Goods of SARAH EGGAR FROGLEY. (*a.*)

Will—Illegitimate child.

Testatrix, by will made in 1876, *bequeathed property in trust for all the children who "might belong" to her at her death. She died in* 1905 *without ever having been married, leaving an illegitimate child born in* 1878.

Held, that the illegitimate child took under the will.

On the 9th of June, 1876, the testatrix executed a will by which she left all her property to her sister in trust for all the children who might "belong to" her at the time of her death, to be divided equally among them share and share alike.

In 1878 the testatrix gave birth to an illegitimate daughter, and died on the 2nd of January, 1905, a spinster, without lawful parent, grandparent, brother, or sister.

Samuel Eggar, a brother of the testatrix's mother, applied for a grant of administration with the will annexed on the ground that the residuary gift was void.

Stimson, for the applicant.

Le Bas, for the illegitimate daughter.

He cited *Clifton* v. *Goodburn*, L. R. 2 Eq. 278; *Wilkinson* v. *Adam*, 1 Ves. & B. 422, 462; and *Occleston* v. *Fullalove*, L. R. 9 Ch. 147.

BARGRAVE DEANE, J., in giving judgment, said he thought there was a great distinction to be drawn between gifts whether by deed or will when made by a man in favour of illegitimate children and gifts made by a mother to her illegitimate children. In the former case it might well be urged that there was an immoral consideration, but it was difficult to see how that argument applied in the case of gifts given by a mother. Although there was a certain amount of conflict among the authorities, he thought that gifts by a mother were not affected by the policy of the law. He proposed to follow the case of *Occleston* v. *Fullalove*. As, therefore, the child in this case did undoubtedly "belong to" the testatrix, he held that she was the person entitled to benefit. The grant would therefore go to the illigitimate daughter of the testatrix, and the costs of both parties would be allowed out of the estate.

Solicitor, *W. M. White.*

(*a.*) Reported by GWYNNE HALL, Esq., Barrister-at-Law.

House of Lords.

From C.A. (England). July 3, 1905.

SHEFFIELD CORPORATION v. BARCLAY & CO. (a.)

Company — Shares — Transfer — Indemnity — Forged transfer of stock—Innocent transferee—Loss incurred by company—Registration of transfer—Liability as between company and transferee.

A request to a person to carry out some statutory or ministerial duty, apparently legal, implies an undertaking to hold him free from loss occasioned by his thus complying with his supposed duty.

The respondents presented what purported to be a transfer of Sheffield Corporation Stock to the appellants, requesting them to register it in the name of their nominee. This was done, all parties acting innocently and without negligence. Subsequently the supposed transfer was found to be a forgery, and the corporation had to make good (there were new purchasers on the register) the loss to the real owners of the stock.

Held, that the respondents were liable to indemnify the corporation, as there was an implied contract to that effect.

The opinion of Lindley, J., *in* Simm *v.* Anglo-American Telegraph Co., 28 *W. R.* 290, 5 *Q. B. D.* 188, *at p.* 195, *dissented from.*

Decision of the Court of Appeal (52 *W. R.* 54, [1903] 2 *K. B.* 580) *reversed.*

Appeal from an order of the Court of Appeal (Vaughan Williams, Romer, and Stirling, L.JJ.) (52 W. R. 54, [1903] 2 K. B. 580), reversing a decision of Lord Alverstone, L.C.J. (reported 51 W. R. 204, [1903] 1 K. B. 1).

The action was brought by the Corporation of Sheffield against Messrs. Barclay & Co., bankers, to recover the sum of £11,487 17s. 5d., being the amount of principal and interest of certain corporation stock which belonged to certain trustees, Timbrell and Honnywill, and was transferred to a nominee of the defendants under a transfer purporting to be executed by Honnywill, but which for the purpose of this action must be taken to have been a forgery.

In March, 1893, 8,500 Sheffield Corporation Stock was transferred to the above-named trustees, and a certificate was issued in their names on the 13th of April.

Upon the 11th of April, 1893, a transfer of £8,200 of this stock to a nominee of Barclay & Co., purporting to be executed by both trustees, was handed to the defendants. This was sent to the corporation for registration on the 15th of April, 1893.

On the 28th of April, 1893, the nominee of Barclay & Co., the person named in the forged transfer of the 11th of April, executed a transfer of £8,000 of the stock to Young and Macdonald, and upon the 12th of May of the balance of £200 to M. F. Cockayne.

Upon the 1st of June the corporation issued certificates to Young and Macdonald for the £8,000 stock, and to M. F. Cockayne for the £200.

In 1901 an action was brought by Honnywill against the corporation claiming the rectification of the register, and it was found that the transfer had not been executed by Honnywill or with his authority, and consequently the corporation had to make good the loss incurred. The corporation the present appellants thereupon sued Barclay & Co. the present respondents upon an implied contract to indemnify them against the liability they had incurred under these circumstances, it being found that there was no negligence on either side.

The Lord Chief Justice held that the corporation were entitled to an indemnity, but the Court of Appeal considered that no contract of indemnity could be implied.

Danckwerts, K.C., Eldon Bankes, K.C., and *H. T. Waddy,* for the appellants.

Haldane, K.C., and *F. R. Y. Radcliffe,* for the respondents.

The arguments used and the cases cited are given very fully in the courts below.

Earl of HALSBURY, L.C.—In this case two persons, Timbrell and Honnywill, were joint owners of corporation stock created under a local Act of Parliament. Timbrell, in fraud of Honnywill, forged a transfer of the stock, and borrowed money on the security of the stock which the transfer was supposed to have transferred. A bank which lent the money sent the transfer to the proper officer of the corporation, and demanded, as they were entitled to do if the transfer was a genuine one, that they should be registered as holders of the stock. The corporation acted upon their demand; they transfered the stock into the names of the bank, and the bank in ordinary course transferred it to holders for value. The corporation also in ordinary course issued certificates, and the holders of these certificates were able to establish their title against the corporation, who were estopped from denying that those whom they had registered were the stockholders entitled. Honnywill, after the death of Timbrell, discovered the forgery that had been committed, and compelled the corporation to restore the stock, and the question in the cause is whether the corporation has any remedy against the bank who caused them to act upon a forged transfer, and so render themselves liable to the considerable loss which they have sustained.

Now, apart from any decision upon the question (it being taken for granted that all the parties were honest), I should have thought that the bank were clearly liable. They have a private bargain with a customer. Upon his assurance they take a document from him as a security for a loan, which they assume to be genuine. I do not suggest there was any negligence—perhaps business could not go on if people were suspecting forgery in every transaction—but their position was obviously very different from that of the corporation. The corporation is simply ministerial in registering a valid transfer and issuing fresh certificates. They cannot refuse to register, and though for their own sake they will not and ought not to register or to issue certificates to a person who is not really the holder of the stock, yet they have no machinery, and they cannot inquire into the transaction out of which the transfer arises. The bank, on the other hand, is at liberty to lend their money or not. They can make any amount of inquiries they like. If they find that an intended borrower has a co-trustee, they may ask him or the co-trustee himself whether the co-trustee is a party to the loan, and a simple question to the co-trustee would have prevented the fraud. They take the risk of the transaction and lend the money. The security given happens to be in a form that requires registration to make it available, and the bank "demand," as, if genuine transfers are bought, they are entitled to do, that the stock shall be registered in their name or that of their nominees, and are also entitled to have fresh certificates issued to themselves or nominees. This was done,

(a.) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

and the corporation, by acting on this "demand," have incurred a considerable loss. As I have said, I think if it were *res integra* I should think the bank were liable; but I do not think it is *res integra*, but is covered by authority. In *Dugdale* v. *Lovering*, 10 C. P. 196, Mr. Cave, arguing for the plaintiff, put the proposition thus: "It is a general principle of law when an act is done by one person at the request of another, which act is not in itself manifestly tortious to the knowledge of the person doing it, and such act turns out to be injurious to the rights of a third party, the person doing it is entitled to an indemnity from him who requested that it should be done." This, though only the argument of counsel, was adopted and acted upon by the court, and I believe it accurately expresses the law. Qualifications have been constantly introduced into the discussion which I think led to some confusion; they are not really qualifications of the principle here enunciated at all, but the expression of principles which would render the application of the principle in question erroneous. One is that there is no right of contribution between tortfeasors, and the other is to distinguish the right insisted upon from the ordinary remedy in damages against a person who has caused injury by intentional falsehood. Neither of these questions has any relation to what is here in debate. The principle insisted upon by Mr. Cave in his argument quoted above has been undoubtedly sanctioned as part of the law by several old decisions, and I think the principle as enunciated is well established. With respect to the case of the sheriff quoted in the Court of Appeal (*Collins* v. *Evans*, 5 Q. B. 820), I think it has been overlooked that the sheriff was executing a genuine writ, and the information he received was given to him to aid him in the execution of the office which by law he was bound to execute, and the information (for it was no more) was given to him in good faith; but can any one suppose that, if any one brought a forged writ, and called upon the sheriff to execute it, such person would not be liable to indemnify the sheriff? I cannot think there would be any doubt on that subject, but the genuineness or otherwise of the document that the corporation were called upon to give effect to made the whole difference; and I think both upon principle and authority the corporation are entitled to recover, and I move your lordships accordingly.

Lord DAVEY.—The appellants are suing the respondents upon an implied contract to indemnify them against the liability which has been incurred by them in these circumstances. On the 11th of April, 1893, the respondents, Barclay & Co. (Limited), forwarded to the appellants a transfer of Sheffield Corporation Stock, purporting to be executed by two persons named Timbrell and Honnywill, who were the registered holders of the stock, in favour of the respondent Barclay, with a request to the appellants to register the name of the last-named respondent, and forward new certificates in due course. The appellants acted upon this request, and granted a new certificate to the respondent Barclay, who afterwards transferred the stock for value to third parties. The names of Barclay's transferees were registered in due course, and it is admitted that they obtained a good title against the appellants. All parties believed that the signatures to the transfer from Timbrell and Honnywill were genuine, but in fact Honnywill's signature had been forged by Timbrell.

It was not, however, until 1899, after Timbrell's death, that Honnywill discovered the fraud, and he thereupon brought an action against the present appellants for rectification of the register and other relief, and recovered judgment against the appellants, under which they have incurred a large liability. On these facts the Lord Chief Justice, who tried the action, has held that the appellants are entitled to be indemnified by the respondents against the liability they have incurred, but his judgment has been reversed by the Court of Appeal. Before referring to the numerous authorities which have been cited, I will first state the grounds upon which I have come to the conclusion that the Lord Chief Justice was right and that his judgment should be restored. Not much turns upon the particular provisions in the corporation's private Act of 1883 as to the transfer of their debenture stock or the keeping of the register or the issue of certificates of title. They for the most part follow the lines of the similar provisions in the Companies Clauses Act. I think that the appellants have a statutory duty to register all valid transfers, and on the demand of the transferee to issue to him a fresh certificate of title to the stock comprised therein. But, of course, it is a breach of their duty and a wrong to the existing holders of stock for the appellants to remove their names and register the stock in the name of the supposed transferee if the latter has in fact no title to require the appellants to do so. And it makes no difference that the appellants were not aware of the invalidity of the transfer or could not with reasonable diligence have discovered it. I am further of opinion that where a person invested with a statutory or common law duty of a ministerial character is called upon to exercise that duty on the request, direction, or demand of another (it does not seem to me to matter which word you use), and without any default on his own part in a manner which is apparently legal, but is in fact illegal and a breach of the duty, and thereby incurs liability to third parties, there is implied by law a contract by the person making the request to keep indemnified the person having the duty against any liability which may result from such exercise of the supposed duty. And it makes no difference that the person making the request is not aware of the invalidity in his title to make the request. I think that this is the broad principle to be deduced from such cases as *Humphrys* v. *Pratt*, 5 Bligh N. S. 154; *Betts* v. *Gibbins*, 2 Ad. & E. 57; *Toplis* v. *Grane*, 5 Bing. N. S. 636 and the other cases which have been cited. In *Humphrys* v. *Pratt* the reasons for the judgment in this House are unfortunately not stated in the report, but in commenting on that case in *Collins* v. *Evans*, 5 Q. B. 820, at p. 829, Tindal, C.J., says: "The declaration states that the judgment creditor pointed out the goods, and required the sheriff to take them. He made the sheriff his mandatary or agent for the purpose of taking the goods, and if the sheriff, acting innocently in obedience to that command, commits a trespass, there is no doubt but he, as any other individual in that position, whether sheriff or not, may recover over against his master or principal the damage he has been obliged to pay in consequence of obeying such directions." In *Toplis* v. *Grane* the same judge, after referring to the evidence in the case, says: "We think this evidence brings the case before us within the principle laid down by the Court of Queen's Bench in *Betts* v. *Gibbins*, that where an act has been done by the plaintiff under the express directions of the defendant which occasions an injury to third parties, yet, if such act is not apparently illegal in itself, but is done honestly and *bonâ fide* in compliance with the defendant's directions, he shall be bound to indemnify the plaintiff against the consequences thereof." In *Collins* v. *Evans*, on the other hand, the sheriff was entrusted with the execution of a writ of *ca. sa.* against one John Wright, and the defendant pointed

out to him a person of the same name as the person liable, and the sheriff acted on the representation and incurred liability. It was held that the defendant was not liable to indemnify the sheriff, because he had merely made an innocent representation to the sheriff, but had not required the sheriff to act upon such representation, and had left him to his own discretion whether he would act upon it or not.

It has been said that the principle of these decisions only applies to cases between principal and agent and employer and employee, and the language of Tindal, C.J., in his comment on *Humphrys* v. *Pratt* gives some colour to that suggestion. I am not, however, of that opinion, and the contrary was decided in *Dugdale* v. *Lovering*, 23 W. R. 391, L. R. 10 C. P. 196. It may be that the language of Tindal, C.J., was not so felicitous as it usually was; but his meaning is plain that the liability to indemnify the sheriff arose from his having acted in supposed execution of his duty at the request and by the direction of the creditor. In some cases it is a question of fact whether the circumstances are such as to raise the implication of a contract for indemnity, but in cases like the one now before your lordships, when a person is requested to exercise a statutory duty for the benefit of the person making the request, I think that the contract ought to be implied. It matters not to the corporation whether A. or B. is the holder of stock, but to the purchaser who has paid his purchase-money or the banker who has lent money on the security of the stock it is of vital interest. The Court of Appeal distinguished the sheriff's cases on the ground that the request was to execute his duty in a particular manner. In the cases in question that was so. But I think the argument *hæret in cortice*, and is neither logical nor maintainable. It is difficult to imagine a case where a person should innocently request the sheriff to execute a writ which, though apparently regular, is in fact fictitious or invalid. If such a case be possible, it would come within the exact words of Tindal, C.J., and I entertain no doubt that the person presenting the writ would be held liable to indemnify the sheriff. It does not seem to matter at what stage of the transaction the request to do an act which turns out to be outside the officer's duty is made. In the present case, as pointed out by Mr. Bankes, the appellants ran no real risk until they issued the new certificate on the demand of the respondents. The judgment of the learned judges in the Court of Appeal seems to be based mainly on three grounds—(1) the decision of Lord Lindley (then Lindley, J.,) in *Anglo-American Telegraph Co.* v. *Spurling*, 28 W. R. 290, 5 Q. B. D. 188; (2) that there was no consideration for the alleged contract of indemnity; (3) that the contract—if any—to be implied from the circumstances was a warranty of their title by the transferees and not a contract of indemnity. The cases of *Simm* v. *Anglo-American Telegraph Co.* and the *Anglo-American Telegraph Co.* v. *Spurling* were an action and cross-action which arose out of a forged transfer of some of the company's stock, and were heard together. The first action was by the persons claiming under the forged transfer against the company for damages for wrongful removal of their names from the register on discovery of the fraud, and the cross-action was by the company against the persons who had brought in the forged transfer for registration, for an indemnity. The learned judge decided the first action in favour of the plaintiffs. He also decided the cross-action against the company. With regard to the transferor, he said: "Supposing that he knows nothing wrong about it, are the company entitled to say to him, 'We assume from the fact that you bring this transfer to us that it is a genuine document'? I apprehend that they are not entitled to say so to him. They are only entitled to say to him, 'We assume that you come honestly to us and that you do not know that anything is amiss with regard to the transaction.'" The learned judge then stated his views as to the duties of the company as follows: "It appears to me that a duty is thrown on the company to look to their own register, which involves, of course, the looking after transfers of stock or shares standing in the names of persons on the register, and that duty the company owes to those who come with transfers, and I do not see any corresponding or conflicting duty on the part of the person who brings the transfer, except, of course, that of bringing what he believes to be an honest document. I think the true view is this, that, there being no negligence, on the score of want of care on either side, but there being a duty on the part of the company to keep the register correct and themselves to look after the transfers between innocent parties, the loss must fall on the company." There was an appeal in both cases, and the decision in the first action was reversed, but counsel for the telegraph company did not proceed with the appeal in the cross-action, because if they succeeded in the first appeal the telegraph company had not suffered any damage. I am of opinion that the case of *Spurling* v. *Anglo-American Telegraph Co.* was also wrongly decided by Lindley, J., and I respectfully dissent from both the propositions laid down by him and adopted by the Court of Appeal in the present case. I dissent from the proposition that a person who brings a transfer to the registering authority and requests him to register it makes no representation that it is a genuine document, and I am disposed to think (though it is not necessary to decide it in the present case) that he not only affirms it is genuine but warrants that it is so. I think that this is the result of the decision in *Oliver* v. *Bank of England*, 50 W. R. 340, [1902] 1 Ch. 610, affirmed in this House under the name of *Starkey* v. *Bank of England*, 51 W. R. 513, [1903] A. C. 114. It may be argued with some force that for this purpose no solid distinction can be made between the power of attorney through which the transfer of Consols is effected and the deed of transfer in the present case. Each of these instruments, it may be said, is put forward as evidence of the authority with which the person making the application professes to be clothed to request the removal of the stockholder's name and the substitution of another name in his place. But however this may be, it is enough for decision of this appeal to say that the deed of transfer was put forward as a genuine document, and the appellants were invited to act upon it as such. I am also of opinion that the authority keeping a stock register has no duty of keeping the register correct which they owe to those who come with transfers. Their only duty (if that be the proper expression) is one which they owe to the stockholders who are on the register. This point was decided by all the learned judges who took part in the decision of the first case of *Simm* v. *Anglo-American Telegraph Co.* I will content myself with quoting the language of Cotton, L.J.: "The duty of the company is not to accept a forged transfer, and no duty to make inquiries exists towards the person bringing the transfer. It is merely an obligation upon the company to take care that they do not get into difficulties in consequence of their accepting a forged transfer, and it may be said to be an obligation towards the stockholder not to take the stock out of his name unless he has executed a transfer; but it is only a duty in this sense—that unless the company act upon a genuine transfer they may be liable to the real stockholder."

True it is that the appellants, following what is now the usual practice, gave notice of the transfer which had been brought in to the persons named as transferors, but they had no duty to do so, and it was done merely for their own protection. Experience in these cases shows, however, that it is a very poor protection. Stirling, L.J., held that the mere performance of a duty imposed by law upon any one holding a definite legal position does not constitute a consideration sufficient to support a promise to him by the person to whom the duty is owed. But, with great respect to that very careful judge, he overlooked that this very point was involved in the decision of the case of *Oliver* v. *Bank of England*. Vaughan Williams, L.J., quoted and commented upon the passage from the judgment of Wills, J., in *Collen* v. *Wright*, 6 W. R. 123, 2 Ell. & B. 627, where he says: "The fact of entering into the transaction with the professed agent as such is good consideration for the promise." And it did not occur either to the learned counsel, who argued the case of *Oliver* v. *Bank of England* with great pertinacity, or to any of the learned judges in the Court of Appeal, or the noble lords in this House, to question that the acting by the Bank of England on the demand of the supposed attorney was not a good consideration for the promise by him to warrant the genuineness of the power which they held to be established. Lastly, it was said in the present case by Romer, L.J., that this is not an action on a warranty, and that a warranty and a contract of indemnity are distinct, one important difference being the period from which the Statute of Limitations would run. That, of course, is so, and the appellants admit that if they were suing on the warranty their action would be out of time. But I can see no legal reason why, in circumstances like those of the present case, it should not be held, if necessary, that the true contract to be implied from those circumstances is not only a warranty of the title but also an agreement to keep the person in the position of the appellants indemnified against any loss resulting to them from the transaction. And I think that justice requires we should so hold. I agree with the Lord Chief Justice that as between these two innocent parties the loss should be borne by the respondents, who caused the appellants to act upon an instrument which turned out to be invalid. I am, therefore, of opinion that the appeal should be allowed and the judgment of the Lord Chief Justice restored, with costs here and below.

Lord ROBERTSON concurred.

Appeal allowed.

Solicitors, *R. F. & C. L. Smith*, for *H. Sayer*, Sheffield; *Maples, Teesdale, & Co.*

Court of Appeal.

From K. B. Div. (Romer and Mathew, L.JJ.) — July 10, 1905.

EDMONDSON v. BIRCH & CO. (LIMITED). (*a*.)

Practice—Discovery—Interrogatories—Action of libel—Plea of privilege—Name of informant—Object of interrogatory.

Where in an action of libel the defendant pleads privilege, the plaintiff will not be allowed to interrogate the defendant as to the names of the persons on whose information the defendant published the words complained of, if it appears that the plaintiff's object is not to rebut the plea of privilege, but to obtain discovery which would enable him to bring actions against other persons.

Appeal from an order of A. T. Lawrence, J., at chambers, allowing an interrogatory in an action of libel.

The plaintiff was a mining agent. The defendants were a limited company carrying on business as merchants in the city of London.

In March, 1904, the plaintiff entered into an agreement of engagement with Messrs. Birch, Kirby, & Co. (Limited), who carried on business at Kobe, in Japan, and were the representatives of the defendants in that country.

By this agreement the Japanese company engaged the plaintiff on trial as their mineral manager and adviser at a monthly salary. It was at the same time arranged that the Japanese company should immediately communicate with the defendants to ascertain whether they approved the engagement; and, as the plaintiff alleged, subject to such approval, the Japanese company agreed that, if after three months' trial they were satisfied with the conduct and ability of the plaintiff, they would continue him in their permanent employ.

On the 22nd of June, 1904, the defendants sent a cablegram to the Japanese company to the following effect: "Have no dealings with Edmondson. Give notice of dismissal."

The plaintiff, having been thereupon dismissed, brought this action, in which he complained of the cablegram as being a libel, and alleged that by it the defendants meant, and were understood to mean that the plaintiff was an untrustworthy and dishonest person and not a man of business integrity fit to be employed in a responsible business capacity.

The defendants, by their defence, pleaded that the words complained of were not capable of the alleged or any defamatory meaning. In the alternative they pleaded privilege.

The plaintiff took out a summons for leave to administer the following interrogatory (among others) to the defendants: "What information, if any, had the defendants received, detrimental or otherwise to the character of the plaintiff, prior to the dispatch of the said cablegram which induced them to send the same? From whom was such information derived? Did the defendants take any and what steps to verify it?"

An affidavit made by one of the directors of the defendant company in opposition to the summons stated that, prior to the commencement of the action, the plaintiff had several interviews with him in which the plaintiff repeatedly stated that he wished to ascertain whether any person had given information to the defendants in regard to him which had resulted

(*a*.) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

in the sending of the cablegram, and the name of that person, in order that he might institute an action against him, and that the plaintiff threatened that in the event of such information not being furnished to him he should institute an action against the defendants with the sole object of obtaining the desired information in the course of the proceedings. The plaintiff denied that he made such threat. From the written correspondence it appeared that the plaintiff repeatedly complained to the defendants that he had been traduced to them by some person, and asked that his name might be disclosed.

An order allowing the interrogatory was made by the master and affirmed by A. T. Lawrence, J.

The defendants appealed.

Montague Lush, K.C., and *J. R. Atkin*, for the defendants.—This interrogatory ought not to be allowed, if the object of the plaintiff in putting it is not to rebut the defendants' plea of privilege, but to ascertain the names of the persons on whose information the defendants sent the cablegram, so that the plaintiff may bring actions against them: *White* v. *Credit Reform Association and Credit Index (Limited)*, 53 W. R. 369, [1905] 1 K. B. 653. The affidavits and the correspondence show clearly that the plaintiff's sole object in bringing the action was that he might administer this interrogatory and so obtain discovery to enable him to bring actions against other persons.

Marshall Hall, K.C., and *A. S. Poyser*, for the plaintiff.—This interrogatory is rightly allowed as necessary to assist the plaintiff in the conduct of the action. The question of malice may depend on the status of the defendants' informant. If the defendant's answer the interrogatory by giving the name of a person whose respectability no one can assail, the plaintiff will be well advised to abandon the action. On the other hand, the answer may be such as to support the plaintiff's allegation of malice and rebut the plea of privilege. The mere fact that answering the interrogatory may incidentally involve disclosing the name of a person whom the plaintiff may afterwards sue is no ground for disallowing the interrogatory.

ROMER, L.J.—In an action for libel, where privilege is pleaded by the defendant, there is no doubt that the court has jurisdiction to allow the plaintiff to administer an interrogatory, which, with the view of rebutting the plea of privilege, is directed to ascertaining from the defendant whether the defendant had made any inquiries as to the truth of the statement complained of, and from whom he had obtained the information on which he relied in publishing the statement. That the court has this jurisdiction is shown by *White & Co.* v. *Credit Reform Association and Credit Index (Limited)*. But undoubtedly an interrogatory delivered with the view of ascertaining the names of persons from whom the defendant received the information on which he acted in publishing the statement complained of is an interrogatory which ought to be looked on with care and jealousy; for it might be used as an engine of oppression. Collins, M.R., pointed this out in the case to which I have referred. After stating the principle that an interrogatory asking the defendant from whom he obtained his information was permissible, he said: "In some cases, of course, countervailing rights and considerations might have to be taken into account. There might in some cases be ground for thinking that the inquiry as to the persons from whom the information was obtained was made with some illegitimate motive, and that the plaintiff was really seeking to assert some right of action against the persons who gave the information to the defendant. If there were ground for the suggestion that the inquiry was not made *bonâ fide* for the purposes of the pending action, and, therefore, was made for other purposes than those for which the law allows interrogatories, then such an interrogatory would be oppressive and illegitimate, and ought not to be allowed." The letters which have been read convince me that the present case falls within the words I have quoted. I am satisfied that in this case the question which is asked as to the persons from whom the information was obtained is asked with an illegitimate motive, and that the plaintiff is really seeking to assert some right of action against persons who gave the information to the defendants, and that the question is not asked *bonâ fide* for the purposes of the present action. In my opinion, the court will be acting wisely in not allowing this interrogatory. It will, therefore, be partly disallowed. So far as it asks what information the defendants had received prior to the despatch of the cablegram that induced them to send the same, it will be allowed. But the rest of the interrogatory, which asks from whom such information was derived, and whether the defendants took any steps to verify it, will be disallowed. To that extent the appeal succeeds.

MATHEW, L.J., concurred.

Appeal allowed.

Solicitors for the plaintiff, *Jacksons & Elwell.*

Solicitors for the defendants, *Greenip, Snell, & Co.*

From K. B. DIV. (Vaughan Williams, Romer, and Stirling, L.JJ.) — April 17, 18; May 19, 1905.

In re BRITISH WIDOWS' ASSURANCE CO. (*a.*)

Company—Life assurance—Company combining other businesses with life assurance—Separate account—Form of scheme—Life Assurance Companies Act, 1870 (33 & 34 *Vict. c.* 61), *s.* 4.

A company combining the business of life assurance with other business, such as selling tea, were authorized by the court to continue their business on undertaking for the future to carry it on in accordance with a scheme which complied with section 4 *of the Life Assurance Companies Act*, 1870, *by the required separation of the two businesses.*

Form of scheme approved.

This was an appeal against a winding-up order made by Buckley, J.

The British Widows' Assurance Co. (Limited), incorporated in 1902 under the Companies Acts, carried on the business of the selling of tea combined with that of life assurance for providing pensions for widows. The system of business was this: Tea was sold at a price of 8d., 10d., or 1s. per lb. in excess of its fair retail value. On a woman purchasing tea with the intention of availing herself of the insurance benefits offered by the company, she received a collection card on which the company's agent entered the purchases made by her from time to time. Upon this card were the conditions of insurance, whereby (amongst other things) the company undertook to pay 10s. a week to every woman who had purchased not less than half a pound of the company's tea for thirteen consecutive weeks next previous to her

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

becoming a widow; and to continue such payments so long as she should continue a widow and buy half a pound of tea from the company in each week. It was further provided that a purchaser of only a quarter of a pound of tea weekly should similarly receive a pension of 5s. a week. Then the conditions went on to state that the rights under the assurance should be limited to receiving the payment of pensions rateably out of 75 per cent. of the net profits on tea, the funds accumulated therefrom to be set aside for that purpose by the company; and that the pensioners should have no rights as against the company beyond the said 75 per cent. of net profits, and the funds accumulated therefrom.

It appeared from the evidence that, taking the middle figure, 10d., as being the loading to answer the pension contract, a very small proportion ever reached the fund to which the assured were to look for the satisfaction of their claims, so that by November, 1904, the company found that their pension scheme was a failure. During that year the company had advertised a proposal to add the sale of coffee and cocoa upon the same terms.

In November, 1904, the insolvency of Nelson & Co. (Limited), a company of a similar kind, became the subject of discussion in the public press, that company being eventually wound up by an order made by Buckley, J.

In consequence on the 5th of February, 1905, the present company ceased to accept new business under the old conditions, and taking legal and actuarial advice they issued a prospectus offering their existing customers substituted contracts or policies under six heads or "Tables of Benefits," A, B, C, D, E, and F, classifying the several events on which persons would be entitled to insurance benefits, these tables having been calculated on what was believed to be a sound financial and practical basis. By that prospectus the company proposed to set aside for the insurance fund 90 per cent. of their profits in lieu of 75 per cent., placing a minimum of 7d. to 8d. per lb. of tea to the credit of that fund.

That was the position when the directors of the company received intimation that a winding-up petition was in contemplation. Thereupon they decided to inform their customers, who were all women in a humble position of life, of the proposed petition, and of the probable consequences if it should be successful, and the result was that about 21,879 customers accepted policies under the new conditions of insurance, all of whom, with the exception of a comparatively small number, were desirous that the company should go on under the new scheme.

On the 2nd of March, 1905, a petition for the compulsory winding up of the company, intituled under the Companies Acts, 1862 to 1900, and the Life Assurance Companies Acts, 1870 and 1872, was presented by two dissentient policy-holders. The petition alleged that the company was hopelessly insolvent, and that a winding up was just and equitable; also that the conduct of the business of the company required investigation.

The petition was heard by Buckley, J., who, on the 12th of April, 1905, made the usual compulsory winding-up order on two grounds — (1) that, on the evidence, not only had the company become insolvent under the old system, but its insolvency had continued under the new; and (2) that the effect of the new scheme was that the entire proceeds of the tea, &c., sold went into the general funds of the company without distinction, the moneys received from each customer by way of premium on insurance not being carried to and forming "a separate assurance fund," as required by section 4 of the Life Assurance Companies Act, 1870. That section provides as follows:

"In the case of a company established after the passing of this Act transacting other business besides that of life assurance, a separate account shall be kept of all receipts in respect of the life assurance and annuity contracts of the company, and the said receipts shall be carried to and form a separate fund to be called the life assurance fund of the company, and such fund shall be as absolutely the security of the life policy and annuity holders as though it belonged to a company carrying on no other business than that of life assurance, and shall not be liable for any contracts of the company for which it would not have been liable had the business of the company been only that of life assurance. . . ."

The company appealed.

After considerable argument occupying the greater part of the 17th and 18th of April, 1905,

THE COURT with a view to preventing the loss which would inevitably accrue to the poor policy-holders of the company should the company have to go into liquidation, directed the appeal to stand over generally for the appellants, the company, to prepare a scheme for carrying on their business, having due regard for the Life Assurance Acts, and to submit it to the actuaries for the petitioners; the scheme then to be brought before the court for consideration, and the appeal to be restored to the paper for that purpose; both parties to be at liberty to file further affidavits before the appeal was restored; pending the further hearing of the appeal the official receiver to carry on the company's business in the same manner as the company were carrying it on, and to allow the funds of the company to be applied for that purpose.

A scheme for the future working of the company was prepared by the company and their actuaries, and was submitted to and approved of by the actuaries for the petitioners, the scheme being in the following form:

"Proposed Conditions of Future Working.—1. The company will institute a separate life assurance branch assuring benefits in accordance with the six tables A, B, C, D, E, and F already advertised—but assurances in accordance with the terms of tables A, B, C, and D will be issued only to persons at present holders of policies upon those terms and to the extent to which they now are entitled to assurance. 2. Every assurance contract under the new scheme will be secured by a separate policy, which will be issuable both to customers for tea and cocoa, &c. (hereinafter called tea customers), and to those who are not tea customers of the company. 3. The policy will be an ordinary industrial life assurance policy containing no reference whatever, neither in the body of the policy nor by indorsement, to the purchase of tea; the weekly premium to be charged for full assurance shall be 1s., for half assurance 6d., and for quarter assurance 3d. 4. Full assurance means such assurance as under tables A to F would have been obtained by the purchase of 1lb. of tea per week, half assurance such as would have been obtained by the purchase of ½lb. of tea per week, and quarter assurance such as would have been obtained by the purchase of ¼lb. of tea per week. 5. In the case of those assured who are tea customers the collection card shall show in the heading thereof that the sum payable weekly includes 1s. in respect of insurance premium. 6. If the tea customer ceases to purchase tea, the insurance premium of 1s. remains payable should she decide to continue the insurance. 7. The whole of the premiums received will be carried to an assurance account, and an assurance fund, as provided by the Life Assurance Companies Acts, 1870, out of which will be payable only the sums allowed by the Life

Assurance Companies Acts, subject to a provision that the contribution of the life assurance funds towards the expenses of conducting the business shall not exceed 5d. per week in respect of each full assurance, and 2½d. per week in respect of each half assurance, and 1¼d. per week in respect of each quarter assurance, so that if the maximum rate of expense is charged against the life assurance fund there will be left 7d. to meet claims and bonuses in respect of each full assurance, 3½d. in the case of each half assurance, and 1¾d. in the case of each quarter assurance. 8. The company shall agree to pay to the assurance fund 1d. upon every premium for a full assurance, ½d. upon every premium for a half assurance, and ¼d. upon every premium for a quarter assurance paid by persons assured previously to the 5th of February, 1905, who are holders of policies under tables A, B, C, or D, or have policies assuring larger amounts than those specified in tables E or F, and the sums payable under this clause into the assurance fund shall be applicable only to the payment of claims and bonuses (if any) as aforesaid. 9. Any expenses of the business of the company in connection with assurance not provided for out of the amounts applicable thereto, as hereinbefore mentioned, shall be borne and paid by the company out of its funds, other than those carried to the assurance account and assurance fund. 10. The accounts of the company shall be made up annually, and if a sum equal to 90 per cent. of the profits of the company for each year other than profits in the life assurance fund shall exceed the aggregate of 7d. out of every full assurance premium, 3½d. out of every half assurance premium, and 1¾d. out of every quarter assurance premium paid to the company during the year, for which the accounts are so made up, or 8d., 4d., and 2d. respectively in the case of those insurances referred to in clause 8 hereof, the said excess shall be added to the assurance fund and be applicable only to the payment of claims and bonuses (if any) as aforesaid. 11. A first valuation of the assets and liabilities of the assurance fund shall be made by a qualified actuary as at the 31st of December, 1908, and annually thereafter, and any surplus available after making all necessary reserves shall be divided into ten equal parts, nine of which shall be apportionable either in cash or equivalent benefits among the persons assured who at the date of the valuation are in full benefit, and such apportionment shall be made in such manner as the directors shall determine, and the remaining one-tenth part shall be treated as part of the profits of the company. 12. The other conditions of the assurance shall be the same as those now in force under the policies issued in pursuance of tables A, B, C, D, E, and F respectively, save that in the place of purchases of tea, cocoa, &c., the payment of premiums shall be the consideration for the policy, and the definition of full benefit, partial benefit, and the other conditions shall be varied accordingly. 13. As regards existing business: Every person entitled to insurance benefits under the tables A, B, C, D, E, and F shall be offered and be entitled to claim a new policy conferring similar benefits under the new scheme. 14. As regards lapsed business, any person whose right of benefits has lapsed during the period since the 5th of February, 1905, by reason of the company's agents not having called upon her, or since the 2nd of March, 1905, by reason of the uncertainty created by the presentation of the petition to wind up, and otherwise owing to the presentation of the said petition, and not by her own desire or default, shall be entitled, upon applying for a policy under the new scheme under tables E or F, and on making a purchase of tea, &c., to the amount which if purchased during the said interval would have kept her assurance on foot (or in the alternative on paying a sum equal to the aggregate weekly premiums falling due during the said interval at the rate of 1s., 6d., or 3d. per week, as the case may be) to have a new policy issued to her for full assurance, half assurance, or quarter assurance, as the case may be, under such of the said tables E or F as she may select. 15. Any person holding a subsisting assurance under the original pension scheme effected before the 5th of February, 1905, who has not in the meantime accepted, or agreed to accept, an assurance under one of the tables A, B, C, D, E, or F, and whose claims have not emerged, and who have regularly taken tea up to this date, shall be offered (*a*) the return of all premiums paid by her at the rate of 7d. for every pound of tea or cocoa she shall have purchased, together with interest at 4 per cent. per annum; or (*b*) the right to have a new policy issued to her for full assurance, half assurance, or quarter assurance, as the case may be, under such of the said tables E or F as she may select. (16) Any person who was assured before the 5th of February, 1905, under the pension scheme, and whose claim has emerged and is still outstanding, shall have her claim satisfied in ordinary course."

The case having been restored to the paper, the scheme was now submitted to the court for approval. In support of the scheme affidavits were filed by experienced actuaries on behalf of the company, and also on behalf of the petitioners, from which it appeared that under the new conditions the company had good prospects of future success, and that the benefits offered would be reasonably secure.

Gore-Browne, K.C., and *Martelli*, for the appellants, the company, at their lordships' suggestion, offered an undertaking on behalf of the company to carry on their business in accordance with the scheme if sanctioned.

Younger, K.C., for contributories supporting the appeal.

Eve, K.C., and *Ward Coldridge*, for the petitioners.

A. H. Jessel, for parties supporting the petition.

R. J. Parker, for the Board of Trade, who had been served with the petition and to whom a copy of the proposed scheme had been sent, asked that the sanction to the scheme should be postponed to enable the Board of Trade to examine the scheme.

VAUGHAN WILLIAMS, L.J.—In this matter we have the advantage of having had this scheme critically considered by actuaries representing both the petitioners in the winding-up petition and the company; and these actuaries, who are persons whose position as skilled actuaries can in no way be questioned, are agreed that if this scheme is carried out there will be reasonable security for the assured receiving the benefits which it is intended they should receive under their policies. In addition to that, the evidence before us shows that there is nothing in this scheme which in any way leads one to suppose that the carrying out of the scheme, which the company by their counsel undertake to carry out, will so cripple the business of the company as to prevent them from not only carrying on their business as a solvent company, but also arriving at a period of prosperity.

Every one must be glad that this result has been arrived at, because it is plain that, if the anticipations of these experts are verified, the assured will gain thereby that sort of assurance which as thrifty people they have been trying to obtain, and they will be saved from very serious loss which would inevitably

have come upon them if this company had had to be wound up under a compulsory order.

With regard to what Mr. Parker has said about the Board of Trade, the board very often affords great assistance to the court in company cases, and the court is always glad to accept its assistance. In the present case it appears that the board has not in fact examined into this scheme, but to postpone the sanction of the scheme to allow the board to do so would be, in effect, to run a great risk that the scheme never could be carried out at all, because it is obvious that every week's delay makes it more difficult to carry out a scheme of this sort.

Mr. Parker mentioned that the Board of Trade thought that they might possibly have thrown some light upon the previous events in the history of this company which might lead us to a conclusion that this opportunity of framing and working out this scheme might possibly be an opportunity which the company were not entitled to have. With regard to that, we decided when this appeal was last before us that the company should have this opportunity; they have had it, and I myself have no reason at all to doubt that, in acting upon the opinion of these experts, we are acting upon opinions which the court is not only entitled to act upon, but is bound to accept.

Under these circumstances we sanction this proposed scheme, and make an order accordingly.

ROMER and STIRLING, L.JJ., concurred.

[The winding up order order made by Buckley, J., was accordingly discharged, the company undertaking by the counsel to carry on their businesses in accordance with the scheme as now sanctioned.]

Solicitors, *Walter B. Styer; L. Weatherley; H. Garland Wells*, for *Dunn & Baker*, Exeter; *Solicitor to the Board of Trade.*

High Court of Justice.

Chan. Div. }
Kekewich, J. } July 6, 14, 1905.

In re SCHOLEFIELD (DECEASED).
SCHOLEFIELD *v.* ST. JOHN.
In re JANE YOUNG (DECEASED).
SMITH *v.* ST. JOHN. (*a.*)

Power—Appointment—Execution—Conflict of laws—Domiciled foreigner—Will and codicils valid according to the law of domicil, but invalid according to English law—Wills Act, 1837 (1 *Vict. c.* 26), *ss.* 9, 10, 27.

A lady domiciled in France, on whom a power of appointment by will had been conferred by an English instrument, made a will, valid by the law of her domicil but not attested as required by the Wills Act, by which she appointed a universal legatee with a general bequest of personalty. The will contained no express reference to the power and no express direction that it was to be construed according to English law.

Held, that the power had not been exercised, as the will, though admitted to probate, was not, owing to non-compliance with the provisions of the Wills Act as to attestation, a will to which the rules of construction contained in section 27 *of the Wills Act as to the execution of powers applied.*

(*a.*) Reported by R. FRANKLIN STUBBING, Esq., Barrister-at-Law.

In re D'Este's Settlement Trusts, 51 *W. R.* 552, [1903] 1 *Ch.* 898, *followed.*

Edward Cotteril Scholefield by his will dated the 22nd of July, 1851, appointed his brothers William Scholefield and John Scholefield executors and trustees thereof and gave, devised, and bequeathed the rest, residue, and remainder of his property both real and personal to his said trustees upon certain trusts for sale and realization thereof and for investment of the proceeds, and upon trust to pay the dividends, interest, and annual proceeds thereof to his wife Isabella Deborah Scholefield for life, and from and after her decease he directed his trustees to stand and be possessed of his residuary estate upon certain trusts for his children, but if there should be no child who should attain a vested interest he directed that his trustees "as to two-thirds of the said stock, funds, and securities and the dividends, interest, and annual produce thereof to stand possessed thereof upon trust for the said William Scholefield and Joshua Scholefield, of Wigginton, near the City of York, their executors and administrators, absolutely as tenants in common, and as to the remaining third part thereof upon trust for such person or persons as my said wife shall by her last will and testament in writing notwithstanding any future coverture direct or appoint, and in default of any such last-mentioned direction or appointment and so far as the same shall not extend then upon trust for the said William Scholefield and Joshua Scholefield, their executors, administrators, and assigns, absolutely as tenants in common."

The said E. C. Scholefield died without leaving issue on the 1st of November, 1859.

His widow Isabella Deborah, whose maiden name was Young, was married a second time in or about October, 1863, to Comte de Damas D'Hautefort, who died on the 14th of April, 1887, leaving his widow surviving.

The said Comte de Damas D'Hautefort was a French subject domiciled in France, and by her marriage with him the Comtesse Isabella Deborah lost her English domicil of origin and acquired the French domicil of her husband, which she retained until her death in Paris on the 13th of March, 1904.

Under the will of Jane Young (her mother), who died on the 6th of May, 1858, the Comtesse de Damas D'Hautefort also had a general power of appointment by will in the ordinary form without any special formalities over a share in the estate of the said Jane Young.

The Comtesse de Damas D'Hautefort made several wills and codicils.

By a will dated the 19th of July, 1888, written in the French language and made at Pau by a notary, the testatrix reappointed her brother Walter Buchanan Young her general and universal legatee, and consequently she left and bequeathed to him all the movable and immovable property which should be found to belong to her on her death as well in France as in England, on condition that he executed the following specific legacies—viz.: To each of her nieces Millicent Massingberd Mundy and Sophia Massingberd Mundy £2,000. In the event of her brother predeceasing her the testatrix appointed her niece Millicent Massingberd Mundy her universal legatee, and the sum of £2,000 specifically bequeathed to her was to revert then to her sister Sophia Massingberd Mundy, so that her legacy should then amount to £4,000. The testatrix then revoked and annulled all other dispositions she had made before the present will, which will only was to be carried out. This will is stated to have been signed by the testatrix in the presence of the notary and three witnesses, who also signed it.

By a holograph codicil dated the 4th of June, 1889, to her will dated the 19th of July, 1888, the testatrix, after reciting that by that will she had appointed her brother Walter Buchanan Young her universal legatee, and in the event of her brother predeceasing her, her niece Millicent Massingberd Mundy, directed that if for any reason whatever, her brother would not accept her estate, the universal bequest made to him by the will should also be received by her niece Millicent Massingberd Mundy.

By a holograph will written in the French language and dated the 29th of September, 1890, the testatrix, after making a declaration of religious faith, appointed her brother Walter Buchanan Young her universal legatee, wishing that he should receive in full ownership all the property which composed her estate in England as well as in France.

By a holograph codicil in the French language, dated the 9th of February, 1893, the testatrix, in the event of her brother not accepting her estate, appointed her niece Helen St. John her universal legatee; also in the event of her brother dying before her.

By a holograph codicil in the French language, dated the 8th of August, 1903, the testatrix, in the event of her niece Helen St. John dying before her, appointed her niece Agnes Leacock her universal legatee.

None of the wills or codicils after the will of the 19th of July, 1888, were attested by witnesses.

The testatrix died on the 13th of March, 1904, having survived her brother Walter Buchanan Young, but leaving her niece Helen St. John surviving, who consequently became universal legatee according to the codicil of the 9th of February, 1893.

At the time of her death the testatrix was possessed of certain furniture and personal belongings of small value in France and in England, of a sum of £362 in a bank, and certain arrears of income due from the trustees of the wills of the said E. C. Scholefield and Jane Young.

Among the papers belonging to the testatrix was found an envelope addressed to Miss Helen St. John, containing five documents written in the English language, and a second envelope containing a list of legacies dated the 20th of October, 1903, which was signed, but contained no words of disposition. The legacies given amounted to £6,400, and included legacies to Miss Helen St. John and £500 to Mary Rogers. On the fly-leaf was a memorandum headed "debts," showing altogether that the debts owed by the testatrix amounted to £6,980. These documents showed that she thought she was disposing of all her property, including the property over which she had a power of appointment.

Letters of administration, with translations of the will of the 19th of July, 1888, the codicil of the 4th of June, 1889, the will of the 29th of September, 1890, and the codicils of the 4th of February, 1893, and the 8th of August, 1903, annexed, were granted to Miss Helen St. John as universal legatee.

The present summonses were taken out by the respective trustees of the wills of E. C. Scholefield and Jane Young for the determination of the question whether the power of appointments given by the wills of E. C. Scholefield and Jane Young had been validly exercised by the testatrix, and to whom the shares, over which there had been a power of appointment, belonged.

Evidence was given that according to the French law the terms of the gift contained in the wills and codicils were such as to pass all the property of which the testatrix was competent to dispose without any restriction whatever, including the property over which she had a power of appointment, and that the mode of disposing of property by means of powers of appointment was unknown to French law. If a French court had to determine whether certain words in a French will had exercised a power of appointment conferred by an English instrument, it would in general refer to English law, unless the terms of the will might as a matter of construction exclude the English law. If the question involved in this case came before a French tribunal the court, in trying to ascertain whether the testatrix had intended to exercise the power, would consider first the terms of the testamentary dispositions themselves and then the surrounding circumstances and any extrinsic documents, including the fact that, apart from these two funds over which the testatrix had a power of appointment, her estate was never at any time sufficient to satisfy the legacies, which amounted to £4,500, or to pay the debts, and would infer from the fact that the testatrix made her brother universal legatee with an obligation to pay out of the property coming to him legacies to the amount of £4,500, that the testatrix was intending to dispose of the whole of her property, including that over which she had a power of appointment.

By section 9 of the Wills Act, 1837: No will shall be valid unless it shall be in writing and executed in manner hereinafter mentioned—that is to say, it shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction, and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary.

By section 10: No appointment made by will, in exercise of any power, shall be valid unless the same be executed in manner hereinbefore required, and every will executed in manner hereinbefore required shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by will, notwithstanding it shall have been expressly required that a will made in exercise of such power should be executed with some additional or other form of execution or solemnity.

By section 27: A general devise of the real estate of the testator, or of the real estate of the testator in any place or in the occupation of any person mentioned in his will, or otherwise described in a general manner, shall be construed to include any real estate, or any real estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will; and in like manner a bequest of the personal estate of the testator, or any bequest of personal property described in a general manner, shall be construed to include any personal estate, or any personal estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will.

T. T. Blyth, for the trustees of the will of E. C. Scholefield.

R. Neville, K.C., and *A. L. Morris*, for the defendant Miss St. John.—The question whether the general power of appointment was validly exercised by the French will must be determined by French law, and according to the evidence of the French lawyers the words used in the will would be sufficient to pass everything which the testatrix had, including property over which she had only a power of appointment.

This case is governed by the decision in *In re Price*, 48 W. R. 373, [1900] 1 Ch. 442, where Stirling, J., held that a testatrix could exercise a general power of appointment by a will made in French form and unattested, notwithstanding sections 9 and 10 of the Wills Act, 1837, and that the same rules of construction ought to be applied to it as would be applied to an English will in the same terms and of the same date, including the rule of construction introduced by section 27 of the Wills Act. If the will is to be construed according to the English law, the reference to England that the testatrix made in her will is almost identical to the reference to England in *In re Price*, and brings the case directly within that decision. The decision in *In re Harman*, [1894] 3 Ch. 607, is also in accordance with this view. There was no principle laid down in *In re D'Este's Settlement Trusts*, 51 W. R. 552, [1903] 1 Ch. 898, except that where there were no general words the French canon of construction would apply, and not the English canon. It is not disputed that a power contained in an English instrument giving power to dispose of property by will can be exercised by a foreign will valid according to the law of the domicil, if the intention so to exercise the power is apparent on the face of the will. Having regard to the French law, this court will look at the letters which show that there was an intention of exercising this power just as the French court would, where extraneous evidence is admissible to show evidence of intention.

P. O. Lawrence, K.C., and *O. Leigh Clare*, for the defendant Mrs. Meredith, one of those who would take in default of appointment.—The power was not validly exercised. Whether it was so or not must be determined according to English law. Upon the face of the testamentary disposition, which is all that the court will look at, there was no exercise of the power of appointment at all; there was no reference in the will or codicils either to the power or to the funds which would pass under such power if exercised, and therefore the will must be construed according to the rules of construction independent of the Wills Act. The rule of construction which section 27 of the Wills Act establishes is an artificial rule of construction and only applies to wills which are executed in compliance with sections 9 and 10 of that Act. It does not apply to wills which our law recognizes as valid as being executed according to the law of the domicil, but not executed according to English law so as to make such wills a good exercise of a power of appointment. There can be a good exercise of a power of appointment by a will which is not made according to English law, but according to the law of the domicil if it directly purports so to do, as was done in *In re Price*. The rule of construction is that if there is a general bequest of personalty that shall operate as a good exercise of the power of appointment by will, but that does not mean a will executed according the law of France. In none of the cases cited was there a general bequest of personalty, but in every case the testator purported to have exercised the power of appointment, and that fact distinguishes those cases from the present case. Stirling, J., in his decision in *In re Price*, distinctly left open the very point that Buckley, J., decided in *In re D'Este's Settlement Trusts* when he held that as the will did not contain express reference to the law of England it did not operate as a valid exercise of the power of appointment. That is a distinct decision which governs the present case, and it is also in accordance with the decision of Stirling, J., in *In re Price*, which went on the ground that in that case there was on the face of the will an indication that the testatrix wrote it with reference to the law of England. It is said that in the present case there is a reference to England, but it is only to property in England, and there was property in England. There is no reference to the will being construed according to the law of England. It is also said that the letters which would be referred to in a French court contain a reference to the exercise of the power of appointment, but on this point the English law must be followed as to whether the power has been exercised by the will, and according to English law any evidence outside the will admitted to probate would be rejected. The evidence tendered has tried to go one step further than the evidence in *In re Price* and *In re D'Este's Settlement Trusts*, and the court will be slow in adopting this extension. Our evidence is in accordance with the decisions of Stirling, J., and Buckley, J., in the cases cited above, that the French courts would require to be instructed as to what, according to English law, amounts to an exercising of a power of appointment, and they would decide whether it had been duly exercised according to English law.

Stewart Smith, K.C., and *Dauney*, for other parties in the same interest.—There was a default in the exercise of the power of appointment. Any documents which are regarded as an exercise of the power of appointment given by the English will must be construed according to English law. The French will was not an exercise of the power, notwithstanding property in England is mentioned in it. It would be impossible to say that this will was a valid exercise of the power unless section 27 of the Wills Act applied, but it is submitted that that section does not apply to a will which does not comply with the requirements of sections 9 and 10, and that therefore the will must be construed as if it had been made before the passing of the Wills Act. The case is governed by the decision of Buckley, J., in *In re D'Este's Settlement Trusts*. The evidence of the French lawyers is admissible only in so far as they state what the French law is, but it must be rejected so far as they purport to construe the will and say what the French courts would decide in the case: *Di Sora* v. *Phillipps*, 10 H. L. C., at p. 638; *The Stearine Kaarsen Fabrik Gonda Co.* v. *Heintzmann*, 17 C. B. N. S. 56. Each court is governed by the *lex fori* as to the admission of extraneous evidence. The fact that the French courts would admit the letters is no reason why this court should be bound to admit them. There is no ambiguity in the will so as to require any evidence to explain the ambiguity.

Neville, K.C., in reply.—It is immaterial whether the will is construed as a French will or as an English will. If it is construed as a French will the words the testatrix used would be sufficient to pass everything she had, including property over which she had only a power of appointment, and if the English law is to prevail the reference in the will to England brings the case directly within the decision in *In re Price*. There has been some misapprehension about the decision in *In re D'Este's Settlement Trusts*. All that Buckley, J., decided in that case was that as the will had to be construed according to French law section 27 of the Wills Act did not apply, as that was a canon of construction of the English law.

Ellis, for the trustees of the will of Jane Young.

Stokes, for those who took in default of appointment under this will.

July 14.—KEKEWICH, J., read the following judgment: The main question arising on this summons can be concisely stated. A lady domiciled in France,

on whom a power of appointment by will over personal property had been conferred by an English instrument, made a will constituting the defendant Miss St. John universal legatee, which referred neither to the property nor to the power, and was admitted to probate here only because it complied with the law of the domicil of the testatrix. Did this will operate as an exercise of the testamentary power of appointment? The precise question came before Buckley, J., in *In re D'Este's Settlement Trusts*, and he decided that a like power was not exercised by a like will. I am not sure that I have thoroughly and correctly grasped the reasoning of the learned judge, but his conclusion is perfectly plain, and I ought to follow it unless convinced that it is wrong. That conclusion is that a testamentary power can only be exercised by a will which conforms to English law, and that what is called the rule of construction depending on the 27th section of the Wills Act has no application to any instrument other than an English will—that is, does not apply to a will not executed according to the provisions of English law, notwithstanding that by reason of its having been made according to the law of the testator's domicil, or otherwise, it is admissible to probate here. Perhaps the phrase "rule of construction" is not a particularly happy one. The effect of section 27 is to provide that as regards English wills—that is, wills executed and attested according to the law of England—there is no longer any occasion to refer to a testamentary power, or to the property affected by that power, provided the will contains a general devise or bequest such as would pass the property if it were the testator's own; and the question, to state it again in a slightly different form, is whether this provision is applicable to wills not executed and attested according to English law. Buckley, J., decided that it is not applicable, and that decision governs the present case.

But it is said that there are other authorities deciding otherwise. First, reference is made to a case of *D'Huart* v. *Harkness*, 34 Beav. 324, which has been approved by Stirling, J., in *In re Price*, 48 W. R. 373, [1900] 1 Ch. 442. In that case Lord Romilly had to consider a power exercisable "by last will and testament in writing duly executed," for he held that the power had been exercised by a will of which, though unattested, probate had been granted in this country because made according to the law of the testator's domicil. But that will specifically gave the property in question, a sum of Consols, to the legatee claiming that the power had been exercised, and thus it appears that there was compliance with the English law apart from the provisions of the 27th section of the Wills Act, and that the question which I have to deal with did not arise. Again, it is said that the point was decided by myself in *In re Harman*, [1894] 3 Ch. 607. There is nothing in the report to indicate that the question now under consideration was there raised. It is extremely unlikely that, if the facts allowed of its being raised, it would have escaped notice, and probably they did not allow it; but it is sufficient to say that the point was not raised in argument or dealt with by the judgment. The only other authority requiring notice is the decision of Stirling, J., in *In re Price*. Needless to say, the judgment is replete with learning, and those who seek instruction on this subject generally, will find it there writ large; but he certainly did not decide, and, as I read his judgment, he did not express an opinion on the particular point now under consideration. In the will before him the testatrix had directed that it should be considered in England the same as in France, and the learned judge accepted this as an indication upon the face of the will that she wrote it with reference to the law of England as well as the law of France, and that therefore he was entitled to apply the rules of construction which would by English law be applied to a will expressed in the same terms, including the rule of construction introduced by section 27 of the Wills Act. His conclusion depends on this, and on this alone. As regards text-writers, there is nothing to add to Stirling, J.'s, quotation from Mr. Dicey; the profession is still waiting for a new edition of Mr. Westlake's book, and Mr. Foote in his valuable work, the most recent on this subject, quotes Buckley, J., as having decided the particular point (in *In re D'Este's Settlement Trusts*), as he certainly did, but without comment. Some reasons were urged why this lady's will should be accepted on special grounds as an exercise of the testamentary power. She disposes of all the movable and immovable property which should be found to belong to her "as well in France as in England," and it was urged that these words are equivalent to those which influenced Stirling, J.'s, decision in *In re Price*. They seem to me essentially different. There is no indication of any reference to English law, and all the testatrix intends is that her will shall be construed largely so as to include property wherever situate, and especially property situate in England. Then it is said that although the codicils were unattested, the will was executed in the presence of two witnesses who attested it in a form sufficient to comply with the English law, section 9 of the Wills Act. It may be so, but the gift to Miss St. John is by an unattested codicil, and her title must depend on that. My attention was called to expert evidence intended to show that French courts would place a construction on this testamentary disposition favourable to Miss St. John. Comments were made on this evidence and objections were raised to the admissibility of some parts of it. I pass by both comments and objections alike, because it seems to me that the question for decision is one of English law, and I take it that, whatever else it might decide, the French court would necessarily follow English authorities on a question of English law.

The short result is that although the power was exercisable by will, and the lady's testamentary disposition, notwithstanding non-compliance with the provisions of the Wills Act, has been treated as a will and admitted to probate, yet it is not a will which can be construed according to the rule contained in section 27 of the Wills Act, and that in default of application of that rule it does not operate as an exercise of the testamentary power conferred on the testatrix. There will be a declaration that the power of appointment was not validly exercised, and that the fund goes as in default of appointment. I have only given judgment in the first case, but it applies to the second case, and the declaration will be in the same terms.

Solicitors, *Blyth, Dutton, Hartley, & Blyth; Burton, Yeates, & Hart; Fardell & Canning*, for *Fardells*, Ryde, Isle of Wight; *C. & S. Harrison & Co.*

Chan. Div. }
Kekewich, J. } June 29, 1905.

In re BRUCE.
HALSEY *v.* BRUCE.

Settled land—Leaseholds—Enfranchisement—Purchase of freehold reversion—Mortgage of settled land—Capital moneys—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *ss.* 18, 21 (6).

The word "enfranchisement" in section 18 *of the Settled Land Act,* 1882, *is applicable to the conversion of leasehold land into freehold by the purchase of the freehold reversion.*

Where, therefore, settled land consists of a leasehold term, the tenant for life (or in the case of an infant absolutely entitled, the trustees of the settlement) can, by virtue of section 18, *raise money by mortgage of the settled leasehold land in order to purchase with the money so raised the freehold reversion under section* 21, *sub-section* 6, *of the Act of* 1882.

Summons.

The testator E. Bruce by his will, made in 1893, gave his residuary estate to trustees upon trust for his infant daughter absolutely; and the trustees were given by the will full discretionary power to sell the same.

The residuary estate consisted of leasehold premises—a theatre and a shop and house adjoining it, and certain property seats in the theatre—held from the freeholder under a lease dated the 4th of September, 1883, for a term of eighty-five years from the 12th of August, 1882, at a ground-rent of £1,000 per annum.

The freeholder had made an offer to the trustees of the will to sell them the freehold reversion of the premises for £27,500. On the 17th of June, 1905, the trustees entered into a conditional contract with the freeholder to purchase the reversion subject to the approval of the court; and also made provisional arrangements with an insurance company, whereby the company agreed to advance the whole £27,500 upon mortgage of the premises.

The infant daughter being absolutely entitled to the leasehold property, the property was constituted settled land, and the infant was to be deemed tenant for life thereof, by virtue of section 59 of the Settled Land Act, 1882; and by section 60 of the same Act the trustees were the proper persons to exercise the powers of the tenant for life.

The present summons was taken out by the trustees to obtain the sanction of the court to the conditional contract by them to purchase the freehold reversion of the lease.

There was no capital money available for such purchase under section 21, sub-clause (vi.), of the Settled Land Act, 1882; but the trustees relied on section 18 of that Act, which enacted that, "where money is required for enfranchisement . . . the tenant for life may raise the same on mortgage of the settled land or of any part thereof. . . ."

P. O. Lawrence, K.C., and *T. K. Crossfield,* for the trustees.—The purchase of the freehold reversion comes within the meaning of the word "enfranchisement" in section 18; the word is not confined to copyhold or customary land; it has been used by the Legislature as meaning the acquisition of the reversion of a leasehold in the Ecclesiastical Commissioners Act, 1860 (23 & 24 Vict. c. 124), ss. 20, 35, 36, 37. In Murray's Dictionary "enfranchisement" is defined as "the action of making lands freehold"; see also Coke upon Littleton, 137 *a, b,* as to the meaning of the word.

Peterson, for the infant.—The word "enfranchisemen," as used in the Settled Land Act, 1882, and in the Conveyancing Act, 1881, has reference only to copyholds or customary freeholds: see Settled Land Act, 1882, s. 3, sub-section (ii.), s. 4, sub-section 7; Conveyancing Act, 1881, s. 3, sub-section 2. It is used in its ordinary legal sense in section 18 of the Settled Land Act, 1882.

W. L. Richards, for other parties interested.

June 29.—KEKEWICH, J.—This, so far as I know, is a new point, and it is obviously one of considerable importance, because, although this particular event is not perhaps likely to occur again, there are, nevertheless, likely to be many cases to which the construction which I propose to put upon it could be applied. The facts here are simple. The infant tenant for life is entitled to a lease of considerable length of a theatre which is held upon a ground-rent of £1,000 per annum—that is to say, that rent is payable to the owner of the fee; and there now occurs an opportunity of purchasing that rent and converting the leasehold into a freehold, and it is said that it would be of great advantage to the infant to make the purchase. How is it to be done? The estate is perfectly solvent, but there is no capital money available for the purchase, and £27,500 is required to purchase the reversion. Now, can that be done? It is important to see exactly what the question is which arises upon these facts. If capital money were available for the purchase, there is no doubt the court might properly sanction it, because the infant is to be deemed a tenant for life under section 59 of the Settled Land Act, 1882, and the trustees could therefore exercise his powers and apply capital money under section 21 (6) of the Settled Land Act, 1882, "in purchase of the reversion or freehold in fee of any part of the settled land being leasehold land held for years or life, or years determinable on life"; and here the settled land is leasehold, and there is a reversion in fee to be bought, and it is therefore within that section. So far there would be no difficulty at all, but the question then arises, can you raise money to effect the purchase?—that is to say, can the trustees be authorized to mortgage the settled land in order to raise the money to make the purchase, and there comes in a question for serious consideration. Now, it is well settled that it is the policy of the Settled Land Acts to allow settled property to be sold, and to enable a tenant for life, or those having the powers of a tenant for life, to convert the property into money, and that must be borne in mind in construing the Acts, so that the court is bound to give a wide interpretation to the words of the Acts in order to assist that policy; but that does not apply to cases where the object is not to sell settled land, but, on the contrary, to acquire settled land, and the settlement itself does not enable it to be done. In the latter case it is necessary to apply the ordinary rules of construction to those other parts of the Acts which would enable this to be done—that is, to those parts of the Act which enable capital moneys to be raised or to be invested, or to be otherwise applied in improvements, &c., and which have received, if not a narrower, at least a stricter construction than those parts which are concerned with the selling of land. Therefore one must take care not to give too liberal a construction to those parts of the Act by reason of any notion that the Legislature must have intended to make easy what is here desired to be done, and which, under certain cirumstances, is authorized to be done. The question then comes to this. Section 18 of the Settled Land Act, 1882, allows money to be raised for certain purposes. It says "where money is required for enfranchisement, or for equality of

exchange or partition, the tenant for life may raise the same on mortgage of the settled land or any part thereof, by conveyance of the fee simple or other estate or interest the subject of the settlement . . . and the money raised shall be capital money arising under this Act." As to the word "required," I do not think that raises any difficulty. It does not indicate absolute necessity, but it seems to me to mean that if there is something which ought to be done, and there is no money in hand to do it, then the money is "required," and that, therefore, in such a case it should be authorized to be raised for the purpose of effecting that needful object. That, I think, is the meaning of "required." Then comes the question whether the particular transaction here proposed can be called "enfranchisement." Of course, it does not come under "exchange" or "partition." The only question then is, does it come under the term "enfranchisement," and this must be considered with reference to the rest of the Act. Now, under section 21 of the Act of 1882 you find that capital money arising under the Act may be applied (4) "in payment for equality of exchange or partition of settled land." There you have grouped together two of the objects which are recognized in section 18, for which money may be required. Where is the other object—viz., "enfranchisement"? Well, you get it in sub-section 5 in purchase of the seigniory of any part of the settled land being freehold land, and in purchase of the fee simple of any part of the settled land being copyhold or customary land." There is no doubt that is "enfranchisement," though the word is not used. There you have grouped together the cases where land is not held in common socage, and it seems to mean that where land is not held in common socage then you may apply the capital money in getting rid of the burdens between yourself and the fee simple, and convert your tenure into a fee simple. There is no question that that may be done, and there is no necessity to go into the authorities upon that. There is no question that, under sub-section 5, you can purchase the fee simple of copyhold or customary land, and that undoubtedly is enfranchisement. But is that necessarily all that is included in the word "enfranchisement"? Well, the next sub-section (6) says you may purchase "the reversion or freehold in fee of . . . leasehold land." Now, is the purchase of the reversion or freehold in fee of leaseholds also strictly "enfranchisement," for it has nothing to do with copyholds or customary land. Now, in no sub-section of section 21 is the word "enfranchisement" used, and although it is used in section 18, there is really nothing in the rest of the Act to assist me to determine what it actually means there. Can I extend its meaning so as to include the purchase of the reversions of leaseholds? With regard to the interpretation of the word by the Legislature, I have been referred to the Ecclesiastical Commissioners Act of 1860, ss. 20, 35, 36, and 37, where the word "enfranchisement" is certainly used as referring to the purchase of the reversion of a leasehold. I will only read one of those sections, as they are all upon the same lines. I will take section 36, which authorizes the raising of "a sufficient sum for the purpose of purchasing the reversion of or otherwise enfranchising the property in such lease or grant." Now there the Legislature says plainly that one way of enfranchisement is purchasing the reversion; that is clearly recognized there by the Legislature. There may be other ways, but that is one way of enfranchisement. Then reference has been made to several dictionaries and also to Coke upon Littleton, which show that the word means "freedom, obtaining freedom," and that as applied to leaseholds it means freedom from rent or from services, and, of course, if applied to leaseholds at all, that is all it can mean, and it is very appropriately so applied to them; and one must not ignore the fact that although no Act has been passed for the "enfranchisement" of leaseholds it is a fact that their "enfranchisement" is a matter which concerns many people, and I have myself been concerned in many transactions to enable leaseholders to acquire their freeholds, and in all those cases the common term used has been the word "enfranchisement." Of course, it would be wrong to rely too much upon that, but it certainly is the common term used in speaking of the acquisition of the reversion of leaseholds, and in so getting rid of the rent and services, which, when they are got rid of, leave a man master of his own property. Now, having regard to that, I think that there is nothing in section 18 in any way restricting the word "enfranchisement" so as to make it refer only to copyholds, and although (5) of section 21 does not refer to them, yet (6) of section 21 distinctly contemplates the purchase of the reversion of leaseholds. It would therefore appear that it is not unlikely that it was intended by the Legislature that money might be raised under section 18 for that purpose. I think, therefore, that I ought not to hesitate to hold that the word "enfranchisement" is of larger application and is applicable to the case of the purchase of the reversion under section 21 (6). [His lordship therefore being of opinion that the transaction was for the benefit of the estate, sanctioned the proposed mortgage and contract].

Solicitors for all parties, *Valpy, Peckham, & Chaplin.*

Chan. Div.
Farwell, J. } Aug. 10, 11, 1905.

ATTORNEY-GENERAL *v.* PONTYPRIDD URBAN DISTRICT COUNCIL. (*a.*)

Electric lighting—Land acquired for particular purpose—Part not required for that purpose—Application to another permanent purpose—Injunction—Electric Lighting Act, 1882 (45 & 46 *Vict. c.* 56), *s.* 10—*Electric Lighting (Clauses) Act,* 1899 (62 & 63 *Vict. c,* 19), *Schedule, clauses* 2 *and* 8.

Where a local authority acquires land, whether compulsorily or by agreement, for a particular purpose, it cannot use any part of the land so acquired for another permanent purpose.

Action.

This was an action brought by the Attorney-General at the relation of the trustees of the will of the Right Honourable Augusta Baroness Llanover, dated the 16th of August, 1889, to restrain the defendant council from erecting any building or works not required and intended for the purposes of or in connection with the defendant council's electric lighting undertaking, and from permanently using the land purchased by the council from the said trustees, or any part thereof, for any other purpose than that for which it was originally acquired.

In 1901 the council obtained a provisional order under the provisions of the Electric Lighting Acts, 1882 and 1888, from the Board of Trade for supplying electric light to the urban district of Pontypridd.

(*a.*) Reported by P. JOHN BOLAND, Esq., Barrister-at-Law.

By an indenture dated the 3rd of December, 1902, the council, under the powers conferred on them by the said order, purchased, not compulsorily but by agreement, a piece of land from the then trustees for the purpose of erecting thereon an electric generating station.

In April, 1903, the council applied to the Local Government Board for permission to use a portion of the said land for the purpose of erecting a refuse destructor to be used in connection with their electric generating station. In reply, the board informed them that it was not empowered to sanction the use of the land for a purpose other than that for which it was acquired. In August, 1903, the council applied to the trustees to accept a conveyance of the portion of the land on which it was proposed to erect the refuse destructor and to reconvey the same to the council; this the trustees refused to do.

Therefore, in December, 1903, the council conveyed the said portion of land to a Mr. Davies in consideration of £250, and took a reconveyance from him in consideration of a like sum of £250; no money, in fact, passed between them.

In January, 1904, the council proceeded to erect the refuse destructor on the said portion of land, and in April, 1904, this action was commenced to obtain an injunction.

Upjohn, K.C., and *Hornell*, for the plaintiffs, cited *Attorney-General* v. *Teddington Urban District Council*, 46 W. R. 88, [1898] 1 Ch. 66; *Attorney-General* v. *Hanwell Urban District Council*, 48 W. R. 69, 690, [1900] 1 Ch. 51, [1900] 2 Ch. 377.

Danckwerts, K.C., and *R. J. Parker*, for the defendants, cited *Attorney-General* v. *Corporation of Sunderland*, 2 Ch. Div. 634.

FARWELL, J., in giving judgment, said that under section 10 of the Electric Lighting Act, 1882, the council had the power of supplying electricity and nothing else. This section, read together with section 8 of the Electric Lighting (Clauses) Act, 1899, meant that the council's powers of acquisition are limited to the special purpose, and the words "dispose of" in section 8 meant to sell out and out. It was quite clear that the suggestion that a refuse destructor is really part of the generating station was an afterthought, and could not be supported in fact. There was nothing in the Act of 1899 to justify what the council has done, and it was *ultrà vires*.

Injunction granted.

Solicitors for the plaintiffs, *Freshfields*.

Solicitors for the defendants, *Sharpe, Parker, Pritchards, Barham, & Lawford*, for *J. C. Jones*, Pontypridd.

Chan. Div.
Swinfen Eady, J. } Aug. 4, 1905.

WESTERN SUBURBAN AND NOTTING HILL PERMANENT BENEFIT BUILDING SOCIETY v. RUCKLIDGE. (a.)

Practice—Writ of summons—Defendant out of jurisdiction—Substituted service of same writ within jurisdiction—Ord. 6, rr. 1, 2.

The plaintiffs obtained an order giving them leave to issue a concurrent writ and to serve the same out of the jurisdiction on the defendant, and also to serve the same by sending a copy thereof through the post addressed to the defendant at five different addresses, three of these addresses being in England and two in Belgium.

Held, that this order was regular within ord. 6, rr. 1, 2.

Motion.

In the course of this action a writ was issued on the 7th of December, 1904, and on the 13th of March, 1905, the plaintiffs obtained an order for substituted service.

This order was discharged on the 11th of May upon the evidence of defendant's daughter that the defendant had gone out of the jurisdiction before the date of the issue of the writ.

On the 5th of June the plaintiffs obtained a further order, giving them leave to issue a concurrent writ and serve the same out of the jurisdiction upon the defendant, and also to serve the same by sending a copy thereof through the post addressed to the defendant at five different places, three of these being in England and two in Belgium.

The defendant now moved to discharge this order on the ground that, as it appeared by the writ that the defendant was out of the jurisdiction, no order could be made for service within it.

G. J. Wood, for the motion.

Eve, K.C., and *Rostron*, for the plaintiffs, cited *Ford* v. *Shephard*, 34 W. R. 63.

SWINFEN EADY, J., in giving judgment, said that this case was similar to *Ford* v. *Shephard*. He was satisfied that the defendant was trying to avoid personal service. The right order had been made.

Motion refused.

Solicitors for the plaintiffs, *Tarry, Sherlock, & King*.

Solicitor for the defendant, *Graham Gordon*.

K. B. Div.
(Lord Alverstone, L.C.J., and Phillimore and Jelf, JJ.) } June 29, 1905.

LARNER v. LARNER. (a.)

Married woman—Husband and wife—Action of detinue by wife against husband—Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), ss. 12, 17.

Under section 12 of the Married Women's Property Act, 1882, an action of detinue by a married woman against her husband in respect of her personal property is maintainable.

Appeal from the deputy-judge of the Brompton County Court.

The action was brought by a married woman living apart from her husband, against her husband, to recover certain of her goods or their value.

The defendant took the objection that an action of detinue by a married woman against her husband does not lie, but the deputy-judge overruled the objection and gave judgment for the plaintiff.

The defendant appealed.

(a.) Reported by P. JOHN BOLAND, Esq., Barrister-at-Law

(a.) Reported by ALAN HOGG, Esq., Barrister-at-Law.

Cox Sinclair, for the defendant.—This action will not lie. The right conferred on a wife to sue her husband by section 12 of the Married Women's Property Act, 1882, is confined to actions "for the protection and security of her personal property." Those words do not include questions of title or possession. The proper remedy was for the wife to have applied under section 17 of the Act to a judge of the High Court or to a county court judge, who may make such order with regard to the property as he thinks fit.

Symmons, for the plaintiff.—The action does lie; section 17 is merely an alternative remedy. An action for detinue is an action for the protection of property.

He referred to *Bashall* v. *Bashall*, *Times*, Nov. 21, 1884.

Cox Sinclair replied.

Lord ALVERSTONE, L.C.J.—In this case it has been contended on behalf of the defendant that the action will not lie. The question turns on sections 12 and 17 of the Married Women's Property Act. Section 12 provides that "every woman, whether married before or after this Act, shall have in her own name against all persons whomsoever, including her husband, the same civil remedies . . . for the protection of her own separate property as if such property belonged to her as *feme sole*; but except as aforesaid no husband or wife shall be entitled to sue the other for a tort"; and by section 17, "in any question between husband and wife as to the title to or possession of property either party may apply to a judge of the High Court or of a county court, who may make such order with respect to the property in dispute as he thinks fit." It is argued for the defendant that the question in this case relates to the title to and possession of property, and that the plaintiff's remedy is therefore by an application under section 17. But in my opinion on the true construction of section 12 the action does lie. It is clear that the section contemplates some torts in respect of which a wife can sue her husband, provided protection and security of her property be concerned. The question is, what torts are covered by the section, and the difficulty which I have had, and to which there does not appear to be any answer, is that if an action will lie against a husband for damaging a chattel of the wife's, as it clearly would, there does not seem to be any reason why an action should not also lie if the husband is also wrongfully detaining the chattel. It is said that in the latter case a question of title is involved, and that the wife is therefore relegated to her remedy under section 17. It is not unimportant to observe that section 17 is an amendment of a similar section (section 9) in the Act of 1870, whereas section 12 is new; in my opinion the language of section 17, enabling a husband or wife to have a dispute determined as to the title to or possession of property is not sufficiently strong to to take away the right of action conferred by section 12. I am therefore of opinion that this appeal must be dismissed.

PHILLIMORE, J.—I agree. I was inclined at one time to think that section 17 barred any proceedings by way of action in a case of this kind, or, to put it more accurately, that, section 12 being the enabling section, section 17 had the effect of limiting the scope of section 12; but I have come to the conclusion that this is not the right view. The Act of 1882 is not a complete code dealing with the rights and position of married women. It deals only with their property, and no doubt in the drafting of section 12 the main idea was that it was necessary to give a married woman the right to take proceedings with regard to her property, and therefore the words "protection and security" were inserted in the section. It would have made the section clearer if the word "recovery" had also been used, and it is the absence of that word that has given rise to the difficulty. But although I appreciate the objection based on that omission, I see a still greater objection, that if section 12 is limited *quoad* the husband it is also limited as regards third parties. Further, when one comes to section 17 one finds that the application which may be made under that section is limited to a dispute between husband and wife as to the title to or possession of property. There is further no power under that section to award damages for injury to or detention of the property. On the whole, therefore, I am of opinion that the language of section 12 must be considered wide enough to include actions for the recovery of all kinds of personal property, including *choses in action*. I say nothing as to an action for the recovery of real property.

JELF, J.—I agree. For my part I have a much more decided view as to the effect of section 12 than has been expressed by the other members of the court. The Act of 1882 was intended to place a married woman in a very different position as regards her separate property from that which she had previously occupied. It having been enacted that a married woman should be capable of holding property as if she were a *feme sole*, it became necessary to give her remedies with regard to her separate property, and it was only logical to give her the same remedies for the protection of her property as are possessed by any other person. So far from reading the words "protection and security" in section 12 as being a limitation on the remedies of a married woman in respect of her property, I am clearly of opinion the section includes actions by a married woman to recover her property, and a great deal more. The first thing necessary for the protection of property is means to prevent it from being taken from the owner, or to get it back if it has been taken. The section enables a married woman to prosecute amongst others her husband for stealing her property (providing they are not at the time living together), and it certainly seems a strong thing to say that the same section which confers that right does not enable her to sue her husband in detinue. The provisions of section 17 seem to me intended to enable certain simple questions in dispute between husband and wife to be dealt with in a summary way. But the section is confined to questions of title and possession; it does not apply as between a wife and third parties, and there is no power to have the question submitted to a jury or to award damages. It seems to me quite impossible to say that that limited permissive right can in any way restrict or cut down the effect of section 12. Actions of this description have, I believe, since the passing of the Act frequently been brought by married women in their own names both against third persons and their husbands.

Appeal dismissed; leave to appeal.

Solicitors for plaintiff, *Oswald Hanson & Co.*

Solicitor for defendant, *F. Fitz Payne.*

Prob. Div. & Adm. Div.
Probate.
(Gorell Barnes, P.)

May 18, 19, 1905.

STONE v. HOSKINS. (a.)

Probate—Mutual will—Fresh will.

A husband and wife entered into an "arrangement" to make wills in each other's favour, and did so. The wife predeceased her husband, and at her death it was found that she had, since the making of her will, made other wills unknown to her husband, which reduced the gifts originally made to him.

The Court held that the mutual will had not become irrevocable by death, for the testatrix had not stood by it, but had executed a later will, and the husband was not prejudiced, for he had notice from the death.

Action.

The testatrix, Emily Hoskins, died on the 3rd of March, 1904.

From the evidence it appeared that there had been an agreement, or as it was said, "an arrangement" that the testatrix and her husband should make mutual wills in favour of each other, and on the 21st of November, 1900, the testatrix made a will by which she left all her property to her husband with the exception of £50.

The testatrix, however, without the knowledge of her husband executed three other wills, on the 29th of June, 1901, the 24th of June, 1902, and the 1st of February, 1904, respectively, and each time reduced the gifts to the husband.

The executors of the last will claimed probate, and the husband, as defendant, propounded the will of the 21st of November, 1900, and set up the alleged agreement. He asked the court to pronounce against the plaintiffs' will and alternatively counterclaimed that if the same was admitted to probate the executors should be directed to hold the property of the testatrix in trust for the persons benefited under the earlier will. The substance of the case he set up was that the testatrix, without notice to him, had attempted to depart from the bargain which had been carried out by the mutual wills.

Barnard, for the defendant.—Neither party could alter his or her will without the consent of, or notice to, the other party.

Bankes, K.C., and *R. H. Pritchard*, for the plaintiffs.—An agreement to make a will is not an agreement not to revoke.

They cited *Hobson* v. *Blackburn*, 1 Add. 274; *Walpole* v. *Orford*, 3 Ves. 402, 418.

Rayden, for a beneficiary.

GORELL BARNES, P., in delivering a considered judgment, said there were no doubt mutual wills made in accordance with an arrangement. The testatrix, however, departed from that arrangement and afterwards died, but the husband did not hear of her departure until after her death. He now claims that in the event which happened, of my pronouncing for the will, the executors of it should hold the property passing under it on the trusts of the arrangement. The contention of the defendant is that there was this arrangement prior to the marriage and it has been carried out by the wills of 1900, and as he has not departed from the arrangement on his part, he ought to have a declaration that matters should still stand on the basis of the arrangement. On the other hand the point is made that the arrangement contemplated by its very nature a power to revoke it in certain circumstances—*i.e.*, that it is not of the character of a settlement, and the fact that it was to be carried out by will indicates its revocability. Unless the deceased died standing by her will, so to speak, she could depart from the arrangement by her husband's consent or notice given to him. It is, I know, objected here that notice was not given. This brings me to the consideration of such authority as there is on the point. I am indebted to Mr. Royden for the reference to Hargreave's Juridical Arguments, vol. 2, p. 304, where that very learned lawyer in his elaborate opinion on *Walpole's case—Walpole (Lord)* v. *Orford (Lord)*, 3 Ves. 402—sets out at much greater length than the report in 1 Dickens the judgment of Lord Camden in *Dufour* v. *Pereira*, 1 Dick. 419. The case before me has been discussed on the lines there indicated. There it is said as follows: "A mutual will is a revocable act. It may be revoked by joint consent clearly; by one only if he gives notice I can admit, but to affirm that the survivor (who has deluded his partner in this will upon the faith and persuasion that he would perform his part) may legally recall his contract either secretly during the joint lives or after at his pleasure, I cannot allow. . . . If not revoked during the joint lives by any open act, he that dies first dies with the promise of the survivor that the joint will shall stand. It is too late afterwards for the survivor to change his mind, because the first dier's will is then irrevocable, which would otherwise have been differently framed if that testator had been apprized of this dissent. . . . Though a will is always revocable, and the last must always be the testator's will, yet a man may so bind his assets by agreement that his will shall be a trustee for performance of his agreement. . . . These cases are common, and there is no difference between promising to make a will in such a form and making his will with a promise not to revoke it. This court does not set aside the will, but makes the devisee heir or executor trustee to perform the contract."

It appears to me that the result is tolerably plain. If these two people had made wills which were standing at the death of the first to die, and the survivor had taken a benefit by that death, the view is perfectly well founded that the survivor cannot depart from the arrangement on his part, because by the death of the other party the will of that party and the arrangement had become irrevocable; but that case is entirely different from the present, where the first person to die has not stood by the bargain and her "mutual" will has in consequence not become irrevocable. The only object of notice is to enable the other party to the bargain to alter his or her will also, but the survivor in the present case is not in any way prejudiced. He has notice as from the death. I cannot see that the cases cited support the proposition for which the defendant contends, with the result that he must, I think, fail to obtain the declaration which he seeks. I pronounce for the will of 1904.

Solicitors for plaintiffs and the beneficiary, *Taylor, Hoare, & Pilcher*, for *J. & S. P. Pope*, Exeter.

Solicitors for defendant, *H. Tyrrell & Son*, for *James Beal*, Exeter.

(a.) Reported by GWYNNE HALL, Esq., Barrister-at-Law.

Court of Appeal.

From Chan. Div. (Vaughan Williams, Stirling, and Cozens-Hardy, L.JJ.) June 21, 22, 23, 24; Aug. 5, 1905.

In re TASKER & SONS (LIMITED).
HOARE *v.* TASKER & SONS (LIMITED). (*a.*)

Company—Debenture—Issue as security for loan—Payment off of loan—Debentures returned to company with blank transfers—Registered owner—Subsequent transfer to purchaser for value—Priorities.

A company duly issued a series of debentures, each of which was to rank pari passu *with the others. Certain of these debentures were issued as collateral security for loans made to the company. On repayment of the loans these debentures were returned to the company with blank transfers, but they were not transferred to the company, and the original holders continued on the register as the owners of such debentures. Subsequently these debentures were transferred to holders for value by completing the blank transfers.*

Held, that the transferees were not entitled to rank pari passu *with those debenture-holders to whom debentures had been at once issued for their full nominal value. The effect of what was done was to pay off an incumbrance which, even if it could be kept alive, could not be set up by the company, the original mortgagor against subsequent incumbrancers, and the transferees were in no better position than the company.*

Decision of Kekewich, J. (53 *W. R.* 247, [1905] 1 Ch. 283), *affirmed.*

This was an appeal against the decision of Kekewich, J. (reported 53 W. R. 247, [1905] 1 Ch. 283), upon the further consideration of a debenture-holders' action.

The articles of the company and the conditions of the debentures are fully set out in the report of the case in the court below.

In 1899 the defendant company, having power to issue first mortgage debentures up to £35,000, part only of which had been issued, and being in want of money, borrowed money from two gentlemen named Ashby and Herbert, and issued to the lenders debentures to twice the amount of their respective loans. The company paid off parts of these loans from time to time, and upon each occasion received back from the lender debentures of twice the value of the money so paid, and also, by request of the company, a transfer of those debentures executed by the lender in blank except as to his own name. From time to time the company received applications for new debentures. Whenever such an application was received, the company, on payment of the amount secured by the debentures, handed the debentures to the applicant, together with the transfers in respect thereof, with the blanks filled in by the company. In other cases the company deposited the debentures as security with persons who had made advances, but without the transfers. All the holders of these debentures were set out in the second schedule, parts 1, 2, 3, and 4 of the master's certificate, and their claim to be debenture-holders was adjourned into court. The question was, whether the transaction above referred to was in effect a transfer of the debentures, or whether it was a new issue of debentures which had been discharged. The debentures as originally issued were secured by a trust deed, and it was provided by the conditions that all the debentures of the series should rank *pari passu* as a first charge on the property and undertaking of the company, and that the company should not be at liberty to create any mortgage or charge upon its undertaking in priority to or *pari passu* with those debentures. It was contended on behalf of the plaintiff in the debenture-holders' action and of other debenture-holders specified in the first schedule to the certificate, as to whose rights there was no question, that the persons mentioned in the second schedule were not entitled to the benefits of the trust deed. Kekewich, J., said that the question was of some importance to those interested in the issue of debentures, and he thought it was a completely new question. The debentures specified in the second schedule might be perfectly good as against the company, but the question was whether they were entitled to rank *pari passu* with the debentures specified in the first schedule. His lordship came to the conclusion that when the repayment was made the debt was gone, and that when the company borrowed further money, whether by depositing the debentures as collateral securities or by issuing them in the ordinary way, they really issued new debentures. Consequently the only persons entitled to rank as holders of the issue of debentures for £35,000 were those mentioned in the first schedule. Some of the persons mentioned in the second schedule appealed.

Younger, K.C., and *Peterson*, for the appellants.—These debentures were issued as collateral security for a loan. The loan was paid off, but the payment off of the loan was not a payment off of the debentures, which remained in the names of the persons to whom they were issued as collateral security. An issue of debentures by way of collateral security is perfectly valid: *In re Regent's Canal Ironworks Co.*, 24 W. R. 687, 3 Ch. D. 43. The other debenture-holders have no right to complain of the bargain between the company and the lender that the debentures shall be security for the loan, and they can have still less right to complain that when the debentures cease to be security on payment off of the loan the company obtains value for them in cash. On the payment off of the loan the company acquired an equity against the holder that he should deliver up the debentures without further payment, and it is really this equity which is now being set up by the respondents. But they are barred by condition 9, which provides that payment shall be made without regard to any equities between the company and any intermediate holder. This case is not covered by the decision in *In re George Routledge & Sons*, 53 W. R. 44, [1904] 2 Ch. 474. That case decided that on the company becoming the registered holder of a debenture issued by itself both the debt and the security were gone, and the only contract between the company and the transferee in that case was to give the transferee the particular bit of paper which was absolutely inoperative. The result was that the transferee got nothing, but Buckley, J., did say that if there is a contract that a person is to have a loan on the terms that the lender is to have a binding security and he does not get that which he has contracted to have, he has the right to be placed in the same position as if he had got it. Here the transferees advanced their money on the understanding that they were to have valid debentures issued to them, and this part of the judgment is, therefore, in favour of the appellants. The company here was never the registered holder of the debentures. They remained in the names of the original lenders as trustees for the company and were thus kept alive: Palmer on Debentures, p. 120; *Adams* v. *Angel*, 25 W. R. 139, 5 Ch. D. 634; *Thorne* v. *Cann*, [1895] A. C. 11, 43 W. R. Dig. 121; *Liquidation Estates Purchase Co.* v. *Willoughby*, 46 W. R. 589, [1898] A. C. 321.

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

In re Anglo-Danubian Steam Navigation Co., 23 W. R. 783, 20 Eq. 339; *Frazer* v. *Jones*, 5 Hare 475; *Watts* v. *Symes*, 1 De G. M. & G. 240; *Johnson* v. *Webster*, 2 W. R. 285; and *Otter* v. *Lord Vaux*, 5 W. R. 188, 6 De G. M. & G. 638, were also cited.

P. O. Lawrence, K.C., and *Ashton Cross*, for the plaintiff.—What was done amounted to a re-issue of these debentures. Condition 2 of the debenture prevents the new issue of a debenture which has been paid off. In any case the company cannot set up these debentures against persons who are in the position of prior mortgagees.

Sheldon, for other debenture-holders in the first schedule, cited *Robinson* v. *Montgomeryshire Brewery Co.*, [1896] 2 Ch. 841, at p. 849, 45 W. R. Dig. 25; and *Mowatt* v. *Castle Steel and Ironworks Co.*, 34 Ch. D. 58, 35 W. R. Dig. 82.

Younger, K.C., replied.

Cur. adv. vult.

Aug. 5.—VAUGHAN WILLIAMS, L.J.—I am of opinion that the judgment of Kekewich, J., ought to be affirmed. The same point appears to have been already decided by Buckley, J., in *In re George Routledge & Sons (Limited)*. I have read the judgments of Stirling, L.J., and of Cozens-Hardy, L.J., in the present case, and it is sufficient for me to say that the conclusion at which I have arrived is fortified by the reasoning contained in those judgments.

STIRLING, L.J., then read the following judgment: The question on this appeal is whether the holders of certain debentures forming part of an issue by the company of first mortgage debentures to the nominal amount of £35,000 are entitled to the benefit of such debentures as against the holders of the other debentures. The powers of the company, as defined by the articles, are as stated in the report in [1905] 1 Ch. 283. The debentures were for sums of £20, £50, or £100 each. Each of them contained covenants on the part of the company that the company would, on the 1st of April, 1946, or on such earlier date as the principal moneys thereby secured became payable in accordance with the conditions indorsed thereon, pay to the person named in the debenture, or other registered holders thereof, the sum named therein, and would, in the meantime, pay interest on such sum at the rate of 5 per cent. per annum by equal half-yearly payments on the 1st of April and the 1st of October in each year. Each debenture also contained a charge of such principal and interest on the undertaking of the company and all its property, whatsoever and wheresoever, both present and future, including uncalled capital. The material conditions indorsed on each debenture are fully stated in the report. It is sufficient to point out that by condition 3 the company was empowered (but was not under any obligation) at any time after the 1st of July, 1906, to redeem the debenture upon payment of the principal and interest secured, upon giving the registered holder six calendar months' notice of its intention so to do. A large number of these debentures were issued to holders who paid to the company the full nominal amounts purported to be thereby received, and as to these no question arises. The dispute relates to debentures given to two gentlemen named Ashby and Herbert by way of security for temporary loans of sums of £1,000 and £700. On the occasions of these advances debentures to the nominal amounts of double the respective advances—that is, £2,000 and £1,400 respectively—were given to the lenders; and it was stipulated that the company should be at liberty to pay off the advances in such sums of not less than £100, and that on each such payment the lender should give up to the company securities to the nominal amount of twice the sum paid off. The debentures so given were registered in the names of Messrs. Ashby and Herbert respectively. The company availed themselves of the right of repayment thus reserved, and on each occasion of repaying part of a loan took from Messrs. Ashby and Herbert blank transfers of debentures of twice the nominal amount of the money repaid. After a shorter or longer interval of time these transfers were filled up with the names of persons who paid to the company the full nominal value of the debentures, and the names of these transferees were placed on the register of debentures in the place of Ashby or Herbert, as the case might be. The question to be decided is whether these transferees are entitled to rank *pari passu* with those debenture-holders to whom debentures were at once issued for the full nominal value. It was not disputed that if no repayment had been made to Ashby and Herbert, and the debentures had remained in their hands, they would have been entitled to prove in the action and to receive dividends on the full amount of the debentures in their hands *pari passu* with the other debenture-holders until they received in full the principal and interest due to them. This right was established by the Court of Appeal in *In re Regent's Canal Ironworks Co.* It was there decided that a company may issue or deposit debentures by way of collateral security for money lent, and that the holders of other debentures of the same issue have no equity to prevent such a bargain from being carried into effect. That case, however, does not govern the present, because there the holders of the debentures were in substance (though not formally) the original holders for value, standing in the position of Ashby and Herbert in the present case, and not in the position of the transferees from them. It is settled law that a mortgagor who pays off an incumbrance created by himself on real estate cannot set it up against a subsequent incumbrancer: *Otter* v. *Lord Vaux*. Dealing with the case just cited, Lord Cranworth, L.C., states the rule thus (6 De G. M. & G., p. 643): "The case is to all intents and purposes that of a mortgagor liable to pay a sum of money to his first incumbrancer and getting a transfer; but that transfer is something which, on general principle, he cannot set up as against a creditor claiming by a title subsequent to that of the person whose charge he has so paid off; he pays it off for the benefit of the inheritance; and all persons who are entitled to any portion of the inheritance under him are also entitled to the benefit of his having liquidated a demand prior to their title." Lord Cranworth speaks of a creditor claiming by title subsequent to that of the person whose charge is paid off; but, on principle, I can see no distinction between the position of such a creditor and that of one who ranks *pari passu* with the incumbrances paid off. This being so, it seems to me that, even if the company could keep alive the debentures handed over by Ashby and Herbert when they were paid off, and has effectually done so—points which are of considerable, but perhaps not of insuperable, difficulty—still the company could not set up those debentures against the holders of the other debentures. Further, I think that the transferees who dealt with the company and not with Ashby or Herbert are in no better position. In the first place, it seems to me that, in the circumstances of this case, the transfers could only confer a legal title by way of assignment under the provisions of section 25, sub-section 6, of the Judicature Act, 1873; and that title would be "subject to all equities which would have been entitled to priority over the right of the assignee in case the Act had not been passed," and consequently subject to the equities of the other debenture-holders. It may be

that the holders acquired a title by estoppel against the company; but this estoppel would not bind the other debenture-holders: see *Mowatt* v. *Castle Steel and Ironworks Co.* Again, condition 9, which provides that "the principal moneys and interest hereby secured will be paid without regard to any equities between the company and any intermediate holder," does not appear to meet the present case. That clause is indeed sufficient to prevent the company from availing itself of any equity to which it was entitled against an intermediate holder (see *In re Blakeley Ordnance Co.*, 16 W. R. 188, 3 Ch. App. 154); but the equity here set up is not that of the company, but of the other debenture-holders, who, in my opinion, could only be excluded from setting up their equity by clear language, as, for example, by words expressly authorizing the company to reissue debentures which had been paid off. I was at one time impressed with the distinction sought to be drawn in argument between redemption under the conditions of the debentures and payment off by virtue of the stipulation contained in a collateral contract; but the rule stated in *Otter* v. *Lord Vaux* appears to me to be independent of any such considerations. It would apply, for example, when the payment off was the result of a bargain voluntarily entered into between mortgagor and mortgagee before the time for redemption of the mortgage had arrived. For these reasons I feel constrained to come to the conclusion that the appeal fails. I much regret the result, for it is not suggested that there has been any want of good faith in the transactions which have given rise to the question; and the present holders (who, as I understand, were ignorant of the facts) may well be excused if they failed to detect the possible infirmity of the title which they accepted.

COZENS-HARDY, L.J., then read the following judgment: In the course of the arguments on this appeal many important and difficult questions have been raised. But, in the view which I take, it is not necessary for our decision that a positive answer should be given to all of these questions. I propose, therefore, to deal very briefly with several of them. It has been argued that a company which has once issued debentures to the full authorized amount may nevertheless reissue debentures which have been paid off, although there is no express power reserved so to do. As at present advised, I think a company cannot under such circumstances reissue. The reissue is in substance the creation of a fresh charge. The extinguishment of the old charge must enure to the benefit of the persons entitled to *pari passu* charges: *Frazer* v. *Jones*. But it suffices in the present case to say that the company did not profess to reissue, and that the appellants must succeed or fail as transferees of issued debentures. I will only add that in any case in which a company reissues debentures the claims of the revenue authorities will demand consideration. Again, it was argued that a company, by registering a transfer of a debenture, is estopped from denying its existence and validity. But this will not suffice for the appellants, for assuming, without deciding, that they have a good title by estoppel against the company, the respondents, who are registered holders of the admittedly valid debentures, are in no way estopped from disputing the validity of the debentures registered in the names of the appellants. *Mowatt* v. *Castle Steel and Ironworks Co.* is a clear authority against any such contention. It is necessary therefore to consider whether, as against the respondents, the appellants can establish a right to rank as transferees and holders of debentures of the first issue. Now it has not been, and it cannot be, disputed that the debentures in respect of which the appellants claim were issued to Herbert and Ashby, who were registered as holders, and for this purpose it is not material that they were issued as so-called "collateral security" for loans of lesser amount than the face value of the debentures. The debentures thus issued were redeemed by the company when the loans were paid off. The debentures themselves were handed back to the company together with transfers in blank. From that time Herbert and Ashby had nothing to do with, and had no interest in, the debentures. The appellants did not contract with Herbert or with Ashby. They entered into direct relation with the company, and after a considerable interval paid to the company the face value of the debentures. The blank transfers were filled up, and the appellants were entered on the register as holders. It seems to me that the redemption of the debentures by payment off of the loans must involve precisely the same consequences as if the debentures had been redeemed by payment off of the amount due on the debentures themselves. In either case the debentures were spent; nothing was due under or in respect of them. But it is argued that they were kept alive, though in a state of suspended animation, and were capable of transfer at the dates when they were transferred to the appellants. It is well established that, if a limited owner, such as a tenant for life, pays off a charge on the inheritance, there is a presumption that he does not make a present of it to the owners of the inheritance. So long as he lives, he is the person whose duty it is to keep down and whose right it is to receive the interest. But on his death his executors are entitled to a charge on the inheritance, with interest from his death. The charge extends beyond the life estate, and no question of merger or extinguishment arises. Lord Cranworth, in *Morley* v. *Morley*, 4 W. R. 75, 5 De G. M. & G. 620, states the principle very clearly thus: "The result of the long series of authorities, proceeding upon a very intelligible principle, I take to be this, that when an incumbrance is paid off by the person having a partial interest (that is, an interest less than the whole inheritance), unless there is something to show a contrary intention, the presumption is that he meant to do that which in law and in equity he might have done—namely, to keep it alive for his own interest, and that the omission was a mere oversight; in such a case the court will supply that omission by giving him, or causing the proper parties to give him, if necessary, an assignment or an instrument which shall put him in the same opinion as if he had obtained it for himself." The presumption is different where the party paying off the incumbrance is entitled to the inheritance—where he is absolutely entitled to the fee simple. The presumption in favour of extinguishment, where the incumbrance is paid off by the owner of the inheritance, does not arise or may be rebutted under certain circumstances. In *Thorne* v. *Cann* Lord Macnaghten says: "Nothing, I think, is better settled than this, that when the owner of an estate pays charges on the estate which he is not personally liable to pay, the question whether those charges are to be considered as extinguished or as kept alive for his benefit is simply a question of intention. You may find the intention in the deed, or you may find it in the circumstances attending the transaction, or you may presume an intention from considering whether it is or is not for his benefit that the charge should be kept on foot." The same principle is again laid down in *The Liquidation Estates Purchase Co.* (*Limited*) v. *Willoughby*. It will be observed that Lord Macnaghten carefully limits the doctrine of keeping alive to an owner who is not personally liable to pay; and, so far as I am aware, there is no authority for extending it to an owner who is

simply paying off his own debt. It is not easy to see how it can be to his interest to keep alive his own debt, which he cannot set up against his own subsequent or *pari passu* incumbrancers. Nor is it easy to follow the argument that a debtor who has paid off his debt and thus satisfied his legal obligation can keep it, or the security for it, alive for his own purposes. The language of Lord Cranworth in *Otter* v. *Lord Vaux* seems to me to indicate that in his view this cannot be done. He says: "The case is, therefore, to all intents and purposes that of a mortgagor liable to pay a sum of money to his first incumbrancer, paying it and getting a transfer; but that transfer is something which, upon general principle, he cannot set up against a creditor claiming by a title subsequent to that of the person whose charge he has so paid off." This, too, was the view of Buckley, J., in the recent case of *In re George Routledge & Sons (Limited)*, though possibly his observations may be regarded only as *dicta*. If, therefore, it were necessary for the decision of the present case, I should be prepared to hold that the company could not keep alive their debt when once paid off. But, assuming, contrary to my present view, that it is possible for an owner in fee to keep alive his own debt, I think it is clear that his intention must be unequivocally manifested at the time when the debt is paid off, and that the presumption of extinguishment cannot be rebutted by subsequent acts. In the present case there is no expressed intention at the time, and there is nothing which can be referred to as indicating intention at the time, unless it be the taking transfers in blank. But, in my opinion, that is not sufficient. An act of doubtful and equivocal import cannot rebut the legal presumption. Even a contemporaneous transfer of the charge to a trustee is not conclusive evidence against the presumption. The intention to keep alive must, in the language of Lord Langdale, not be "left as a matter of implication and inference," but must be "clearly and unequivocally expressed": *Hood* v. *Phillips*, 3 Beav. 513, 519. Nor can it be said that the company had any interest in keeping alive the debt and the security, for they could not in any way use it against their own incumbrancers. I think the debentures when redeemed must be considered as dead and gone for all purposes and as incapable of transfer. They were no longer part of the series, they were merely pieces of paper; and, that being so, the ninth condition, upon which so much reliance was placed by counsel for the appellants, has no application. The result is that the instant the debentures were redeemed by the company, the redemption inured for the benefit of all persons entitled to the *pari passu* charge. The appellants cannot be in any better position than the company through whom they claim. Their title is subsequent in date to that of the respondents, and there being no question of legal estate, priority of date is the governing element. For these reasons I think the judgment of Kekewich, J., was correct, and that this appeal must be dismissed with costs.

Solicitors, *Mackrell, Maton, Godlee, & Quincey; Wood & Wootton; E. Bevir.*

From K. B. Div. (Collins, M.R., and Romer and Mathew, L.JJ.) — July 28, 1905.

CAVALIER AND ANOTHER *v.* POPE. (*a.*)

Landlord and tenant—Notice to landlord of defective state of repair — Contract by landlord to repair—Injury to wife of tenant—Remedy of tenant—Remedy of wife.

A. lets a house to B. C., the wife of B., as agent of B., subsequently agrees with A. that B. would continue in occupation of the said premises on the condition that A. does the repairs, which are badly needed. A. does not repair, and C. is seriously injured owing to the defective condition of the kitchen floor.

Held (Mathew, L.J., *dissenting*), *that C. had no cause of action; not on the contract because she was no party to it; not in tort because it could not be shown that A. owed any duty to her so as to make him liable for misfeasance.*

Per Mathew, L.J., *C. had a cause of action, on the ground that A. induced her to continue on the premises by a representation which proved to be untrue.*

Appeal from the judgment of Phillimore, J., sitting with a common jury.

The action was brought in respect of injuries sustained by Minnie Cavalier, wife of James Cavalier, owing to the defective condition of the floor of the kitchen in a house owned by William Pope, the defendant, and let to James Cavalier.

The husband sued to recover damages he had sustained by reason of the injuries inflicted upon his wife, and Minnie Cavalier, the wife, sued in her own name to recover damages for the injuries done to her.

The jury brought in a verdict of £25 in respect to the husband's claim, and £75 in respect to the wife's claim, and Phillimore, J., gave judgment accordingly.

The defendant Pope appealed in respect of the sum awarded to the wife on the ground that she had no cause of action.

For the purposes of the appeal the following findings of the jury were undisputed: That the appellant, through his agent, had notice before the accident that the kitchen floor was out of repair; that the appellant, through his agent, had promised before the accident to put the said floor in repair.

Lush, K.C. (*Lilley* with him), for the appellant.—The wife here has no cause of action, as she was not a party to the contract, and can only base her claim, if any, in tort. This is a case of misfeasance, and to establish her claim for negligence she must prove some breach of a duty owed by the landlord to her (*Hayn* v. *Culliford*, 27 W. R. 541, 4 C. P. D. 185) unless she can bring her case within one of the three exceptions—viz., (1) Invitation to enter upon the premises; (2) public nuisance—*e.g.*, the ruinous condition of the house constituting a menace to passers-by; (3) things noxious in themselves—*e.g.*, firearms: *Scholes* v. *Brook*, 63 L. T. R. 837, 39 W. R. Dig. 133. This case falls within none of those exceptions. Certainly she was not invited upon the premises by the landlord, because the control of the premises was in the hands of the tenant. [ROMER, L.J.—Could it not be said that she had a remedy against her husband, who in his turn had a remedy over against his landlord by reason of his contract.] No; because her cause of action, if any, would rest upon the tort of her husband—viz., in inviting a person on to his premises without warning her of a concealed danger, and for tort there would be no remedy over against another. You must find a duty towards the wife owed by the landlord, and there is no such duty. If A. does not owe a duty to B., that position cannot possibly be altered by the fact that under his contract A. owes a duty to C. That is the real position here. The learned judge below rested his judgment upon a *dictum* of Lopes, J., at p. 313, *Nelson* v. *Liverpool Brewery Co.*, 25 W. R. 877, 2 C. P. D. 311. That *dictum* has been overruled: *Lane* v. *Cox*, 45 W. R. 261, [1897] 1 Q. B. 415. The very point in this case arose in this court in *Broggi* v. *Robins*, 15 T. L. R. 224, but was

(*a.*) Reported by MAURICE N. DRUCQUER, Esq., Barrister-at-Law.

expressly reserved for a future occasion, the decision going on a different question. The question has been fully answered in the recent case argued in this court, *Earl* v. *Lubbock*, [1905] 1 Q. B. 253—the only distinction being that there the injuries were caused by defective repair of a chattel, which could involve no distinction in principle. If the injury had happened to the tenant, apart from contract, he would have had no cause of action, on the maxim *caveat emptor*; how can the wife be in a better position?

He also referred to Lord Herschell's remarks in *Caledonian Railway* v. *Mulholland*, 46 W. R. 236, [1898] A. C. 216; *Le Lievre* v. *Gould*, 41 W. R. 468, [1893] 1 Q. B. 491; *Pretty* v. *Bickmore*, 21 W. R. 733, L. R. 8 C. P. 401; *Gwinnell* v. *Eamer*, L. R. 10 C. P. 658; *Payne* v. *Rogers*, 2 H. Blackstone 350.

Wilshere (*Lever* with him), for the respondents.—The wife does not base her action upon contract, but upon tort, the contract only being pleaded as an inducement to go on the premises. She was injured whilst lawfully upon the premises, and has a right of action against somebody. The landlord had full knowledge of the circumstances (*Heaven* v. *Pender*, (1883) 11 Q. B. D., at p. 512), and by his contract to repair he alone had effective control of the premises; in fact the tenant had no authority to do the repairs. A house is analogous to a dangerous instrument: *Le Lievre* v. *Gould*. There is a clear distinction between *Earl* v. *Lubbock* and this case. In *Earl* v. *Lubbock* the defendant had no knowledge of the defective condition of the cart, and he did not invite the driver to use the cart. *Miller* v. *Hancock*, 41 W. R. 578, [1893] 2 Q. B. 180, is a decision in point where a stranger received damages from the landlord. [ROMER, L.J.—If you look at all the judgments you will see that they were based on the fact that the staircase, alleged to be defective, was not let to the tenants of the flats but remained always in the occupation and under the control of the landlord. It would be absurd to say here that the landlord had control or occupation. He does not invite and could not invite anybody into the house.] I submit a duty was upon somebody, and the landlord by his contract submitted to that duty.

He referred to *George* v. *Skivington*, (1869) L. R. 5 Ex. 1, and *Tredway* v. *Machin*, 20 T. L. R. 726.

Lush, K.C., replied.

Cur. adv. vult.

COLLINS, M.R., read the following judgment: In this case the defendant let an unfurnished house to the male plaintiff at a monthly rent of £2 16s. 8d. The terms were not reduced to writing, and there is no finding that anything was then said about repairs. Some time after the letting, and before the accident hereinafter mentioned, the defendant's agent, as the jury found, agreed with the female plaintiff, acting as agent for her husband, to repair the kitchen floor, which was in a defective condition. The consideration of this promise was the withdrawal by the male plaintiff of a threat to give up the tenancy. Some months later, and before the defendant had done any repairs, the female plaintiff met with an accident owing to a chair on which she was standing going through the floor. The claim as pleaded was by husband and wife for damages for breach of contract. Phillimore, J., gave judgment for the husband, apparently on the footing of the contract, for damages sustained by him by reason of the accident to his wife. He held that the wife could not recover as for a breach of contract, but that the defendant was nevertheless liable for damages sustained by her through the defective condition of the floor, which the defendant was under contract to repair. Against this judgment in favour of the wife the defendant appeals. The learned judge, as I have said, was clearly of opinion that the plaintiff was not entitled to maintain the action on the contract made by the defendant with her husband through her agency. No doubt counsel for the respondents did seek to support the judgment in their favour by contesting the learned judge's view on this point, and they sought to apply the authorities as to misrepresentation on the sale of chattels of a dangerous character intended for the use of persons not parties to the contract: *Langridge* v. *Levy*, 2 M. & W. 519, and *George* v. *Skivington*, L. R. 5 Ex. 1, were cited. But even assuming that the latter case can be supported, there is, I think, a broad distinction between the rights arising upon the sale of chattels intended for the use of third parties and those which arise out of the failure of a contractor to put premises known to be dilapidated in repair. In this latter case there is neither fraud, misrepresentation, nor warranty, nor the handing over possession of a thing known to be dangerous without warning. There is nothing but remissness in carrying out a contract. The defendant himself was not even aware that such a contract had been made, and there is no evidence that the agent made any misrepresentation or did not intend, if this were material, that what he promised should not be performed. I need, therefore, say no more upon this point than that I cordially concur in the learned judge's view; neither is it necessary to consider whether, even if she was entitled to claim the benefit of the contract, the damages which she claimed could be treated as flowing from the breach.

It remains to be considered whether her claim can be supported on any other ground. The learned judge has based his decision in her favour on the authority of those cases, of which *Nelson* v. *Liverpool Brewery Co.*, 2 C. P. D. 311, is a type, which establish that, where premises are in such a condition as to be dangerous to passers by and particular damage results to a person so passing, an action lies against the person who is charged with the duty of keeping the premises in repair. These cases rest on the principle that the person who has control of the premises is liable for the consequences of a nuisance, and though that person is *primâ facie* to be found in the occupier, he may rebut that presumption by showing that, in effect, the control has been passed to another person, who has contracted to be responsible for the repairs. Whether the ground on which the liability has been thus cast upon the person responsible for the repairs is, as suggested by Heath, J., in *Payne* v. *Rogers*, 2 H. Bl. 350, avoidance of circuity of action, or the broader ground that the liability should rest on the person who, in fact, has the control, the liability has never, in any decided case that I am aware of, been placed on any one who was not deemed to have control. In all these cases there was a duty arising, as Lord Esher, M.R., puts it, "from proximity": *Lane* v. *Cox*, [1897] 1 Q. B., at p. 417; *Le Lievre* v. *Gould*, [1893] 1 Q. B., at p. 491. They are, in fact, cases of nuisance adjoining places of passage or public highways. Can the analogy of these cases be applied where there is no public nuisance, but merely a defect in the interior of the house, and an injury resulting therefrom to a member of the tenant's family? I think not. To hold otherwise would be to ignore the principle which limits the liability of occupiers towards licensees and guests to what has been described as setting a trap. If the view adopted by Phillimore, J., were sound, it would only be necessary for such persons to prove that they had sustained damage from the dangerous condition of the premises and that the person they sued was liable to repair them. But this is certainly not the law. Therefore, even if the defendant had by the

contract of demise taken upon himself the burden of keeping the premises in repair, I cannot see how his liability could be higher than that of an invitor, and inasmuch as the condition of the floor at the time of the accident was probably better known to the plaintiff than to the lessor, including his agent, the "trap" element is quite out of the case. But were his duties as high as those of an invitor? I think *Lane* v. *Cox* is a strong authority that they were not. There the landlord had let an unfurnished house in a dilapidated condition without making any contract to repair. It was held that he was not liable to a workman who sustained personal injuries through the defective condition of the staircase while moving furniture for the tenant at his request. "It has been held," says Lord Esher, M.R., [1897] 1 Q. B., at p. 417, "that there is no duty imposed on a landlord by his relation to his tenant not to let an unfurnished house in a dilapidated condition because the condition of the house is the subject of contract between them. If there is no duty in such a case to the tenant there cannot be a duty to a stranger. There was, therefore, no duty on the part of the tenant to the plaintiff and there could be no liability for negligence." The court followed the authority of a passage in the judgment in *Robins* v. *Jones*, 15 C. B. N. S., at p. 240, delivered by Erle, L.C.J., but prepared by Willes, J. (see p. 223). "A landlord who lets a house in a dangerous state is not liable to the tenants, customers, or guests for accidents happening during the term; for, fraud apart, there is no law against letting a tumble-down house." If no duty was created towards the plaintiff in *Lane* v. *Cox* by the letting of the house in a dilapidated condition, what difference could it have made if he had contracted with the tenant to keep it in repair? What higher rights could this fact have given the plaintiff?

I think these considerations suffice to determine this case, but even apart from them I think the plaintiff's case fails. The circumstances here are peculiar. There was no contract for repairs on the creation of the tenancy. It was not made till some time afterwards, and then it was not a contract to keep in repair, but to do certain specific repairs. I think the effect of this contract was not to put the landlord into the control of the premises so as to fix him with liability for a nuisance existing thereon. Suppose the contract to repair had been made by the tenant with an independent tradesman and not with the landlord, and that the tradesman had been remiss in beginning the work and the accident had happened, could he have been made responsible to the plaintiff? I should have thought clearly not. Why is the landlord in any worse position in the circumstances of this case? With all respect, therefore, to the learned judge, I think this appeal must be allowed and judgment entered for the defendant. I do not refer to the Housing of the Working Classes Act, 1890, which was not mentioned in the argument.

ROMER, L.J., read the following judgment: I agree with the judgment just delivered by my lord, and only desire to add a few words. The plaintiff, Mrs. Cavalier, has no contract with the defendant on which she can sue. Nor does she complain of any breach by the defendant of any public duty on his part. To enable her to succeed, she must establish that her injury was caused by his neglect of some private duty he owed towards her in reference to the dilapidated condition of the flooring in the interior of the house. Now, I take it to be clear that if a person takes as tenant an unfurnished house, he cannot, in the absence (as here) of a warranty or other special circumstances, hold the landlord liable because of damage arising to him during and by reason of his occupancy as tenant through the house being out of repair or dilapidated. And if the tenant brings his wife with him to live in the house, she cannot be in a better position than her husband by reason of her occupancy of the house. It follows that in the present case the plaintiffs, during and by reason of their original occupancy of the house, could have had no cause of action against the defendant in respect of any injury arising to them from the house being out of repair or dilapidated. It remains to be considered what difference was made by the landlord coming to an agreement with the plaintiff Mr. Cavalier after the original occupancy that he (the landlord) would repair the premises. It appears to me that that agreement gave to Mr. Cavalier a right to sue for damages for breach of the agreement, but that it did not otherwise alter or affect any duty previously owing to him by the landlord. It could not be successfully contended that by reason of the agreement the landlord is to be taken to have invited the tenant, pending the repairs, or after the expiration of a reasonable time when such repairs ought to have been done under the agreement, to remain in occupancy of the house on the footing that as between them the house was to be taken as repaired. Nor can it be said, in my opinion, that the agreement to repair brought the landlord within that class of case where the owner or occupier of dangerous premises is held liable for inviting an unsuspecting guest or stranger to come upon the premises. And the same observations apply to the wife. The contract with the husband to repair could not create a special private duty on the part of the landlord to the wife which would have had no existence in the absence of that contract. The wife could not be said to remain in occupancy of the house on the footing that as between her and the landlord the repairs were to be taken as effected, or on the footing that she was an unsuspecting person invited by the landlord to come upon or remain in dangerous premises. If any invitation to her can be implied at all, it must be an invitation by her husband which she accepted knowing all the facts. I agree, therefore, that the appeal should be allowed, and judgment entered for the defendant as against the wife.

MATHEW, L.J., read the following judgment: I regret to say that I am unable to agree with the judgments of the Master of the Rolls and Romer, L.J. The case is not free from difficulty, but I have come to the conclusion that Mrs. Cavalier is entitled to a remedy at law for the injury she has sustained. For the defendant it was contended that the husband could not recover damages for the injuries occasioned to his wife. It was said that there was no contract which bound the defendant to pay any such damages. The contract with the plaintiff, it was argued, entitled him only to damages for his personal injuries, and his wife could recover nothing because the defendant made no contract with her. My brother Phillimore properly held that the claim of the wife did not arise out of any contract with her, but he gave judgment in her favour on the ground that she must be treated as a stranger injured by the defective condition of the premises, and he dealt with the case as analogous to that of a passer-by in the street injured by the fall of some portion of a ruinous building. I do not think the judgment can be supported on this ground, for the reason given by the Master of the Rolls. But I think there is another principle to which the plaintiff's wife can have recourse. There was no doubt that she was induced to occupy the premises with her husband by a representation which proved to be untrue—viz., that the defendant had resolved that the premises should be properly repaired within a reason-

able time. That he never intended to make his representation good is shown from the fact that before and at the trial the defendant denied that any statement had been made about repairs which was binding upon him. It is true that a considerable time elapsed without complaint on the part of the plaintiffs. But I do not see how the defendant can avail himself of this fact to support his defence. He had greater forbearance and indulgence from his tenants than he could reasonably have expected. He could not say that the plaintiffs had so acted as to lead him to think that they had released him from the fulfilment of the representation which induced them to continue their tenancy. It was said that their remedy was to leave the premises, but, as the landlords of such property well know, it is not easy for humble people to change their residence. If a husband and wife had been induced to take a dwelling-house upon the representation by the lessor that the premises were, for instance, in good sanitary condition, and it turned out that they were not to the knowledge of the lessor, it could not be disputed that an action would lie on the ground of deceit at the suit of either husband or wife who had suffered from illness in consequence of the misrepresentation. I see no reason for saying that a representation, though prospective, may not be equally deceptive. It is true that the plaintiffs knew of the condition of the premises, but they did not willingly incur the risk to which they were exposed by the conduct of the landlord. With respect to the law of the case, I think there is authority for the position taken on behalf of the wife. *Langridge* v. *Levy* can be supported on the ground that the son for whom the gun was purchased was induced to use it on the faith of the promise to his father that he could do so in safety. It is said that this useful and just decision, as it seems to me, has been doubted, but it has never been overruled. It has been followed in *George* v. *Skivington*, and has been referred to without disapproval in many well-known cases—*e.g.*, *Peek* v. *Gurney*, 22 W. R. 29, L. R. 6 H. L. 377; *Longmeid* v. *Holliday*, 6 Exch. 761; *Barry* v. *Croskey*, 1 Jo. & H. 117; and *Heaven* v. *Pender*, 11 Q. B. D. 503.

Appeal allowed.

Solicitor for appellant, *R. Chapman.*

Solicitor for respondent, *John Davis.*

High Court of Justice.

Chan. Div. Kekewich, J. } Oct. 31; Nov. 1, 2.

GILBEY *v.* RUSH. (*a.*)

Settled land — Tenant for life — Lease — Principal mansion-house — Consent of trustees — Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 53—*Settled Land Act,* 1890 (53 & 54 *Vict. c.* 69), *s.* 10.

A tenant for life of settled land, in exercise of the powers conferred by the Settled Land Acts, granted a non-repairing lease of a messuage and lands, part of the settled estate, to his wife for a term of twenty-one years. The trustees of the settlement for the purposes of the Settled Land Acts, assented to the grant of such lease, but did not express such assent either to the lessor or the lessee orally or otherwise.

Held, that the lease was good as against a remainder-man, and not made in contravention of section 53 *of the Settled Land Act,* 1882; *and, further, assuming that the demised messuage was the principal mansion-house within the meaning of section* 10 *of the Settled Land Act,* 1890, *that a sufficient consent had been given by the trustees under that section.*

Action.

This was an action by the plaintiff, Sir Walter Gilbey, for a declaration that a lease of Farthinghoe Lodge, in the county of Northampton, granted to the defendant by her husband, the late G. A. G. Rush, as tenant for life was invalid as against the plaintiff.

Under the will dated the 22nd of June, 1854, of the late G. W. Rush, the Farthinghoe Estate and the Elsenham Estate, in the county of Essex, were settled to the use of the said G. A. G. Rush during his life without impeachment of waste, remainder to his first and other sons in tail, remainder to W. B. Rush, during his life without impeachment of waste, with divers remainders over.

In the year 1902 G. A. G. Rush was in possession of the settled estates as tenant for life under the said will, and being desirous of granting a lease of Farthinghoe Lodge to his wife, the defendant, for a term of twenty-one years under the Settled Land Acts, instructed Mr. Maxwell, the family estate agent, and Mr. Smythe, the son of the family solicitor to prepare and draw up such a lease. These gentlemen were the trustees of the will of the late G. W. Rush for the purposes of the Settled Land Act, and both approved of the project. They did not, however, consider Farthinghoe Lodge to be the principal mansion-house within the meaning of the statute.

By a lease dated the 26th of September, 1902, G. A. G. Rush, as tenant for life, demised Farthinghoe Lodge to the defendant for a term of twenty-one years from the 29th of September, 1902, at a yearly rent of £140. The lessee covenanted to yield up the demised premises at the end of the said term in as good a state of repair as they were at date of the lease, fair wear and tear and damage by fire excepted. There was no further covenant by the lessee to repair. After the grant of the lease G. A. G. Rush continued to occupy Farthinghoe Lodge jointly with the defendant until his death.

G. A. G. Rush died on the 2nd of November, 1903, without issue.

At the date of the action the plaintiff was in possession of the settled estates as the assignee of the trustee in bankruptcy of W. B. Rush, the next tenant for life under the will.

Stewart Smith, K.C., and *Wace*, for the plaintiff.—This lease is invalid as against the plaintiff. It was not granted for the good of the estate, but in order to provide for the defendant's wife. The lease is an improper one; the rent is sufficient, but there is no covenant by the lessee to repair. In exercising the power given him by the Act the life tenant is in a fiduciary position; here the lease is in fraud of the power and is bad: *Duchess of Sutherland* v. *Duke of Sutherland*, 42 W. R. 12, [1893] 3 Ch. 169. Further, this is a lease of the principal mansion, and the consent of the trustees has not been obtained within the meaning of section 10 of the Settled Land Act, 1890: *Bateman* v. *Davis*, 3 Maddock 98; *Greenham* v. *Gibbeson*, 10 Bing. 363; and *Pease* v. *Courtenay*, 53 W. R. 75, [1904] 2 Ch. 503.

Lawrence, K.C., and *Pollock*, for the defendant.—This is a proper lease and one that the tenant for life had power to grant. Elsenham Hall is the principal mansion-house within the meaning of section 10, and not Farthinghoe Lodge. In any case the consent of the trustees has been given to the lease; that they did not consider Farthinghoe Lodge the principal mansion-house is immaterial.

(*a.*) Reported by H. WOLCOTT WARNER, Esq., Barrister-at-Law.

KEKEWICH, J., in giving judgment, said: In this case it falls to me to decide two questions, arising under the Settled Land Acts, which are of great interest and importance and of some novelty. Before I state them it is necessary, however, to go briefly into the facts in order to show how the questions arise.

In 1902 Mr. G. A. G. Rush was tenant for life in possession of certain lands settled by the will of Mr. G. W. Rush. He was not in actual possession of the greater part of it, which was let to the plaintiff, but he was in legal terms tenant for life in possession, and was in physical possession of Farthinghoe Lodge and lands occupied therewith. There was a power of leasing under the will of G. W. Rush for a term not exceeding twelve years, and also, of course, the power of a tenant for life under the Settled Land Acts. This latter power Mr. G. A. G. Rush was minded to exercise in order to give a lease to his wife, the present defendant, and she was anxious to have such lease. She knew the property before her marriage and was devoted to it. She had spent money on improving it and desired to remain there as long as the law allowed. Such lease as he had power to grant the husband was willing to grant and the wife was willing to accept. I do not myself see any impropriety in that. It was a natural desire on the part of the husband to provide for his wife. Of course the wife regarded the possibility of the husband's death, and he did in fact die soon after the grant of the lease; she had good reason for thinking that that event might be far distant, but, of course, she desired a lease which would be prolonged beyond her husband's life if he died early. The real question is whether the lease was one which a tenant for life had power to grant. Every precaution had been taken to ensure that the lease should be a good one and its terms had been carefully considered. I can see no impropriety in the scheme. Nor do I think that there has been any want of good faith or that anything has been done in contravention of section 53 of the Settled Land Act, 1882. That section is, I think, explained so far as this case is concerned by the words of Romer, L.J., in *The Duchess of Sutherland* v. *The Duke of Sutherland*, where he says: "In my judgment these leases were not granted by the late duke in *bonâ fide* exercise of his leasing powers for the benefit of the settled estate, but were granted for the purpose of conferring, as they did confer, a benefit upon his wife, the plaintiff, at the expense or to the serious injury of those who were to come after him under the settlement in the enjoyment of the estate." What I understand the learned judge to say is that if the lease is granted at the expense or to the serious injury of those who come after, the lease must fail. I do not read the passage as meaning that the lease must not be for the benefit of the lessee. Every lease is presumably for the benefit of the lessee or he would not take it. It is the contrast between the benefit conferred on the lessee and the injury to those that come after which constitutes the offence that brings the case within section 53 of the Settled Land Act, 1882. I have therefore to consider if the benefit on the defendant was so conferred at the expense or serious injury of those who come after her. The evidence is so strong against that view that it is impossible to hold that any injury has been done or intended to those that come after. It has been suggested that so long as this lease endures the house cannot be altered, repaired, &c., and that this constitutes an injury to the estate. In my opinion the answer is that any lease would do that. The law allows a life tenant to grant a lease of any property provided that if it is the principal mansion he obtains the consent of the trustees, and this of necessity postpones any alteration or repair. I cannot accept this suggested view, which is negatived by the Act itself. It seems to me, therefore, that a good lease has been granted if it can be brought within the terms of the Settled Land Acts.

It is only necessary to deal with section 10 of the Act of 1890. Apart from that question there is no difficulty at all. That section, however, contains a proviso whereby "the principal mansion-house on any settled land" cannot be sold, exchanged, or leased by the tenant for life without the consent of the trustees of the settlement or an order of the court. I have to consider, then, whether this Farthinghoe Lodge would properly be considered "the principal mansion-house on any settled land." I am not prepared to say that there may not be more than one principal mansion-house on land settled by the same instrument. On large estates there may be several. Whether or not there is more than one must be a question to be tried in each case. Upon consideration of the evidence in this case I have come to the conclusion that Elsenham Hall, and not Farthinghoe Lodge, is the principal mansion-house on the settled land in question. If I were dealing with the Farthinghoe Estate alone I would have no hesitation in saying that Farthinghoe Lodge would be the principal mansion-house, but in considering the union of the two estates I have to determine whether Farthinghoe Lodge, as compared with Elsenham Hall, is the principal mansion-house within the meaning of the section, and I hold that it is not.

That being so, it is not necessary to determine the second question, as to whether there has been a consent by the trustees; but the question has been argued before me, and I think it only fair to the parties that I should express my opinion upon it.

Assuming, then, that Farthinghoe Lodge is the principal mansion within the section on this settled land, the consent of the trustees of the settlement for the purposes of the Settled Land Acts become necessary. What consent is necessary? In the first place the consent must be given at the time, it cannot be retroactive (*Greenham* v. *Gibbeson*); and secondly, it must be considered *ad hoc* with reference to the particular transaction, with full responsibility and with a full knowledge coming home to the trustees that they are the trustees for the purpose of the transaction in question. The Act contains no definition of the consent required. It certainly need not be in writing, and it seems to me that it need not be communicated either to the lessor or the lessee so long as it is given. Of course it must be the consent of both trustees honestly given, and the consent of one assented to by the other without consideration might be difficult to support. Let us see what happened in this case. Mr. Maxwell, the family estate agent, was concerned in the lease from beginning to end, and approved of it heartily as being for the benefit of all parties. Mr. Smythe, the son of the family solicitor, is in a position not far different, though somewhat weaker. He was not in his father's office when the lease was negotiated, but joined before it was granted, and all the papers passed through his hands. He entirely approved, and thought it a good thing to be done; but no consent was expressed orally or otherwise either to the husband or the wife. Why should not that be sufficient? Section 10 of the Settled Land Act, 1890, puts a fetter on the action of the life tenant. If the trustees assent, it seems to me that by that assent all that is required is obtained. But the trustees are required to give their consent to the lease of the principal mansion-house, and it was suggested with some force that as neither of them considered Farthinghoe Lodge

to be the principal mansion-house they did not think that their consent was required, and therefore they could not be said to have consented to a lease of the principal mansion-house. This somewhat troubled me, but the answer seems to me to be this—they both consented to the lease of Farthinghoe Lodge, and so long as they did that their opinion as to whether or not it was the principal mansion-house is immaterial. I must take it, therefore, that the trustees gave their consent within the meaning of the Act. This disposes of all the questions before the court, and there must be judgment for the defendant with costs.

Solicitors for the plaintiff, *Baileys, Shaw, & Gillett.*

Solicitors for the defendant, *Granville Smith, Coleman, Betts, & Co.*

Chan. Div.
Farwell, J. } June 26, 1905.

In re HOLE.
DAVIES *v.* WILLS. (*a.*)

Inland revenue—Estate duty—Lunacy—Lunatic entitled to both real and personal estate—Estate duty payable for real estate out of personalty—Charge for next-of-kin—Surplus rents—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *s.* 9, *sub-section* 1.

A testatrix, by her will, gave all her real and personal estate to D., her sole executor, upon trust, in certain events which had taken place, for her brother, a lunatic. She died in 1896. *D., as committee as well as executor, paid all the estate duty, for realty and personalty, out of personalty. The lunatic died in* 1903 *intestate. The lunatic's next-of-kin claimed that they were entitled to a charge on the real estate for the duty so paid out of the personalty, on the ground that during the lunatic's life, the income of the realty being more than enough for his support, the surplus rents had been accumulating and were quite enough to have satisfied the estate duty:*

Held, on the assumption that a charge on the real in favour of the personal estate was created by such payment, which point the court refused to decide, the accumulation of rents ought to have borne the charge, which must be considered to have been discharged thereout; and therefore that the claim of the next-of-kin failed.

Petition.

This was a petition for the distribution of the real and personal estate of a Mr. A. J. B. Davies, a person of unsound mind.

He died on the 20th of February, 1903, intestate.

The petition was intituled in three actions for the administration of certain estates, in all of which the lunatic was entitled to participate.

The sister of the lunatic, Mrs. F. J. Hole, who died in December, 1896, and to whose estate he was absolutely entitled at her death, by her will appointed Canon S. E. Davies her sole executor and trustee, and devised and bequeathed to him all her real and personal estate upon certain trusts, under which the lunatic became entitled as aforesaid. Canon Davies was appointed committee of the estate of the lunatic, and on Mrs. Hole's death paid in respect of the real estate the estate duty due thereon, out of the personalty—namely, the sum of £816 15s. 9d. He never applied in lunacy for any directions about this payment or for a charge on the realty for the amount so paid.

It was shown that the income derived from the lunatic's estate was more than enough to provide for his maintenance, and accordingly there was an accumulation of the surplus rents and profits of the realty after so providing. These accumulations between the deaths of Mrs. Hole and the lunatic amounted to more than the said sum of £816 15s. 9d. The lunatic's next-of-kin accordingly presented this petition, asking, among other things, for a declaration that they were entitled to a charge upon the lunatic's real estate for the said sum.

No evidence was produced of the alleged practice in lunacy, that when ordering payment of the duty, a charge on the real estate was given. The only evidence produced was a master's order of February, 1900, in the estate of M. J. Grimshaw, and the circumstances of such order did not appear.

Jenkins, K.C., and *Dickinson*, for the petitioning next-of-kin, cited the Finance Act, 1894 (57 & 58 Vict. c. 30), s. 6, sub-section 2, and s. 9, sub-section 1.

Butcher, K.C., and *Higgins*, for the heir-at-law, cited *Ex parte Grimstone*, Amb. 706; *Newcombe* v. *Newcombe*, 3 Ir. Eq. Rep. 414; *Lord Leitrim* v. *Enery*, 6 Ir. Eq. Rep. 357, 365; *In re Leeming*, 9 W. R. 403, 3 De G. F. & J. 43; *Attorney-General* v. *Marquis of Ailesbury*, 36 W. R. 737, 12 App. Cas. 672; Pope on Lunacy (2nd. ed.), on p. 167. [By FARWELL, J.—Pope on Lunacy (2nd. ed.), on p. 212.]

Upjohn, K.C., and *R. J. Parker*, for certain other next-of-kin, cited *In re Melly*, 31 W. R. 898, 49 L. T. 429, and Lord Macnaghten's judgment in *Attorney-General* v. *Marquis of Ailesbury*, 36 W. R. 737, 12 App. Cas., on p. 690.

H. B. Vaisey, for Canon Davies.

FARWELL, J.—This is a point which I think it is proper for this court to decide, although I should have been better satisfied if I could have seen my way to sending it to the Court of Lunacy. I am certainly not deciding it from any desire to trench on their jurisdiction, but because I do not see my way clear to send it to them to decide for me. [His lordship referred to the facts set out above, and read section 6, sub-section 2, and section 9, sub-section 1, of the Finance Act, 1894.] I assume for the purpose of my judgment in this case that the duty which was so paid by Canon Davies became thereupon a charge upon the real estate. I do not desire to decide that point, because there may be a question whether that section means anything more than that there shall be a charge upon the estate for the benefit of the Crown or for the benefit of any person who may find the money to pay the duty, being a person other than the person accountable. Now in the present case if A. J. B. Davis had not been a person of unsound mind, it was absolutely immaterial how the duty was paid, whether out of his realty or personalty; but, inasmuch as he was of unsound mind and Canon Davies paid the duty, properly in my opinion, out of his personal estate, I have to decide what the effect of section 9 has been in view of subsequent events. The income of the lunatic was more than sufficient to maintain him, it was produced in very nearly moieties by the realty and personalty. It was enough to maintain him, and to leave a balance of rents, after deducting the maintenance rateably from the rents of the realty and personalty, not only sufficient to keep down the interest on this charge, but also, if that be proper, to discharge it altogether. Now, assuming section 9, to have created a charge, it was a charge vested in Canon Davies, who was the person in receipt of the rents and profits, and who was also the legal owner of the personal property. This matter has never come before the Court in Lunacy. Probably the committee would have applied originally, if he had

(*a.*) Reported by A. R. TAYLOUR, Esq., Barrister-at-Law.

thought fit, but it was not necessary for him to do so, because he did not require to apply to the court for the payment of the money; consequently he made the payment merely by virtue of his power as executor. The payment having been so made, it is the duty of the court to consider whether that payment has operated to alter the rights of the real and personal representatives of the lunatic as between themselves. In lunacy, the court always, so far as possible, subject to the paramount duty of seeing to the interests of the lunatic, avoids interfering with the rights of the personal representatives and the heir-at-law *inter se*. Now, in the events that have happened, what is fair between the parties? What will interfere least with the rights of the real and personal representatives? It is admitted by counsel, and I think rightly, that the interest on this charge must be kept down out of the rents of the real estate, and, if that be so, it must logically follow that Canon Davies, the person entitled to the charge, must be treated as mortgagee in possession for all purposes. That is the view of Lord St. Leonards in *Lord Leitrim* v. *Enery*, 6 Ir. Eq. Rep., pp. 357 and 365: "If there be a surplus of the rents of the real estate after providing for the lunatic's maintenance, the estate may be made to discharge its own burden by applying the surplus rents from time to time in discharge of the incumbrance; and if the rents have been accumulated, although they form part of the personal estate, they may be applied in paying it off." In my opinion, I am bound to regard the charge as having been paid off in the way there suggested by the Lord Chancellor. There is therefore no charge now existing in respect of the estate duty, and the claim of the petitioners fails.

Solicitors, *Currie, Williams, & Williams; Trower, Still, Freeling, & Parkin; Richard Ballard; E. Bevir.*

Chan. Div.
Swinfen Eady, J. } Aug. 3, 4, 10, 1905.

In re MARVIN.
CRAWTER *v.* MARVIN. (*a.*)

Executor — Retainer — Judgment creditor — Judgment against executor—Administration decree.

A simple contract creditor obtained judgment de bonis testatoris *against the executrix. The executrix did not plead* plene administravit *or her retainer. Subsequently a decree for administration was made.*

Held, that the judgment was conclusive proof that the executrix had assets to satisfy it, and that in the administration action the executrix could not claim to retain a debt due to herself as against the judgment creditor.

Further consideration.

The defendant was the executrix of Richard Marvin, who died on the 30th of June, 1899.

In April, 1900, the plaintiff Elizabeth Crawter, a simple contract creditor, issued a summons for administration.

In May, 1900, the plaintiff issued a writ in the Queen's Bench Division, and on the 18th of May, 1900, she signed judgment under order 14 against the executrix for £5,000 and £7 costs, "to be levied of the goods and chattels which were of the said Richard Marvin, deceased, at the time of his death in the hands of the defendant as executrix to be administered, if she has so much thereof in her hands to be administered, and if she hath not so much thereof in her hands to be administered, then £7, being the costs aforesaid, to be levied out of the proper goods and chattels of the said defendant."

On the 28th of May, 1900, a decree for administration was made.

In December, 1900, the conduct of the action was given to certain simple contract creditors.

A question was raised on further consideration, as to whether the executrix could retain a simple contract debt of £4,821 as against the simple contract debt of the judgment creditor on which £4,519 was certified to be due for debt and costs.

Theobald, K.C., and *W. Baker*, for the creditors with conduct.

Micklem, K.C., and *Waggett*, for the executrix.

Eve, K.C., and *T. T. Methold*, for the judgment creditor.

Henry Wace, for a specialty creditor.

SWINFEN EADY, J., in giving judgment, said: The short point is whether the executrix can retain her debt as against the judgment creditor. Before the decree for administration was made the plaintiff obtained the ordinary common law judgment *de bonis testatoris* against the executrix for her debt. The executrix did not plead *plene administravit* or her retainer.

Now it is pointed out in Williams on Executors (8th ed.), p. 1986, that the difference in effect between a judgment *de bonis testatoris* and a judgment *de bonis testatoris et si non de bonis propriis* against an executor or administrator is not so great as it may appear at first sight, "for although the judgment is only *de bonis testatoris*, yet the executor, upon a deficiency of assets, must ultimately pay the debt, as well as costs recovered, out of his own pocket, because the judgment is in law a proof that he has assets to satisfy it." The early history of the law is fully dealt with in the notes to *Wheatley* v. *Lane*, 1 Wms. Saund. 216*a*, 219*b*. The nature and extent of the right of an executor or administrator to retain a debt due to him from the deceased is dealt with in Williams on Executors (8th ed.), p. 1043, and at p. 1970 it is stated that "it is held to be optional in the executor or administrator either to plead a retainer for such debt, or to give it in evidence under a plea of *plene administravit*.

If, however, the executor does not set up the retainer in one form or another, the judgment is conclusive proof that he has assets to satisfy it.

Under these circumstances I am of opinion that in an administration action an executor cannot claim to retain his debt against a judgment creditor. The question, of course, only arises in case of an insufficiency of assets. The executor claims to retain the assets to satisfy his own debt, and says to the judgment creditor "There is not enough to pay you." In my opinion he cannot do this in face of a judgment which is conclusive between the two.

This principle was recognized in *In re Hubback*, 33 W. R. 666, 29 Ch. D. 934. In that case one of two executors claimed to retain against a balance order directing a call to be paid out of assets in their hands "to be administered in a due course of administration." It was held that this was not a judgment to pay a definite sum *de bonis testatoris* to which the executor could have pleaded *plene administravit* or set up the retainer, and therefore there was no admission of assets, and the right of retainer was not destroyed. In the present case there was a judgment for a definite sum against the executrix. She did not plead *plene administravit* or retainer, and it is now too late to do so.

Solicitors, *Williamson, Hill, & Co.; Emmet & Co.*, for *C. W. W. Bowling*, Southsea; *Baileys, Shaw, & Gillett.*

(*a.*) Reported by PAUL STRICKLAND, Esq., Barrister-at-Law.

Chan. Div.
Swinfen Eady, J. } July 15, 29, 1905.

In re MATHEWS.
OATES *v.* MOONEY. (*a.*)

Practice—Co-plaintiffs—Striking out one of co-plaintiffs—Stay of proceedings—Discretion of court.

A co-plaintiff who has compromised with the defendants has no absolute right to have his name struck out. In a proper case his name will be struck out and added as a defendant upon security being given for the costs of the defendants. On an application by two defendants to strike out the name of one of three co-plaintiffs on the ground that she had entered into a compromise with them, the order was refused by the court.

Attorney-General *v.* Cooper, 3 *My. & Cr.* 258, *and* Brown *v.* Sawer, 3 *Beav.* 598, *followed.*

Adjourned summons.

A testatrix, S. Mathews, by her will and codicil left the sum of £1,500 upon trust for the plaintiff Mrs. Oates for life and then for three of the testatrix's grandchildren absolutely.

In 1893 Mrs. Oates mortgaged her life interest in the fund to the City Assets Co. (Limited).

The form of mortgage contained a power for the mortgagees to take any proceedings they should think proper for the protection of the estate of the testatrix and to use the name of the mortgagor, if necessary, for that purpose.

In 1904 the City Assets Co. sub-mortgaged this security to the plaintiff H. J. Simpson, together with a policy on the life of Mrs. Oates.

In 1904 an action was commenced by Mrs. Oates, H. J. Simpson, who was also a mortgagee of the reversionary interest of H. R. Mumford, a grandson of the testatrix, in one-third of the fund, and Isabel Bateman, the mortgagee of the reversionary interest in another third, against Mooney and Lickorish, the trustees of the will, and a solicitor named Bellord. It was alleged that the firm of Lickorish & Bellord had acted as solicitors for the trustees and had received the sum of £1,500 for which they and the defendant Mooney were jointly and severally liable.

The defendant Lickorish became bankrupt in 1904 and did not appear.

Affidavits were filed by Bellord and Mrs. Oates, from which it appeared that in March, 1905, the defendant Bellord arranged with Mrs. Oates, who was over eighty years of age, to compromise the action on the terms of paying her an annuity of £30 a year during her life and £30 paid down in advance. This compromise was arranged without the knowledge of Mrs. Oates' mortgagee or of the solicitors to whom Mrs. Oates had given a retainer jointly with her co-plaintiffs. The solicitors for the co-plaintiffs had refused to recognize this compromise, and leave had been obtained to deliver interrogatories to the defendants in the names of all the co-plaintiffs.

This was a summons taken out in the action by the defendants Bellord and Mooney asking that proceedings might be stayed between the plaintiff Mrs. Oates and themselves, or in the alternative asking that the name of Mrs. Oates might be struck out from the record.

E. A. Nepean, for the summons, argued that a solicitor whose authority had been revoked could not continue the proceedings, and that this summons was the proper course to adopt for staying proceedings so far as Mrs. Oates was concerned.

W. Baker, for the co-plaintiffs, contended that this summons was incorrect. One co-plaintiff cannot retire from an action as of course. The application, too, was entirely bad on its merits in the circumstances, and moreover, Mrs. Oates being a necessary party, there was power to use her name by virtue of the clause on that behalf contained in the mortgage deed.

SWINFEN EADY, J., stated the above facts, and continued: The applicant's case is that he, a solicitor, went to Mrs. Oates behind the back of her solicitors and her mortgagee and, by promising her an annuity of £30 a year and £30 down, obtained from her some document accepting a compromise of the action. The plaintiffs oppose the application upon the ground that under the terms of the mortgage deed they have power to use the name of Mrs. Oates. I cannot decide this point on the summons, but it will be reserved to the hearing, and the defendant can then plead the compromise in his defence. But I cannot stay proceedings summarily.

In several cases it has been pointed out that it is not a matter of course to allow one of several co-plaintiffs to withdraw and have his name struck out. If co-plaintiffs disagree the general rule is that the name of one is struck out as plaintiff and added as defendant. But in Daniell's Chancery Practice, vol. 1, p. 224, of the 7th edition, it is stated that "an order to strike out the name of a co-plaintiff will not be made as a matter of course even on the terms of giving security for costs." In *Attorney-General* v. *Cooper*, 3 Myl. & Cr. 258, an information was filed at the instance of several relators, and on their application an order of course was obtained to amend by striking out the names of all the relators except one. The Six-Clerk conceiving such amendment to be irregular refused to enter it, and the Vice-Chancellor refused a special application to thus amend upon an undertaking to give security for the defendants' costs to the time of the application. In 1837 the matter came before the Lord Chancellor. He discussed the question whether there was any ground for the application that the names of some of the relators should be struck out, and said that they must shew "that justice will not be done or that the suit cannot be so conveniently prosecuted unless the alteration is made." He then examined the circumstances and refused the application. In *Brown* v. *Sawer*, 3 Beav. 598, it was decided that where there are two co-plaintiffs one cannot sever as of right. The Master of the Rolls there considered that "justice will not be done unless the alteration is made," and made the order prayed, on the terms of security being given for the costs of the original defendant. That practice would be followed in a proper case, but this summons is irregular and also fails upon its merits. The co-plaintiff here is a necessary party to the action and I cannot stay proceedings. I dismiss the summons with costs, but the applicant may amend his defence by pleading the compromise.

Solicitors, *Bellord & Coveney; Bowkers.*

(*a.*) Reported by C. H. CARDEN NOAD, Esq., Barrister-at-Law.

Chan. Div.
Swinfen Eady, J. } June 6; July 16, 1905.

In re MARSHALL'S SETTLEMENT.
MARSHALL *v.* MARSHALL. (*a.*)

Settled land—Tenant for life—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 2 (1) (5).

Freeholds were settled by plaintiff on his marriage, to the use of himself for life, remainder to the use of his

(*a.*) Reported by C. H. CARDEN NOAD, Esq., Barrister-at-Law.

wife to receive a jointure during her life, remainder to trustees during a term to raise portions for children, remainder to the plaintiff in fee:

Held, that plaintiff was tenant for life within the meaning of the Settled Land Acts.

In re Mundy and Roper's Contract, 47 *W. R.* 226, [1899] 2 *Ch.* 175, *followed.*

Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 2, *sub-sections* 1 *and* 5, *discussed.*

Summons.

Thomas Horatio Marshall, the plaintiff, upon his marriage with Lucy Martina Bree created a settlement dated the 29th of November, 1862, whereby certain lands, tenements, and hereditaments stood limited to the use of the plaintiff for life, with remainders to the use that if his wife Lucy Martina should survive him she might receive a jointure of £400 a year during her life, reducible to £200 a year in the event of her second marriage, and to further uses limiting powers of distress and entry for the purpose of enforcing payment of the said jointure, and subject and charged as aforesaid to the use of the trustees of the settlement for a term of 100 years to commence from the decease of the plaintiff upon the trust thereby declared to raise the sum of £5,000 for portions for the children of the marriage upon attaining the age of twenty-one years or marrying, and subject thereto and to the trusts of the term to the use of the plaintiff, his heirs and assigns, for ever.

The question raised by this summons was whether the plaintiff was, under this settlement, a tenant for life or had the powers of a tenant for life under the Settled Lands Acts.

H. Johnston, for the plaintiff, argued that though perhaps not technically a tenant for life, because the remainder in fee was also limited to him after the intervening jointure and term for portions, the plaintiff had as a matter of fact the first life estate, and that the settled property did actually "stand for the time being limited to or in trust for persons by way of succession" in accordance with the definition of a settlement in the Settled Land Act, 1882, and thus came within the policy and scope of these Acts.

Champernowne, for the defendants, the trustees of the settlement.

Cur. adv. vult.

SWINFEN EADY, J., in delivering judgment, referred to the terms of the settlement, and continued as follows: It will be observed that the husband, who is the settlor, takes an estate for life, and also the remainder in fee, subject to the jointure and portions, and the question is whether there is a settlement within the meaning of the Settled Land Act or whether there is an estate in fee simple in possession in the plaintiff, subject to the charge of jointure and portions. In considering this question I bear in mind what was said by Chitty, L.J., in delivering the judgment of Lindley, M.R., and himself in *In re Mundy and Roper's Contract*, 47 W. R. 226, [1899] 1 Ch. 275, at p. 288: "The broad policy on which the Act is founded is laid down by the House of Lords in *Lord Henry Bruce* v. *Marquis of Ailesbury*, 40 W. R. 243, [1892] A. C. 356. The object is to render the land a marketable article, notwithstanding the settlement. Its main purpose is the welfare of the land itself, and of all interested therein, including the tenants, and not merely of the persons taking under the settlement. The Act of 1882 had a much wider scope than the Settled Estates Acts. The scheme adopted is to facilitate the striking off from the land of the fetters imposed by settlement; and this is accomplished by conferring on tenants for life in possession, and others considered to stand in a like relation to the land, large powers of dealing with the land by way of sale, exchange, lease, and otherwise, and by jealously guarding those powers from attempts to defeat them or to hamper their exercise. At the same time the rights of persons claiming under the settlement are carefully preserved in the case of a sale by shifting the settlement from the land to the purchase-money which has to be paid into court or into the hands of trustees. The Act of 1882 and the subsequent Acts ought, then, to be construed by the court with regard to these broad principles and in a spirit of wise and reasonable liberality." The question in that case was whether it was necessary for the jointress and younger children to join in the conveyance for the purpose of releasing their rights. The learned judge then proceeded to consider the provisions of sub-section 1 of section 2 of the Settled Land Act, 1882, and said (at p. 290): "The right interpretation of the words 'stands for the time being limited to or in trust for any persons by way of succession' is a critical point in this case. The words have no technical force. I see no sufficient reason for restricting their meaning. I think that, according to the natural and ordinary meaning of the words, they include the case of a jointure and portions for younger children limited to arise on or after the death of a tenant for life, and the terms of years limited to trustees to secure them. The jointress and the portioners take an interest in the land, and they succeed to their interests in the land on or after the death of the tenant for life. I state this proposition generally, and without reference to the Acts imposing a duty on successions; but such Acts, if referred to, would support this proposition. It may be that conveyancers, when they employ the phrase that the lands stand limited to uses, often mention only the leading estates in the land—namely, the estates of freehold—and refer to jointures and portions as charges or incumbrances to which the freehold estates or some of them are subject. Such a mode of reciting title is often sufficient for the purpose which it is intended to serve. But it is quite correct in point of law to set out among the limitations to which the land stands limited the limitations in favour of the jointress and the portioners and the terms for securing them, and this is often done by conveyancers." That reasoning is directly applicable in the present case. The jointress and portioners will succeed to their interests upon the death of the tenant for life, and the trustees of the term to secure the portions will then become entitled in possession to the term of years thereby limited to them to commence from the decease of the plaintiff. Under these circumstances, I am of opinion that under or by virtue of the settlement of the 29th of November, 1862, the lands in question or some estate or interest in them stand limited to or in trust for persons, by way of succession, within the meaning of section 2, sub-section 1, of the Settled Land Act, 1882, and that under sub-section 5 the plaintiff is the tenant for life of those lands for the purposes of the Act. In my judgment, the doubt expressed in the last edition of Wolstenholme's Conveyancing and Settled Land Acts (8th ed., at p. 307), as to whether there is a "settlement" in such a case as the present, where the husband is the settlor, is not well founded. My decision leaves open the question, upon which Vaughan Williams, L.J., expressed a doubt in *In re Mundy and Roper's Contract* (at p. 298), whether the land will continue to stand limited by way of succession after the death of the tenant for life, and when the remainder shall have fallen into possession, subject to any terms previously created. My decision in the present case is in entire conformity with what was said by Farwell, J., in *In re Phillimore*, 52 W. R.

682, [1904] 2 Ch. 460. There Captain Phillimore, being the owner in fee of certain freeholds and absolutely entitled to certain leaseholds, declared trusts under which he made himself tenant for life, with trusts in remainder to pay certain annuities, and subject thereto for himself absolutely. That, said the learned judge, was obviously a settlement within the meaning of the Act.

Solicitors, *Williamson, Hill, & Co.*, for *Trafford & Cook*.

Chan. Div.
Warrington, J. } June 20, 1905.

In re GUEDALLA.
LEE *v.* GUEDALLA'S TRUSTEE. (*a.*)

Bankruptcy—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *ss.* 9, 44—*Power of appointment—Appointment by bankrupt's will—Property divisible among creditors —Creditors subsequent to receiving order—Assets.*

H. G. had, under a settlement, a general testamentary power of appointment over a fund. By his will, made in 1892, *he executed the power in favour of E. L., whom he appointed executor. A receiving order was made against H. G. in* 1900, *and he was adjudicated a bankrupt on the* 1*st of October*, 1900. *E. L. proved against the estate for* £1,131. *H. G. died in* 1904 *without having obtained his discharge. Between the date of the receiving order and the time of his death he had become indebted to various creditors.*

Held, that the appointed fund was not property divisible amongst the creditors in the bankruptcy, either under section 44 *of the Bankruptcy Act*, 1883, *or by virtue of any equitable doctrine as to property appointed in exercise of a general testamentary power; that the trustee in the bankruptcy was not entitled to receive the fund; that the duty of dividing it devolved upon the executor; and that the only creditors who had a right to share in the fund were the creditors who had become so after the bankruptcy.*

Jenney *v.* Andrews, 6 *Madd.* 264, *followed.*

Action.

A settlement was executed on the 3rd of November, 1840, on the marriage of Haim Guedalla, by which a sum of £2,000 3½ per cent. bank annuities was settled upon certain trusts under which he, in the events which happened, became entitled to a general testamentary power of appointment over the fund.

On the 5th of September, 1892, Guedalla made his will, reciting the power and appointing the annuities to Edward Lee absolutely.

Lee was also appointed his sole executor.

On the 17th of August, 1900, a receiving order was made against Guedalla, and on the 1st of October, 1900, he was adjudicated a bankrupt.

The official receiver was the trustee in his bankruptcy.

Lee proved in the bankruptcy for a sum of £1,131 9*s.* 11*d.*

Guedalla died on the 2nd of October, 1904, without having obtained his discharge.

At the time of his death he was indebted to various persons in sums amounting to about £170 incurred since the date of the receiving order, and not provable in the bankruptcy. The question arose whether Edward Lee, the executor, was entitled to receive from the trustees of the settlement the funds representing the bank annuities, or whether those funds ought to be transferred to the trustee in bankruptcy for administration by him as part of the bankrupt's estate, and were assets for payment of debts provable in the bankruptcy.

This action was brought by Lee against the trustee and against Wolfe Levy, representing the creditors whose debts were provable in the bankruptcy, claiming declarations that the plaintiff was entitled to receive the funds and administer them; that neither the trustee in bankruptcy nor any of the creditors whose debts were provable in the bankruptcy was or were entitled to prove in respect of such debts in the administration by the plaintiff of the estate of Guedalla; and that the appointed fund was assets out of which the plaintiff would be entitled to retain any sum claimable by him against the estate of the deceased.

Norton, K.C., and *T. Ribton*, for Lee.

R. J. Parker, for the defendants.

WARRINGTON, J. (after stating the facts).—The real question which I have to decide is whether, under the circumstances I have mentioned, this fund is one which is to be administered and dealt with in all respects as if it had been property vested in the trustee in bankruptcy. It is not contended that it did vest in the trustee, but it is said, applying the equitable doctrine relating to funds subject to powers of appointment which have been exercised by the donee, that the fund should be treated in all respects in a court of equity as if it had been the property of the donee, that if it had been the property of the donee it would have vested in the trustee in bankruptcy, and that being so, it must be administered and dealt with as if it had been so vested. That seems to me to be the real question. There is a subsidiary question, which is this: Whether, assuming the answer to what I consider the real question to be in the negative, then should the fund be distributed amongst the two classes of creditors *pari passu?*

Now, as I have said, I will consider the real question first. For that it is necessary to look at the provisions of the existing Bankruptcy Act of 1883. First, I think it is desirable to look at section 44, which provides what property shall be divisible amongst the creditors. Section 44 provides this: "The property of the bankrupt divisible amongst his creditors, and in this Act referred to as the property of the bankrupt, shall not comprise the following particulars"—which I need not read—"but it shall comprise the following particulars: (i.) All such property as may belong to or be vested in the bankrupt at the commencement of the bankruptcy, or may be acquired by or devolve upon him before his discharge; and (ii.) the capacity to exercise and to take proceedings for exercising all such powers in or over or in respect of property as might have been exercised by the bankrupt for his own benefit at the commencement of his bankruptcy or before his discharge. . . ." Now, that section, it will be observed, enumerates, not the classes of property which are vested in trustees, but the property of the bankrupt divisible amongst his creditors, and it plainly does not in terms include property over which the testator has a power, not for his own benefit, but a testamentary power which he may exercise in any way he pleases.

Now, the only section which it is necessary to refer to is section 9. That is the section which enacts what shall be the effect of a receiving order made under the Act: "On the making of a receiving order an official receiver shall be thereby constituted receiver of the property of the debtor, and thereafter, except as directed by this Act, no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the debtor in respect of the

(*a.*) Reported by PERCY H. WINFIELD, Esq., Barrister-at-Law.

debt, or shall commence any action or other legal proceedings unless with the leave of the court and on such terms as the court may impose."

Now, the first question is, What is the position of property over which a person has a testamentary power which he exercises? Is it to all intents and purposes his property, or does it only constitute assets which, subject to certain restrictions, are applicable by the executor, in due course of the administration of the estate, to the payment of such debts of the testator as his own property is not sufficient to pay? It is admitted that it does not go further than that. Now, to a certain extent there is a doubt, according to the doctrine of the court of equity, that funds under those circumstances are treated as the property of the donee of the power. For that reference has been made to the case of *Lord Townshend* v. *Windham*, (1750) 2 Ves. sen. 1, which is a very peculiar case; but I think in all cases in which those expressions have been used the judges who made use of them had nothing to consider except the relative position of the volunteers under the exercise of the testamentary power and the creditors of the testator. I think that is shown quite clearly in *Lord Townshend* v. *Windham* by the comparison which the Lord Chancellor (Lord Hardwicke) makes in that case between the position of creditors under the statute of Elizabeth and the position of creditors under the execution of such a power as the present; and when the Lord Chancellor in that case said that the fund must be treated as regards the creditors as if it had been the property of the testator, I think he meant nothing more than that the disposition which he had made by his will in favour of volunteers could not have effect given it in priority to the creditors any more than it could have that effect given to it with regard to property of his own. There is no authority which goes so far as to say that you must treat such a fund—to this extent the property of the debtor—so as to divide it amongst the creditors in a preceding bankruptcy. So far as any authority is concerned there is authority to the contrary. It is true that is under an old Bankruptcy Act, and it might be necessary carefully to analyze the distinction between the law of bankruptcy at the time of that decision and the law at the present time; but I do not think in this case any such analysis is required. The case I am referring to is *Jenney* v. *Andrews*, (1822) 6 Madd. 264, 23 R. R. 216. In that case the donee of the power had become bankrupt, and had obtained a certificate. Meanwhile, before his bankruptcy he had made his will and appointed the fund, as in the present case, and he died without having revoked his will. It was held that the fund was not available for payment of the creditors in the bankruptcy, and the Vice-Chancellor says: "Where there is a general power of appointment by will and an appointment is made, the appointee is a trustee for creditors, but it is not for creditors at the time of the execution of the will, but at the death of the testator. The certificate of the bankrupt deprives the assignees of all claim for the benefit of the creditors under the commission." Now, in the present case one does not have to go so far as that. I think it is enough to say that the property divisible amongst the creditors does not include this particular fund. If that is so, the trustee is not entitled to have this fund, and for that I think *Jenney* v. *Andrews* is also an authority. It is through the trustee in bankruptcy that the creditors in bankruptcy are entitled to a dividend on their debt. It seems to me, therefore, that on the true construction of the Bankruptcy Act, notwithstanding the doctrine of equity with regard to testamentary powers which have been exercised, it is impossible to bring this fund within the definition of property divisibl in the bankruptcy; and, further, that it is impossibl to say that this is property which, in equity, independent of the express statutory provisions which plainly would not apply, ought to be administered as if it had been property divisible amongst the creditors in bankruptcy.

Then there is the further question: Is this a fund which is divisible amongst all creditors *pari passu*, including those who were creditors in the bankruptcy? Now, there the question is rather a different one. I am assuming now, for the purpose of deciding this case, that the executor is the person on whom devolves, according to the ordinary doctrines of equity in this matter, the duty of distributing this fund amongst the creditors. Are the creditors in the bankruptcy creditors whom the executor is to include in making the distribution? I think not. The general effect of the provision of the Bankruptcy Act appears to me to be this—that it substitutes for the personal relief against a debtor which the creditor possesses certain rights given by the Act of resorting to his property and having that property divided amongst the creditors. In this case there has been no order of discharge. The debtor is, therefore, not actually released from his debt, but it seems to me, by the effect of section 9, that as from the receiving order, the order never having been discharged, and it having been followed by an order of adjudication, the creditors were deprived of their right of action. I do not see how it is possible for the creditors in the bankruptcy by any process whatever to get at the executor. It seems that the executor has nothing to do with the creditors in the bankruptcy who were entitled to have divided among themselves the assets divisible in the bankruptcy, and to have those assets divided amongst them to the exclusion of subsequent creditors. The creditors in the bankruptcy had to look to the trustee in bankruptcy and to the property which under the Bankruptcy Act was divisible, and have nothing to do with the executor or the property which is divisible by the executor in that capacity. In the view I take, therefore, I conceive that as to the fund in question, so far as creditors are concerned, the only creditors who can have any right to be paid out of it are the creditors who have become such subsequently to the bankruptcy, and who therefore have the executor to look to, and not the trustee in bankruptcy.

A further question was raised by Mr. Norton with regard to the right of the executor to retain; but if the only creditors to be paid are those whose debts have been incurred since the bankruptcy, the right of retainer becomes immaterial, inasmuch as the fund is solvent. I need say nothing about that, except perhaps that, so far as I form any opinion on the subject, I think the right of retainer would not have existed against such a fund.

Solicitors, *Lee, Davis, & Lee; Solicitor to the Board of Trade.*

K. B. Div. (Walton, J.) April 12, 14, 1905.

CHADWICK *v.* PEARL LIFE ASSURANCE CO. (*a.*)

Inland revenue—Income tax—Annuity or annual payment—Deduction of income tax—Income Tax Acts, 1842 (5 & 6 *Vict. c.* 35), *s.* 102; *and* 1853 (16 & 17 *Vict. c.* 34), *s.* 40—*Customs and Inland Revenue Act,* 1888 (51 & 52 *Vict. c.* 8), *s.* 24, *sub-section* 2.

The plaintiff was the owner of a leasehold interest, expiring in 1912, *in certain property which was sub-let*

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

to the defendants. The net rent accruing to the plaintiff after payment of rent to the superior landlord was £1,625 per annum. The plaintiff agreed to sell the defendants his reversion in consideration of a cash payment of £1,000 and the execution of a deed whereby the defendants covenanted to pay to the plaintiff £1,625 per annum to the end of the term. The defendants claimed to deduct income tax from the annual sum of £1,625 under section 40 of the Income Tax Act, 1853.

Held, that the object of the transaction being to secure to the plaintiff to the end of the term the same net amount that he had previously received as rent, the payments were payments of an annuity or other annual payment within the meaning of section 40 of the Income Tax Act, 1853, and were not payments of a fixed amount by instalments, and therefore that the deduction had properly been made.

Action tried by Walton, J., without a jury, to determine whether certain annual payments were subject to deductions for income tax or not.

The plaintiff, Alfred Chadwick, was one of the lessees of certain premises near London Bridge, and he brought this action to recover from the Pearl Life Assurance Co. the sum of £50 5s. 9d. as the balance of money due to him from the defendants in pursuance of a deed of covenant dated the 6th of February, 1904. The particulars showed that the claim was in respect of certain annual sums payable to the plaintiff under that deed. The total amount of the sums so payable to the plaintiff as his individual share of the £1,625 hereafter mentioned was £1,038 4s. Of that amount the defendants had paid £987 18s. 3d., leaving the balance now sued for, and which represented deductions in respect of income tax from the periodical payments which the defendants were liable to make under the deed of covenant. The defendants, who had been sub-lessees of the property, had purchased from the plaintiff his interest in the leasehold reversion in the property in consideration of £1,000 and the execution of the deed of the 6th of February, 1904, whereby the defendants covenanted that until and including the 25th of December, 1912, they would pay the further sum of £1,625 per annum to the plaintiff in equal quarterly instalments.

Montague Lush, K.C. (*T. T. Paine* with him), for the plaintiff.—The question in this case is one of principle. The defendants contracted for the absolute purchase of the vendor's entire interest in a term of years for £1,000 down and the balance by deferred payments. The part of the purchase-money that was paid down in cash was admittedly capital; it would be impossible to say that one part of the consideration was capital and the other part income. There can be no doubt that these instalments ought to be treated as payments of capital by instalments, and therefore not subject to the deduction of tax. Lord Macnaghten in *London County Council* v. *Attorney-General*, 49 W. R. 686, [1901] A. C. 26, points out that "income tax means a tax on income and can mean nothing else." The question turns on the documents, which show that the consideration here in the assignment for the sale by the vendor of his interest in the property was partly £1,000 and partly something else. The covenants in the deed of covenant of even date make it quite clear that part of the consideration in the latter deed was the defendants' covenant to pay £1,625 to the plaintiff until 1912 by equal quarterly payments, as payments by instalment of the purchase sum.

Secretary of State for India v. *Scoble*, 51 W. R. 675, [1903] A. C. 299; *Foley* v. *Fletcher*, 3 H. & N. 769; and *East Indian Railway Co.* v. *Secretary of State for India*, (1904) 21 Times L. R. 3, 53 W. R. Dig. 70, were relied on.

Danckwerts, K.C., and *Grimwood Mears*, for the defendants.—The deductions were rightly made by the defendants, because these instalments were payments of "an annuity or other annual payment" within the meaning of section 40 of the Income Tax Act, 1853. As no gross sum was here ascertained as the total amount which would have to be paid by the defendants, the present case is distinguishable from *Scoble's case*. The question depends here on the proper construction of the two contemporaneous deeds. When the two deeds are carefully looked at it is clear that the object of the arrangement was that for the whole term of the plaintiff's leasehold interest, which was sold outright, the plaintiff was to receive the same rent that he would have received had he not sold. The case comes within the very words of section 102 of the Income Tax Act, 1842, which is the original section under which annuities and other annual payments were charged with duty. The defendants were obliged to make this deduction, the language of section 24, sub-section 3, of the Customs and Inland Revenue Act, 1888, being imperative on that point: see judgment of Lord Macnaghten in *London County Council* v. *Attorney-General*, [1901] A. C. 26, at p. 40. In *Delage* v. *Nugget Polish Co.*, 92 L. T. 664, 53 W. R. Dig. 70, the plaintiff had sold a secret process for making blacking to the defendants on the terms that the defendants were to pay him an annual sum—fixed at 8 per cent.—of the gross receipts, and in that case Phillimore, J., held that the defendants were entitled to deduct income tax. The transaction here was a sale of the plaintiff's reversion upon the terms that he was to continue to receive his present income until the close of the year 1912. The net beneficial rent previously received by the plaintiff was the same sum of £1,625 subject to the tax. A covenant to pay £1,625 per annum free of income tax would have been void under the decision in *Attorney-General* v. *Shield*, (1858) 3 H. & N. 834, 28 L. J. Ex. 49, 7 W. R. Dig. 42. The offer was made upon the basis of the income previously obtained by the plaintiff, and the object of the transaction was to secure to the plaintiff the value of the reversion while he remained in the same position as regards income.

T. T. Paine replied.

Cur. adv. vult.

April 14.—WALTON, J., gave the following judgment, in which, after stating the facts as set out above, he said: This action was brought for the balance owing in respect of three instalments, the balance being £50 5s. 9d. which has been deducted by the defendants in respect of income tax. The question which I have to decide is whether the defendants were entitled to make such deductions. They contended that they were authorized and entitled to make the deductions by section 40 of the Income Tax Act, 1853. That section is in these words: "Every person who shall be liable to the payment of any rent, or any yearly interest of money, or any annuity or other annual payment, either as a charge on any property, or as a personal debt or obligation by virtue of any contract . . . shall be entitled and is hereby authorized, on making such payment, to deduct and retain thereout the amount of the rate of duty which at the time when such payment becomes due shall be payable under this Act." I think those are the only words of the section which it is necessary for my present purpose to read. The defendants say that they are in the words and within the meaning of the Act, a "person liable to the payment of an annuity or annual payment"—that is to say, the £1,625—"as a personal debt or obligation by virtue of a contract." That is the deed of covenant which I have referred to. If this be so, then it seems to me clear that the

defendants are entitled and authorized to make the deduction in question and therefore to succeed in their action. It does not appear to me necessary to consider the question whether they were bound to make the deduction under section 24, sub-section 3, of the Customs Act of 1888.

As to the general history and effect of the Income Tax Acts in their bearing upon annuities, it is sufficient for me to refer to the judgment of Lord Macnaghten in *London County Council* v. *Attorney-General*, 49 W. R. 686, [1901] A. C. 26, the part of the judgment to which I refer being at pp. 37 to 40. What I have to decide here is whether the annual payment of £1,625 payable under the deed to which I have referred is "an annuity or annual payment" within the meaning of the words which I have cited of section 40 of the Income Tax Act, 1853, and in considering this the general scheme of the transaction must be kept in mind. It must be admitted that there may be in the words of the Act, an annual payment payable as a personal debt, by virtue of a contract which is not an annuity or annual payment within section 40—*e.g.*, where a debtor repaid a sum borrowed in fixed annual payments, or such cases as *Foley* v. *Fletcher*, 28 L. J. Ex. 100, 3 H. & N. 769, and *Secretary of State for India* v. *Scoble*, 51 W. R. 675, [1903] A. C. 299. In the present case the agreement in substance was that the defendant company, in consideration of the assignment to them of a certain leasehold interest in an unexpired residue of a term ending on the 25th of December, 1912, would pay to the assignors a fixed amount of £1,000 and make to them an annual payment of £1,625 by equal quarterly payments until the expiration of the term. The £1,625 was the net rent which the assignors at the date of the assignment were receiving under certain sub-leases which they had made of the leasehold premises. It is said that the annual payments of £1,625 are really in substance instalments of the price or of part of the price payable for the leasehold interest sold. I asked counsel for the plaintiff in the course of the argument what was the gross amount payable, but I received no satisfactory answer. It is plain to me that no estimate of any gross amount was involved in the contract between the parties. What the vendors bargained for was that they should continue to receive until the end of the term the same amount of income which they were receiving from the property at the date of the assignment, and should be paid in addition to this, a lump sum of £1,000. In my judgment the annual payments of £1,625 were not paid as instalments of a debt, but were amounts payable and receivable as income, just as an annuity is what is payable for a certain number of years under a covenant or contract made in consideration of a sum of money paid by the annuitant as the price of the annuity. It seems to me to make no difference whether the contract to make the annual payments is entered into in consideration of money paid or in consideration of property assigned.

For these reasons I think that the present case is not within the cases quoted by Mr. Montague Lush, but comes within section 40 and is similar to the case of *Delage* v. *Nugget Polish Co.*, 21 Times L. R. 454, 92 L. T. 682. Therefore there will be judgment for the defendants with costs.

Judgment accordingly.

Solicitors for the plaintiff, *Finch & Turner.*

Solicitors for the defendants, *Japheth Tickle.*

K. B. Div.
(Lord Alverstone, L.C.J., and Kennedy and Ridley, JJ.) April 6, 1905.

REX *v.* HANKEY AND OTHERS (JUSTICES). (*a.*)

Motor-car — Refusal by owner of driver's name and address—Conviction—Omission of averment that driver committed an offence—Motor-car Act, 1903 (3 *Ed.* 7, *c.* 36), *ss.* 1, 60—*Motor-cars* (*Use and Construction*) *Order,* 1904, *Art. IV.* (6).

A conviction of an owner of a motor-car under section 1, *sub-section* 3, *of the Motor-car Act,* 1903, *stated that the defendant "being . . . the owner of a certain motor-car . . . which was then being driven upon the highway . . . did unlawfully . . . after due notice had been given to him, refuse to give the name and address of the person who was then and there driving the same, such name and address being required in order that proceedings might be taken against him under section* 1 *of the Motor-car Act,* 1903, *and Art. IV.* (6) *of the Motor-cars* (*Use and Construction*) *Order,* 1904."

Held, that the conviction was bad, in that it did not sufficiently allege that the driver had committed an offence under the section.

Held, also, that it was not a condition precedent to the duty cast upon the owner of a motor-car by section 1 (3) *to furnish the name and address of the driver of the car, that the driver should previously have been asked for and should have refused to give his name and address.*

This was a rule *nisi* obtained by the Earl of Craven for a *certiorari* to quash a conviction against him by the justices of Wokingham, Berks, for that being on the 2nd of July, 1904, the owner of a certain motor-car, No. A.C. 143, which was then being driven upon the highway at Twyford, Berks, he did unlawfully on the 4th of August, after due notice had been given him, refuse to give the name and address of the person who was then and there driving the same, such name and address being required in order that proceedings might be taken against him under section 1 of the Motor-car Act, 1903, and article 4 (6) of the Motor-cars (Use and Construction) Order, 1904.

The grounds upon which the rule *nisi* was obtained were: (1) That the conviction was bad on the face of it because it did not allege that the driver had committed an offence under section 1 of the Act, and did not allege that the driver had refused to give his name or address or had given a false name or address; (2) that the justices had no jurisdiction to convict in the absence of evidence to the above effect.

Section 1 (3) of the Motor-car Act, 1903, is as follows: "If the driver of any car who commits an offence under this section refuses to give his name and address, or gives a false name and address, he shall be guilty of an offence under this Act, and it shall be the duty of the owner of the car, if required, to give any information which it is within his power to give, and which may lead to the identification and apprehension of the driver, and if the owner fails to do so he also shall be guilty of an offence under this Act."

Article 4 of the Motor-cars (Use and Construction) Order, 1904, contains the following provisions: Every person driving or in charge of a motor-car when used on any highway shall comply with the regulations hereinafter set forth—namely, (6) He [the driver] shall, on the request of any police-constable in uniform, or of any person having charge of a horse, or if any such constable or person shall put up his hand as a signal for that purpose, cause the motor-car to stop and to remain stationary so long as may be reasonably necessary.

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

Cecil Walsh showed cause against the rule.—It is not necessary under section 1, sub-section 3, of the Motor-car Act, 1903, that the driver should have been asked for and should have refused to give his name or address before the owner can be convicted. Such a construction would defeat the whole object of the latter part of the section, which was framed to meet the difficulty in the case of drivers who did not stop so that their name and address could be taken by giving a remedy against the owner. It is not enough for the police to know in such a case the registered number of the car, for this would not help if the owner persisted in refusing to give the driver's name and address. Moreover, the owner of the car here has adopted the wrong remedy. He ought to have appealed to quarter sessions as a person adjudged to pay a fine exceeding twenty shillings under section 11 (2) of the Act. This rule should therefore be discharged.

Avory, K.C., and *Moresby White* (*G. H. Condy* with them), in support of the rule.—*Certiorari* is the absolute right of a party aggrieved by a wrongful conviction. Here the conviction is bad on its face because the defence alleged is insufficiently described; moreover, it couples the offence alleged under section 1 (3) of the Act with that alleged under art. 4, r. 6. [Lord ALVERSTONE, L.C.J.—The rule is that a conviction must be as precise as an indictment: *Smith* v. *Moody*, 51 W. R. 252, [1903] 1 K. B. 56, per Channell, J., at p. 63.] The mere fact that the police state they want to take proceedings against a driver is no evidence that he has committed an offence. It is submitted that on the true construction of section 1 (3) of the Act an owner is not bound to give the driver's name and address unless and until the driver has been asked for them and has refused them.

Lord ALVERSTONE, L.C.J.—It is with considerable reluctance I find myself driven to the conclusion that this conviction cannot be supported. But there is an established rule of many years' standing upon which we feel ourselves constrained to act, and driven to act now, which is that where a conviction contains matters of uncertainty it is bad. In this case the offence charged was that the owner of a motor-car did not give to the police certain information in his power; and the main point taken in opposition to this charge was that the obligation of the owner to give information as to his driver's name and address did not arise until the driver of the car had himself refused these particulars. I do not, however, construe section 1 (3) in that way. Possibly the language of the section ought to be different, but the words which create the offence on the part of the driver are these: "If the driver of any car who commits an offence under this section refuses to give his name and address or gives a false name or address he shall be guilty of an offence under this Act." So far, therefore, the offence is that of the driver and is complete in itself; but then the section goes on to create a different offence on the part of a different person: "And it shall be the duty of the owner of the car, if required, to give any information which is within his power to give, and which may lead to the identification and apprehension of the driver, and if the owner fails to do so he shall be guilty of an offence under this Act." It seems to me that to say that the obligation on the part of the owner to give information is only to arise where the driver has refused his name and address would be to make the section meaningless and reduce its usefulness to nothing so far as obtaining information is concerned, for it would give the go-by to the case of a driver speeding away as quickly as possible and giving no one an opportunity of ascertaining his name and address. I am therefore of opinion that we should decide this point against Mr. Avory.

The next point, however, is of greater difficulty. It is alleged in the conviction that the owner unlawfully after due notice refused to give the name and address of the driver, "such name and address being required in order that proceedings might be taken against him under section 1 of the Act and article 4 of the order." I am by no means sure that there is not some objection to that conviction on the ground of two offences being coupled together. The word is not "or" but "and" which couples the sentence stating that proceedings might be taken against the owner under section 1 of the Act and article 4 of the order. I am not clear that an owner is bound to give his driver's name and address in a prosecution under article 4. These are two different offences. If that had stood alone I do not know that I should have thought that the conviction was open to serious objection. But the main question arises upon the words "in order that proceedings might be taken against him under section 1." I think that this is very nearly a good allegation, having regard to the words of sub-section 3, but yet it is open to the view that it does not allege in terms that any offence has been committed by the driver; it is ambiguous in this, that it may mean that the driver's name might be wanted, so that the police might consider whether they would or would not institute proceedings against him. Bearing in mind the doctrine that a conviction must have the certainty of an indictment, I think that it is safer to hold that this conviction does not allege in sufficiently clear terms what offence had been committed by the driver.

The rule must therefore be made absolute to quash the conviction.

KENNEDY, J.—I agree, and for the same reasons.

RIDLEY, J.—I agree.

Order absolute.

Solicitors showing cause, *Snow, Fox, & Higginson*, for *Cave & Wilson*, Bracknell.

Solicitors in support, *Firth & Co.*

Court of Appeal.

Appeal.
(Collins, M.R., and Romer and Mathew, L.JJ.) — Oct. 26.

SMITH v. COLES. (a.)

Master and servant—Employers' liability—Accident—Compensation—Employment in agriculture—Agricultural work—Workmen's Compensation Act, 1900 (63 & 64 *Vict. c.* 22), *s.* 1, *sub-sections* 1 *and* 3.

In an arbitration under the Workmen's Compensation Acts, 1897 *and* 1900, *it appeared that the applicant was a carpenter, that he was employed on a farm as the farm carpenter, that he acted as gamekeeper for three months in the year, and that he helped in such work as harvesting, rick-making, and carting.*

Held, that there was evidence which justified the county court judge in finding that the applicant was employed in agriculture within the meaning of the Act of 1900.

Appeal from an award of the judge of the Salisbury

(a.) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

County Court in an arbitration under the Workmen's Compensation Acts, 1897 and 1900.

The applicant for compensation was Samuel Smith, who was accidentally injured on a farm where he was employed as a carpenter, gamekeeper, and in other ways.

The question was whether his employment came within the meaning of the expression "the employment of workmen in agriculture" in the Workmen's Compensation Act, 1900.

The evidence was as follows:

The applicant was forty-five years of age, and had been taught carpentering by his father, with whom he worked for twenty-five years. He had been in the service of his employer, Mr. Coles, for four years and a-half before the accident, as farm carpenter and keeper. He had a carpenter's shop on the farm, where he worked alone. He did not mend gates, that work being done by the estate carpenter. He acted as keeper for three months in each year, and during that time he went out every day and trapped vermin. He worked at putting up wire netting when and where necessary. He also helped in carting work. He lent a hand at hay harvest and corn harvest, but he never went out ploughing. His regular wages were 22s. a week. He was paid for overtime at carpentering, and he also got extra pay when he acted as keeper.

On the 8th of November, 1904, after he had been carpentering all the morning, he received orders from Mr. Allen Coles, his employer's son, to do some repairs to the fence of an enclosure. On his way across some fields to the enclosure and also on his way back he was accompanied by Mr. Allen Coles, who carried a gun with him and shot rabbits. They had reached the farmyard, and the applicant was walking to the carpenter's shop, when he was accidentally injured in the leg by a charge of shot from Mr. Allen Coles's gun. The applicant went to the hospital, and subsequently gangrene set in and the leg had to be amputated. The employer paid the applicant a weekly sum for several weeks, but then ceased to make any further payment.

The main contention on the part of the employer before the county court judge was that the applicant's employment was not an employment to which the Workmen's Compensation Act, 1900, applied.

The material provisions of the Act are as follows: Section 1, sub-section 1, "From and after the commencement of this Act, the Workmen's Compensation Act, 1897, shall apply to the employment of workmen in agriculture by any employer who habitually employs one or more workmen in such employment." Sub-section 3: "Where any workman is employed by the same employer mainly in agricultural but partly or occasionally in other work, this Act shall apply also to the employment of the workman in such other work. The expression 'agriculture' includes horticulture, forestry, and the use of land for any purpose of husbandry, inclusive of the keeping or breeding of live stock, poultry, or bees, and the growth of fruit and vegetables."

The county court judge held that the applicant was engaged in agricultural employment, and therefore his employment was one to which the Act applied, and he made an award of compensation.

The employer appealed.

Robert Wallace, K.C., and *Macgillivray*, for the employer.—The Workmen's Compensation Act, 1900, only applies to agricultural labourers. The applicant is not an agricultural labourer, but a carpenter. The Act of 1897 applied to employment in a particular place, viz., a railway, a factory, a mine, a quarry, an engineering work, or a building. In the Act of 1900 there is no reference to any place at all. It extends the application of the original Act to the employment of workmen in agriculture. The point to be considered is not the place where the work is done, but the kind of work. A large farm may require the employment of carpenters, stonemasons, and blacksmiths. But the men engaged in these ancillary mechanical trades, though they are employed by an agriculturist, are not employed in agricultural work, and are therefore not within the Act.

C. E. Dyer (*T. H. Walker* with him), for the applicant.—The Act applies to all agricultural work. Agricultural work includes all work which is necessary for properly carrying on a farm. It is indispensable to the good management of a farm that the fences and hedges should be kept in good order. A farm carpenter is therefore within the Act. The definition of "agriculture" in sub-section 3 shows that the Act is not limited in its application to mere agricultural labourers. Further, the applicant has done a great deal of purely agricultural work. He seems to have done every kind of agricultural work except that of ploughing.

Robert Wallace, K.C., in reply.—The definition of "agriculture" indicates an intention that the Act should apply to work on things that grow. A hedger has to do with things that grow, and therefore he may be within the Act. But a man who makes or repairs fences does not work on things that grow. He is no more within the Act than a man who builds or repairs outhouses, or a blacksmith in a shop on the homestead, or a clerk in the farm office.

COLLINS, M.R.—This is an appeal by an employer from an award of compensation in favour of a workman. The question is whether the employment in which the applicant was engaged comes within the terms of the Workmen's Compensation Act, 1900, which enacts as follows: "From and after the commencement of this Act, the Workmen's Compensation Act, 1897, shall apply to the employment of workmen in agriculture by any employer who habitually employs one or more workmen in such employment." The applicant has admittedly suffered personal injury by accident, and the only question is whether he was employed in agriculture, so that if all the other conditions enabling him to claim compensation are fulfilled, he comes within the terms of this Act of 1900. He actually received the injury at a time when he was apparently not engaged in any agricultural employment whatever. It seems that he was in company with the son of the owner of the farm on which he was employed, who was carrying a gun and shooting rabbits. The applicant himself had been doing some fencing work, and was on his way back to the farm when the young man with whom he was, accidentally let his gun go off and injured the applicant in the leg. No question now arises as to whether the accident arose out of and in the course of the applicant's employment. No such point was taken at the hearing of the arbitration, and the case is not now before us on that point.

The only point we have to consider is whether the county court judge, who held that the applicant was employed in agriculture, could have arrived at that conclusion without misdirecting himself on a point of law. It is contended on the part of the employer that the applicant is a skilled artizan, a carpenter, and does not come within the expression "the employment of workmen in agriculture." It is necessary to read some further provisions of the Act. Sub-section 3 of section 1 is as follows: "Where any workman is employed by the same employer mainly

in agricultural but partly or occasionally in other work, this Act shall apply also to the employment of the workman in such other work." Then follows an important factor—viz., the definition of agriculture: "The expression 'agriculture' includes horticulture, forestry, and the use of land for any purpose of husbandry, inclusive of the keeping or breeding of live stock, poultry, or bees, and the growth of fruit or vegetables." We must look at the evidence as to the nature of the applicant's employment. He was undoubtedly a skilled carpenter. His father had been a carpenter, and he had been taught carpentering by his father. But besides his carpentering work he appears to have acted as a handy man about the farm. He certainly did a considerable amount of work which might fairly be described as employment in agriculture. He was also employed as a keeper for two or three months in the year. His own evidence was this: He had been at carpentering all the day; as gamekeeper he looked after partridges, hares, and rabbits; he was keepering three months in the year; he might be described as working carpenter on the farm; he lent a hand at hay harvest and also at corn harvest; he made corn-ricks and straw-ricks; he did no ploughing. Another witness, who was a carter, said that he had worked on the farm with the applicant, who helped him with the threshing; that he had seen the applicant rick-making, gamekeeping, harvesting, and mangel-carting; that he did work like other labourers. On this evidence the county court judge held that the applicant was engaged in agricultural employment within the Act. In the circumstances it seems to me that there was evidence fit for the consideration of the county court judge that this man's duties embraced work which was purely agricultural employment. I think there is no doubt about that, and therefore it is not necessary to consider the nature of his carpentering work, or to decide whether, if his only work had been that of a farm carpenter, which work is in a sense ancillary to agricultural operations, the case would have been brought within the Act. I am far from saying that employment in work ancillary to agricultural operations may not be deemed to be employment in agriculture. But, in my opinion, that point does not arise in this case. There was plenty of evidence of employment in work which was purely agricultural work, and therefore the question was reduced to a question of fact, and the county court judge was the proper person to decide that question. In my opinion there has been no misdiscretion on any point of law, and there is no ground for interfering with the finding of the county court judge.

ROMER, L.J.—I am of the same opinion. It ought to be borne in mind that the Workmen's Compensation Acts are expressed not in technical language, but in popular language; and in my opinion they ought to be construed and considered not technically, but in a popular sense. I think that it is unadvisable to define the word "agriculture" as used in the Act of 1900. The Legislature themselves did not attempt to define agriculture, but only pointed out that they meant it to include certain things which might otherwise have been in doubt. Taking the expression "employment in agriculture" in its popular sense, I think it is not necessarily limited to those persons who are mainly employed in any particular year in the manual occupations of tilling, sowing, and reaping. For instance, suppose a man is employed on a farm in one particular year mainly in the necessary work of hedging and ditching; I should not be disposed to say that such a man was not employed in agriculture. In the present case we have to deal with a man who was always employed on and for the purposes of a farm. Sometimes, for the greater part of his time, he was engaged in what were admitted to be purely agricultural pursuits, at other times he did carpentering work, the making and repairing of fences and so forth, which is work essential to the proper conduct of a farm, and for a small portion of his time he appears to have assisted in keeping down rabbits and to have acted as a gamekeeper. In these circumstances I think it is impossible to say that the county court judge misdirected himself on a point of law when he found that the applicant was employed in agriculture.

MATHEW, L.J.—I am also of the same opinion. The Workmen's Compensation Act of 1900 applies the original Act of 1897 to a new class of persons. The statute is comprehensive in its terms. Though it is not distinct in the description of the class, it appears that the whole class of persons employed in agricultural operations is intended to be protected by the Act. We are now asked to read in a comprehensive exception, and to say that the Act only applies to labourers in fields, such person as are employed in sowing, reaping, and carrying away the produce of a farm. There is no indication of any intention on the part of the Legislature so to limit the Act. If the contention put forward on the part of the employer was correct, we should have this extraordinary result, that persons employed on a farm in such capacities as that of a shepherd or a steward would not be entitled to the benefit of the Act. The court ought to be slow to allow an interpretation to prevail which would introduce an exception which has not been made by the Legislature. I therefore agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors for the applicant, *Taylor, Hoare, & Pilcher*, for *Nodder & Trethewan*, Salisbury.

Solicitors for the employer, *Beyfus & Beyfus*.

From K. B. Div. (In Bkcy.). (Vaughan Williams, Stirling, and Cozens-Hardy, L.JJ.) } July 21; Aug. 4, 1905.

In re COHEN. (*a*.)

Bankruptcy—Disclaimer of onerous property—Time for disclaimer—First appointment of trustee—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *ss.* 21, 55 (1)—*Bankruptcy Act*, 1890 (53 & 54 *Vict. c.* 71), *s.* 13.

The "twelve months after the first appointment of a trustee," within which, under section 55 (1) *of the Bankruptcy Act*, 1883, *as amended by section* 13 *of the Bankruptcy Act*, 1890, *onerous property may be disclaimed by the trustee of a bankrupt, begin to run from the date of the certificate of the appointment of the trustee under section* 21 *of the Bankruptcy Act*, 1883, *and not from the date of the order of adjudication.*

Appeal from Mr. Registrar Giffard.

This case raised a question of considerable importance under the Bankruptcy Act, 1883—namely, whether the period of twelve months, within which, under section 55, as amended by section 13 of the Bankruptcy Act, 1890, the "trustee" is at liberty to disclaim onerous property belonging to the bankrupt, commences to run from the date of the order of adjudication or from the date of the certificate of the trustee's appointment.

The facts were shortly these: The order of adjudi-

(*a*.) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

cation against the debtor was made on the 2nd of October, 1902. Thereupon a trustee was appointed by the creditors, and his appointment was certified on the 16th of October, 1902. The bankrupt, being possessed of certain leasehold property in Limehouse subject to onerous covenants, the trustee gave notice to the landlords of his intention of disclaiming the bankrupt's interest in the lease; and on the 14th of October, 1903, he executed his disclaimer, which was duly filed in the bankruptcy. On his applying for his release the Board of Trade raised objections to the disclaimer on the ground that the properties had not been disclaimed "within twelve months after the first appointment of a trustee," in accordance with the terms of section 55 of the Bankruptcy Act, 1883, as amended by the Act of 1890. The trustee then maintained that the disclaimer was within the twelve months, which, he said, did not expire until two days after the date of his disclaimer; whereas the contention of the Board of Trade was that the twelve months ran from the 2nd of October, 1902, the date of the adjudication, and the consequent automatic "appointment" as on that date of the official receiver as "trustee," so that the disclaimer was too late. The trustee, under the direction of the board, then applied, under section 13 of the Act of 1890, for leave to extend the time in which to disclaim the property.

The application came before Mr. Registrar Giffard, who refused to grant an extension of time, being of opinion that no extension was necessary, since, according to his view of the Act, the time for disclaiming ran from the date of the certificate and not from the date of the adjudication. The trustee appealed. Section 55 provides that, where any part of the property of the bankrupt consists of land of any tenure burdened with onerous covenants, the trustee "may, by writing signed by him at any time within twelve months after the first appointment of a trustee, disclaim the property." The various other enactments bearing upon the question will be found referred to in the judgments of the Court of Appeal. It was said that the Board of Trade regarded the question as one of considerable importance as possibly involving a serious liability upon the official receiver, inasmuch as the effect of granting a release to a trustee was that the official receiver thereupon became trustee (section 82, sub-section 4), and, as such, succeeded to the original trustee's liabilities, including those arising out of onerous property of the bankrupt not validly disclaimed.

Hansell, for the appellant.—On the true construction of the Bankruptcy Acts the twelve months run from the date of adjudication, not from the certificate of appointment of a trustee.

He referred to the Bankruptcy Act, 1883, ss. 12, 20, 21, 31, 54, 55 (1), 70 (1 *a*, *b*, *g*), 121, 125 (5); Bankruptcy Act, 1890, s. 13; *In re Parker*, 15 Q. B. D. 196, 33 W. R. Dig. 20; *Turquand* v. *Board of Trade*, 11 A. C. 286, 34 W. R. Dig. 14; *In re Baker*, 8 Morrell 116.

Cur. adv. vult.

Aug. 4.—VAUGHAN WILLIAMS, L.J.—The question in this case is whether the time for disclaiming runs from the certificate of the appointment of the trustee or from the adjudication. By section 55 of the Bankruptcy Act, 1883, as amended by section 13 of the Act of 1890, the trustee may, by writing signed by him at any time after the first appointment of a trustee, disclaim the property. These words seem certainly to refer (in the absence of anything in that Act showing intention) to an appointment of a trustee under section 21, which provides that, where a debtor is adjudicated bankrupt, or the creditors have resolved that he be adjudicated bankrupt, the creditors may, by ordinary resolution, appoint some fit person, whether creditor or not, to fill the office of trustee of the property of the bankrupt, or they may resolve to leave his appointment to a committee of inspection thereinafter mentioned; and sub-section 2 provides that the person so appointed shall give security, in the manner prescribed, to the satisfaction of the Board of Trade, and that the board, if satisfied with the security, shall certify that the appointment has been duly made, unless the board objects to the appointment on certain specified grounds. Sub-section 4 of the same section provides that the appointment of a trustee shall take effect as from the date of the certificate. I am inclined to think that sub-sections 2 and 4 of this section, as to the giving of security and as to the certificate of appointment, apply only to a trustee "so appointed"—that is, appointed by the creditors as provided by sub-section 1—and have no application to the official receiver when he is the trustee. In practice no certificate is given of his appointment; no security is taken from him. It is, however, to be observed that section 21 not only provides for the appointment of a trustee by the creditors after an adjudication, but also for the appointment of a trustee by the Board of Trade in cases where a trustee is not appointed by the creditors within four weeks from the date of the adjudication, or where negotiations for the composition scheme or schemes have been closed by the refusal of the creditors to accept, or of the court to approve, a composition or scheme. Section 54, by sub-section 1, provides that until a trustee is appointed the official receiver shall be the trustee for the purposes of the Act, and that immediately on the debtor being adjudicated bankrupt the property of the bankrupt shall vest in the trustee, and sub-section 2 provides that on the appointment of a trustee the property shall forthwith pass to and vest in the trustee appointed. This property would seem to vest, having regard to the judgment of Lord Selborne in *Turquand* v. *The Board of Trade*, independently of any appointment within the meaning of that word as used in section 21. But then sub-section 2 of section 54—which provides that on the appointment of a trustee the property shall forthwith pass to and vest in the trustee appointed—in my judgment contrasts the case where the property of the bankrupt vests in the official receiver independently of any appointment of him as trustee, and the case where the property of the bankrupt passes to a trustee forthwith on his appointment. There can be no doubt but that in sub-section 2 the word "appointed" is used in the sense in which it is employed in section 21. It is true that Lord Selborne says on p. 289 of 11 App. Cas.: "A certain time is allowed to the creditors to choose a trustee for themselves. If they do, when that choice is complete it supersedes the earlier official appointment," meaning thereby, I think, the appointment of the official receiver as trustee under sub-section 1 of section 54. And it is also true that Lord Esher in *In re Parker*, 15 Q. B. D., at p. 203, says: "Section 20 had said that the property shall vest in 'the trustee.' What trustee? There is no one but the official receiver at that moment. 'Until a trustee is appointed the official receiver shall be the trustee for the purposes of this Act.' The property of the bankrupt therefore vests in the official receiver who has just been appointed." But the use of these expressions by Lord Selborne and by Lord Esher in no way proves that the words "first appointment" in section 55 do not exclusively refer to an appointment under section 21. The provisions of sub-section

1 of section 54 will necessarily in every case in which the creditors appoint the trustee make the official receiver the trustee before there is a creditors' trustee, because a creditors' trustee is appointed by a meeting called after the adjudication.

This brings me to section 55, the disclaimer section, and to the question of the meaning of the words "may, by writing signed by him, at any time within [twelve] months after the first appointment of a trustee, disclaim the property." Sub-section 1 of the section runs thus: "Where any part of the property of the bankrupt consists of land of any tenure burdened with onerous covenants . . . the trustee notwithstanding that he has endeavoured to sell or has taken possession of the property, or exercised any act of ownership in relation thereto, but subject to the provisions of this section may, by writing signed by him, at any time within [twelve] months after the first appointment of a trustee disclaim the property." In my opinion the words "after the first appointment" refer to an appointment under section 21 either by the creditors or by the Board of Trade under sub-section 6 of that section. I do not think they refer to the official receiver becoming trustee under sub-section 1 of section 54 until a trustee is appointed. It follows that the twelve months mentioned in sub-section 1 of section 55 will run from the certificate of the first appointment of a trustee, and not from the date of the official receiver becoming trustee, on the debtor being adjudicated bankrupt, until a trustee is appointed. It is said that the effect of the court so holding will be that the official receiver being trustee cannot exercise the power of disclaimer at all, and that this is inconsistent with the decision of the House of Lords in *Turquand* v. *The Board of Trade*, and of the Court of Appeal in *In re Parker*, because the judgments both in the Court of Appeal and in the House of Lords, when the House reviewed the decision of the Court of Appeal, in effect decided that—to use the words of Lord Blackburn in his speech as reported in 11 App. Cas., p. 291—"the official receiver, whilst he is trustee after adjudication, may exercise the powers of a trustee." But I do not think, nor do we intend, that the effect of our decision shall be that the official receiver on becoming trustee will not have the power to disclaim. One of the powers of the trustee appointed by the creditors is to disclaim. I think that the official receiver, as trustee, can exercise that power. It is said that if the official receiver has that power the twelve months limited for the exercise of it must run from the vesting of the property in the official receiver—that is, from the moment of adjudication; but I do not think that this follows. The official receiver, in becoming trustee immediately upon the debtor being adjudicated bankrupt, may exercise the power of disclaimer which section 55 gives to the trustee appointed by the creditors, for twelve months from that appointment, without being subject to this limitation in time for the exercise of the power, which limitation by its very terms runs from a date which has no relation to to the trusteeship of the official receiver, because he is never appointed. As the twelve months from the appointment had not at the time of the application for extension expired in this case I think no extension was necessary, and that the extension was properly refused. The result is that Mr. Registrar Giffard is right, and the appeal must be dismissed.

STIRLING, L.J.—I agree. I only wish to say this for myself—that the only difficulty I have felt arises from the apprehension that some injustice might be done to persons interested in onerous property owing to there being no limit of time for disclaimer when the official receiver is trustee before a trustee is appointed under sub-section 1 of section 54. But that difficulty is, in my opinion, removed when it is considered that sub-section 4 of section 55 provides that any person interested in onerous property may require the trustee, which includes, as my lord has pointed out, the official receiver when trustee under sub-sections 1 and 2 of section 54, to decide whether he will disclaim or not.

COZENS-HARDY, L.J.—I agree, and I have nothing to add.

Solicitor, *Solicitor to the Board of Trade.*

From Chan. Div. (Vaughan Williams, Stirling, and Cozens-Hardy, L.JJ.) — July 19, 1905.

LORD KINNAIRD AND OTHERS v. FIELD (No. 2). (*a*.)

Practice—Counterclaim—Plaintiff—Action brought in Chancery Division—Counterclaim for slander—Trial by jury—R. S. C., 1883, *ord.* 36, *rr.* 2, 7—*Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 100.

Where an action is properly brought in the Chancery Division a defendant who raises by counterclaim issues of slander, libel, false imprisonment, malicious prosecution, seduction, or breach of promise of marriage, is not entitled to have all the issues of fact in the action tried by a judge with a jury as of right under rule 2 of order 36, that rule not applying to the case of a counterclaiming defendant. But in such a case the court will, in the exercise of the discretion given by rule 7 of the same order, direct the issues raised by the counterclaim, to which rule 2 would apply if the counterclaim were an original action, to be tried by a judge with a jury, the original action and any other issues raised by the counterclaim being tried in the Chancery Division in the ordinary way.

This was an appeal by the defendant against the refusal of Warrington, J., of his application that the action and his counterclaim might be transferred to the King's Bench Division and tried by a judge with a jury.

The action was brought by the plaintiffs, as the council of the Evangelical Alliance, against their former secretary, in effect to enforce the specific performance of an agreement for the compromise of a former action brought by him.

The defendant put in a defence and a counterclaim, seeking damages against the plaintiffs in respect of alleged slander, libel, and malicious prosecution. He alleged that by rule 2 of order 36 of the Rules of Court he was entitled as of right to have the whole issue to be tried by a judge with a jury, or by a judge sitting with assessors, or by an official referee or special referee with or without assessors.

By the Judicature Act, 1873, s. 100: "In the construction of this Act, unless there is anything in the subject or context repugnant thereto, the several words hereinafter mentioned shall have, or include, the meanings following (*inter alia*)—'action' shall mean a civil proceeding commenced by writ or in such other manner as may be prescribed by rules of court, and shall not include a criminal proceeding by the Crown; 'plaintiff' shall include every person asking any relief (otherwise than by way of counterclaim as a defendant) against any other person by any form of proceeding, whether the same be taken by action, suit, petition, motion, summons, or otherwise."

The defendant appealed.

(*a*.) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

The defendant in person.—A counterclaim is really in the nature of a cross-action, and it has been held that the claim and counterclaim are for all purposes except execution two independent actions: *Stumore* v. *Campbell*, 40 W. R. 101, [1892] 1 Q. B. 314. Before the Judicature Acts an action for slander would have been properly tried by a judge with a jury, and it is provided by section 22 of the Judicature Act, 1875, that nothing in the Act or in the rules or orders made under it is to prejudice the right of any party to an action to have the issue for trial by jury submitted and left by the judge to the jury before whom the same shall come for trial. Under ord. 36, r. 2, the right to a jury is expressly given to a plaintiff in slander actions; rule 7 of the same order, which provides for trial by a judge without a jury, refers to actions in which neither party has insisted on his right to a trial in the manner prescribed by rule 2: *Jenkins* v. *Bushby*, 39 W. R. 321, [1891] 1 Ch. 484.

Buckmaster, K.C., and *Greenwood*, for the plaintiffs.—This action has been properly commenced in the Chancery Division. Ord. 19, r. 3, allows a defendant to set up by way of counterclaim any right or claim so as to enable the court to pronounce a final judgment in the same action on both the claim and the counterclaim. But this gives him no right to have the action transferred, and if a transfer of the counterclaim is necessary this would be a good ground for having it tried separately. Ord. 36, r. 2, does not apply here. The definitions of "action" and "plaintiff" exclude counterclaim, and these definitions are incorporated into the rules and orders, rule 1. The result is that to give the defendant the right he now claims he must show that there is something in the rule or its context repugnant to this definition. This is all that the courts have ever done—viz., if a rule would obviously work injustice by not including a counterclaiming defendant as a "plaintiff" they have held the definition to be repugnant: *Jones* v. *Macaulay*, 39 W. R. 211, [1891] 1 Q. B. 221.

The defendant replied.

VAUGHAN WILLIAMS, L.J.—This is a case involving the construction of rule 2 of order 36. This rule is somewhat difficult of construction, and Stirling and Cozens-Hardy, L.JJ., are prepared to put upon it the construction which has been contended for by counsel for the respondents. There is, according to my view, no reported case which in any way determines this question. I may say further that I think the decided cases go to show that the word "action" was occasionally used in these rules and orders as including a cross-action and counterclaim. At all events the decision in *Jones* v. *Macaulay* on ord. 27, r. 11, shows that the word "plaintiff" is used in these orders as including a plaintiff on a counterclaim. It is undoubted that in reference to many matters the plaintiff in a counterclaim is regarded as the plaintiff in an action, and I think that in *Stumore* v. *Campbell* Kay, L.J., happily described the result of the legislation effected by the Judicature Act, 1873, when he said that all that the Judicature Act did with reference to a counterclaim was to allow a cross-action to be brought which should be tried at the same time as the original action. Under these circumstances, speaking for myself, I should have been disposed to look at ord. 36, r. 2, to see really what was the principle which was enunciated by that rule. I cannot doubt myself but that the principle there enunciated is this, that as regards actions for slander, libel, false imprisonment, malicious prosecution, seduction, or breach of promise of marriage the party who is making complaint in respect of any of these matters ought to have a right to have the question of the justice of his complaint tried before a judge and jury independently of the discretion of any judge. Unless that was the view of the Legislature I cannot understand why it should have provided, as it has provided, by rule 2, that the plaintiff in such cases should have a right to insist upon having his action tried by a jury. If that is the true principle of this rule it obviously can make no difference, so far as that principle is concerned, whether the claim is made by the plaintiff in an original action or by the plaintiff in a counterclaim. Every reason which could have led the Legislature to say that the plaintiff in such a case was entitled as of right to a jury in an original action equally applies to an action by counterclaim. But it is said, and there is great force in the argument, that the words of the rule are such as to exclude the existence of this right in a portion of the class of persons apparently included in this principle. [His lordship read the rule, and continued:] It is said that not only does the wording of the rule point exclusively to a plaintiff in an action who has issued his writ, but the fact that the definitions of "action" and "plaintiff" in section 100 of the Judicature Act, 1873, are such as to make it difficult to include a plaintiff in a counterclaim, ought in cases of doubt to cause the rules to be construed in the same way, especially as rule 1 of order 71 in express terms incorporated the definitions in section 100 into the rules themselves. Warrington, J., has decided this case upon the basis of the construction contended for by the respondents, and I do not think that I ought under these circumstances to do more than give a decided expression to the doubts which have passed through my mind and particularize the reasons which I think are somewhat weighty in favour of the opposite view. Therefore I tried before delivering this judgment to see whether the parties would not accept a decision in this case which would have prevented the necessity of laying down a construction of this rule which I cannot help thinking will be found extremely inconvenient hereafter, as, for example, in a case where the court is trying two common law actions in respect of a chain of facts which may properly be described as one. But our suggestions were not acceded to. This is a case in which it is very urgent that our decision should be given today. Under these circumstances with some hesitation I accept the view taken by Warrington, J., although I consider that conclusion is somewhat difficult to reconcile with the spirit of the Judicature Act itself. Having decided this much, we must consider what order ought to be made in this case. We might make an order simply affirming the decision of Warrington, J., but we have power independently of rule 2 of order 36, under rule 7 (*a*) of order 36, to order any cause, matter, or issue to be tried by a judge with a jury, and if the appellant thinks fit to apply to us to order any particular issues to be tried with a jury we shall have to consider it. Subject to that observation I think the appeal must be dismissed with costs.

STIRLING, L.J.—This is an application by the defendant in the action asking that the action may be tried by a jury. The action is one brought by the plaintiffs to enforce an agreement for the staying of a previous action between the same parties. That action was stayed upon terms, and the plaintiffs in the present action complain that the terms of that agreement have been violated by the defendant, and they claim specific performance, an injunction, and damages. The agreement was not one which in any way related to the sale or purchase of land, and I doubt whether specific performance of it would be ordered by the court, but at any rate it is not a case

of specific performance specially assigned to the Chancery Division. The whole action might perfectly well have been brought in the King's Bench Division, although it is equally correctly brought in the Chancery Division, being an action which before the Judicature Act might have been brought in the old Court of Chancery. To that action the defendant has put in a defence and a counterclaim, and in the counterclaim he alleges in the first six paragraphs that he has suffered damage by reason of the various acts on the part of the plaintiffs defamatory of himself, those acts being partly in the nature of libel and partly in the nature of slander. In respect of these matters he claims damages. He also claims specific performance of an undertaking given to the court on the 29th of June, 1903. As to that, I think that specific performance could not be decreed. He also claims four months' salary and an injunction. A reply to the counterclaim has been delivered and notice of trial given by the plaintiffs before a judge without a jury. The defendant has given notice of his desire to have the action and counterclaim tried by a jury. The first question to be determined is whether he is entitled as a matter of right to have the issues of fact tried by a jury. The rule is confined to actions of slander, libel, false imprisonment, malicious prosecution, seduction, or breach of promise. The original action does not fall under any of those heads, and the only way in which this rule could be invoked would be by alleging that inasmuch as the counterclaim contained issues of libel and slander, the counterclaim ought to be treated as an action of libel and slander. I have great difficulty in seeing how that can be. I feel the force of the remarks made by my lord, but it appears to me that rule 2 of order 36 does not apply, considering that we must bear in mind that rule 1 of order 71 incorporates the provisions of section 100 of the Judicature Act, 1873, which gives definitions of various terms used in the rules. [His lordship read the definitions of "cause," "action," "plaintiff," and "defendant."] Now, I do not think that a counterclaim is an "action" within that definition. It is certainly not a civil proceeding commenced by writ, nor can it be met by the subsequent words of the definition, "or any other such manner as may be prescribed by rule of court." From the definition of "plaintiff" is excluded a person seeking relief by way of counterclaim as a defendant. Under these circumstances it appears to me that rule 2 of order 36 does not in terms cover the case of a defendant who has brought a counterclaim claiming relief in respect of the matters mentioned in the rule. At the same time I think that the framers of this rule have clearly indicated an intention that any person who is making a claim for relief in respect of these matters should have these issues tried by a judge and jury if possible, and I think that the greatest weight ought to be given to this consideration in exercising any discretion which the court possesses under the subsequent rules. Rule 3 does not apply as it relates to matters assigned to the Chancery Division. Rule 4 enables the court to direct a trial without a jury of any issue of fact, or partly of fact and partly of law, arising in a case which without any consent of parties was formerly triable without a jury. That includes all that large class of cases which are not now assigned to the Chancery Division, but which would have been tried by the old Court of Chancery previously to the passing of the Judicature Act. Then rule 6 deals with "any other cause or matter." That includes all matters not mentioned in the previous rules, and provides that as regards those matters either party may demand a jury. None of these rules, in my opinion, applies to the present case. But then we come to rule 7. That rule provides by clause (*a*) that "in every cause or matter unless under the provisions of this order a trial with a jury is ordered, or under rule 2 of this order either party has signified a desire to have a trial with a jury, the mode of trial shall be by a judge without a jury," but it empowers the court to order any cause, matter, or issue to be tried with a jury. That embraces the present case. Here the defendant has seen fit to counterclaim in respect of libel and slander, and, speaking for myself, I should be prepared to exercise that discretion by directing that the issues in those portions of the counterclaim which relate to libel and slander should be tried by a judge and jury. This view of the case has really never been considered by Warrington, J. Therefore, while deciding that the defendant is not entitled as of right to a jury, that is the order which in the absence of special circumstances I should be disposed to make in favour of the counterclaiming defendant.

COZENS-HARDY, L.J.—This appeal has not been argued upon any matter of form. In form this was an application to transfer the whole action to the King's Bench Division; but it has been argued as an application based on ord. 36, r. 2, and the main question which we have to decide is whether as a matter of right a defendant who counterclaims to an action brought in the Chancery Division can by the mere fact of tacking on to his counterclaim a claim for slander successfully assert a right to deprive the plaintiff of the privilege of having the action tried without a jury and insist upon the right of having the whole action tried by a judge and jury. I have arrived at the same conclusion as Stirling, L.J. I do not think that the word "action" in rule 2 applies to a counterclaim or that the word "plaintiff" applies to a counterclaiming defendant. *Primâ facie* the meaning of these words in that rule is governed by section 100 of the Judicature Act, 1873, which makes it quite clear that a "plaintiff" does not include a counterclaiming defendant, and that an "action" does not include a counterclaim, unless there is anything in the context which is repugnant to the meaning given in the section. I look in vain for anything in this rule to enable me to construe "action" and "plaintiff" in any other than their natural meaning. I am therefore driven to the conclusion that rule 2 of order 36 does not confer any such right upon a counterclaiming defendant as is alleged by the appellant. But although I think that, I also think that in any case in which the defendant by his counterclaim claims relief in respect of any of the matters specified in rule 2 there is very strong ground for applying to a judge to exercise his discretion in such a manner as to give the defendant a right to have either the whole action or at least the particular issues relating to the specified matters tried by a jury. Now as I read rule 2 it applies to the whole action and to all the issues to be tried in the action and also to everything which is being tried in the counterclaim, and it does not contemplate the trial of particular issues. But the court has, under the subsequent rules, the widest discretion either to order the whole action to be tried by a jury or leave the action and such part of the counterclaim as does not relate to the matters enumerated in rule 2 to be tried by a judge alone and send the rest to be tried by a jury.

In the present case I think it would be extremely wrong to make an order directing the whole action to be tried by a jury. It is to be in the list for to-morrow. It would have been tried already but for this pending appeal. Therefore we ought not in the exercise of our discretion to make such an order as

the appellant asks for. But if he thinks fit to sever the issues, and asks that the issues relating to defamation only shall be tried before a judge and jury, the rest of the action and counterclaim coming on for trial to-morrow, I think, subject to anything that may be said on behalf of the respondents, we should accede to the application.

The appellant declining to make any such application, the appeal was dismissed.

Solicitors for the respondents, *Andrew, Wood, Purves, & Co.*

High Court of Justice.

Chan. Div. Kekewich, J. } Nov. 2, 3, 6, 7.

In re MACKAY.
MACKAY *v.* GOULD. (*a.*)

Limitation Statutes—Legacy—Action to recover—Express trust—Implied trust—Real Property Limitation Act, 1874 (37 & 38 *Vict. c.* 57), *s.* 8.

An executrix by investing and otherwise dealing with the property of beneficiaries, and by acting as defendant on behalf of herself and other beneficiaries, does not constitute herself an express trustee, and therefore an action against such executrix by a legatee to recover a legacy is capable of being barred by section 8 *of the Real Property Limitation Act,* 1874.

Action.

The question in this case was whether a legatee's claim in respect of a legacy was barred by section 8 of the Real Property Limitation Act, 1874.

Section 8 provides that "no action or other proceeding shall be brought to recover . . . any legacy, but within twelve years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same."

The plaintiff was the sole surviving child and beneficiary under the will of Alexander Mackay made on the 26th of August, 1856. By this will he left all his property to his wife and children, and appointed his wife his sole executrix. He died on the 14th of September, 1856, leaving his wife and two children—namely, the plaintiff and one son. The son died in September, 1874.

In 1857 the widow married George Richard Barry.

In 1866 Mrs. Barry, as executrix, advanced the sum of £31,641 12s. 6d., substantially the whole of the testator's estate, to Mr. Barry, and accepted from him as security the mortgage of certain estates.

Mr. Barry died in January, 1867, having appointed Mrs. Barry his sole executrix.

In 1867 the action of *The Agra Bank* (*Limited*) v. *Barry*, reported 7 L. R. H. L. 135, was commenced, being a suit instituted to obtain priority over the said mortgage. Mrs. Barry was defendant in that action on behalf of herself and the other beneficiaries.

By the judgment of the House of Lords the validity and priority of the mortgage was upheld.

In 1868 an action was commenced to administer under the direction of the court the estate of the said G. R. Barry, which was insolvent, and by an order of the 1st of August, 1882, Mrs. Barry was held entitled to retain the sum of £8,683 5s. 1d. along with other personal estate of the said G. R. Barry in part satisfaction and discharge of the moneys due to her as executrix of the testator under the said mortgage.

The plaintiff came of age in 1876.

During the lifetime of Mrs. Barry the plaintiff received from her certain moneys, part of the testator's estate. Mrs. Barry, by her will made on the 9th of December, 1882, appointed the defendants her executors, and left all her property away from the plaintiff. She died in 1885 leaving personal estate of the value of £8,200. The plaintiff alleged that this constituted part of the testator Mackay's estate, and that it was held by Mrs. Barry in trust for herself and the plaintiff as joint tenants. She therefore commenced this action for a declaration that she was entitled to the whole of the testator Mackay's estate as sole surviving beneficiary under his will, an account of the moneys representing that estate and of the defendants' dealings therewith, and payment of the moneys that should be found due to her upon the taking of the account.

Stewart Smith, K.C., and *H. L. Fraser*, for the plaintiff.—Mrs. Barry had not so fully informed the plaintiff as to her rights under the testator's will as she was bound to do (*In re Roberts, Roberts* v. *Roberts*, [1905] 1 Ch. 704, 53 W. R. Dig. 36; *Brittlebank* v. *Goodwin*, 12 SOLICITORS' JOURNAL 744, L. R. 5 Eq. 545); and her failure to perform this duty amounted to a fraud in law; *Thompson* v. *Eastwood*, 2 A. C. 215, 25 W. R. Dig. 341; *In re McCallum, McCallum* v. *McCallum*, 49 W. R. 129, [1901] 1 Ch. 143. Mrs. Barry by defending the action of *The Agra Bank* (*Limited*) v. *Barry* on behalf of herself and the other beneficiaries, and by retaining the property and investing it for the beneficiaries, had converted herself into an express trustee: *In re Timmis, Nixon* v. *Smith*, 50 W. R. 164, [1902] 1 Ch. 176.

P. O. Lawrence, K.C., and *Christopher James*, for the defendants.—Mrs. Barry had done nothing whereby it could be held that she had converted herself into an express trustee (*In re Rowe, Jacobs* v. *Hind*, 58 L. J. Ch. 703, 37 W. R. Dig. 4; *In re Davis, Evans* v. *Moore*, 39 W. R. 627, [1891] 3 Ch. 119); and therefore the statute applied. On the other point raised they cited *In re Lewis, Lewis* v. *Lewis*, [1904] 2 Ch. 656.

KEKEWICH, J., found as a fact that, although the plaintiff had not received all that she was entitled to under the testator's will, she was aware, during Mrs. Barry's lifetime, of the contents thereof. The question whether the plaintiff's claim was barred by section 8 of the Real Property Limitation Act, 1874, depended on whether the defendants were representatives of an express trustee, or merely representatives of an executrix. If they were representatives of an express trustee the statute did not apply, but if they were representatives of an executrix the statute did apply and the claim was barred. Mrs. Barry was the defendant in an action concerning the whole estate on behalf of herself and the other beneficiaries, and in an affidavit she said that the moneys were trust property. If she had recovered the property she would have held it as a trustee, but only in a loose sense. The fact that executors perform their duty by suing for *cestuis que trust* is no reason for converting them into express trustees. To hold otherwise would be contrary to *In re Rowe* and *In re Davis*. The statute therefore applies and the plaintiff's claim is barred. It has also been said that Mrs. Barry was under an obligation to fully inform the plaintiff of her rights under the testator's will. On this point it was a question how far the decision in *In re Lewis* was consistent with a *dictum* of Giffard, V.C., in *Brittlebank* v. *Goodwin*, but having regard to the facts it is not necessary to determine that question now.

Judgment for defendants.

Solicitors for the plaintiff, *T. C. Summerhays.*

Solicitors for the defendants, *Trinder, Capron, & Co.*

(*a.*) Reported by P. JOHN BOLAND, Esq., Barrister-at-Law.

Chan. Div.
Swinfen Eady, J. } July 26, 27; Aug. 8, 1905.

PESCOD v. MAYOR, &c., OF THE CITY OF WESTMINSTER. (a.)

Metropolis—Widening streets—Compulsory purchase—Severance—Sub-lessee—Michael Angelo Taylor's Act, 1817 (57 *Geo.* 3, *c. xxix.*), *ss.* 80, 96.

Where a local authority took a house let in separate floors for street widening under Michael Angelo Taylor's Act, s. 80, *the owner of the ground-floor is not necessarily entitled to restrain the local authority from taking more than is wanted to be thrown into the street. Where the danger, inconvenience, and excessive cost of severance resulted in a* bonâ fide *adjudication that it was necessary to acquire the whole building, this was not vitiated by a prior agreement to re-sell the surplus portion, subject to the owner's right of pre-emption under section* 96.

Teuliere *v.* Vestry of St. Mary Abbotts, Kensington, 30 *Ch. D.* 642, 34 *W. R. Dig.* 102, *and* Gordon *v.* Vestry of St. Mary Abbotts, Kensington, [1894] 2 *Q. B.* 742, *followed.*

The plaintiff was the lessee for a term of 2½ years unexpired of the basement, ground floor, and entresol of No. 30, Piccadilly, where he carried on the business of a tailor under the name of Nicholls & Co. Part of the basement and ground-floor had been sub-let by him to a tobacconist, Notaras, for the residue of his lease except the last day thereof.

The defendants, the Westminster City Corporation, in order to carry out the scheme of the London County Council for the widening of Piccadilly, put into operation their statutory powers of acquiring land under Michael Angelo Taylor's Act (57 Geo. 3, c. xxix.), by giving a notice to treat, dated the 10th of June, 1905.

The plaintiff alleged that the adjudication made by the defendants that the whole of No. 30 would be necessary for the purpose of widening was wrong and *ultra vires* and was not made *bonâ fide.* He claimed an injunction to restrain the defendants from proceeding under their notice to treat.

The plaintiff's premises consisted of: (1) On the ground-floor two shops having a total frontage to Piccadilly of 18ft. and a total depth of 64ft., the width of the back being 25ft. for a depth of about 32ft.; (2) the basement beneath the whole of the ground-floor; (3) a large room of about 650ft. superficial area on the entresol floor, 26ft. from the street. The plaintiff had no interest in the front portion of the entresol floor nor in the 1st, 2nd, 3rd, or 4th floors of the house fronting Piccadilly except in respect to a claim for flues and to a cistern. These floors had a separate entrance and extended over the two shops and the entrance, a front of 25ft. The plaintiff's room on the entresol floor at the back had no building over it.

The plaintiff alleged that all that was necessary for the widening of Piccadilly was a strip 22ft. 6in. in width, and that he was willing to sell that part and could not be required to sell the whole. The adjudication that it was necessary to take the whole house could not be *bonâ fide,* because the defendants had previously agreed to resell to the Piccadilly Hotel (Limited) the portion not actually required for street widening. It was further shown that along most of the line of widening only the part actually to be laid down into the street had been acquired by the defendants.

Macmorran, K.C., and *Lyttelton Chubb,* for the plaintiff, argued that the business could be carried on in the curtailed premises, and that, as this was so, the plaintiff could not be forced to sell so as to allow his immediate landlord, the Piccadilly Hotel, to acquire his lease from the defendants: *Teuliere* v. *Vestry of St. Mary Abbotts, Kensington,* 30 Ch. D. 642. Even if the corporation should be put to extra expense thereby, they were bound to incur it, and would have the power to enter the plaintiff's premises to shore them up and maintain them during the period of working, and could easily place a passage over their underground alterations so as to give access to the plaintiff's shop from the street.

Aldis v. *Corporation of London,* 47 W. R. 514, [1899] 2 Ch. 169, and *Manchester Ship Canal Co.* v. *Manchester Racecourse Co.,* 49 W. R. 418, [1900] 2 Ch. 352, [1901] 2 Ch. 37, were cited.

Eve, K.C., and *T. T. Methold,* for the defendants, argued that the adjudication made was entirely *bonâ fide.* The tenure of the house in question was so divided that the contemplated alterations would make the house quite useless to the tenants other than the plaintiff, who all wished to be bought out. The defendants' action was entirely in the public interest, and good rents had been obtained for all land not necessary for the actual widening. As to the contention that the plaintiff would be able to carry on his business during and after the alterations, surveyors were called to show that this was not so, and that not only would the rest of the house—which the plaintiff claimed must be left standing to support his cistern and flues—be quite useless, but that the underground operations of the defendants in preparing the new street would entirely cut the plaintiff off from Piccadilly and prevent for long periods any satisfactory communication with the street for the purposes of his business. It had been already admitted on an interlocutory motion for an injunction that the plaintiff had a right of preemption over the premises in accordance with section 96 of the Act.

Gordon v. *Vestry of St. Mary Abbotts, Kensington,* [1894] 2 Q. B. 742, and *Fernley* v. *Limehouse Waterworks,* 68 L. J. Ch. 344, 47 W. R. Dig. 130, were cited.

SWINFEN EADY, J., in a considered judgment, stated the nature of the plaintiff's action and the facts of the case above-mentioned, and continued: The plaintiff contends that it is physically possible to pull down and remove so much of the entire building as lies to the south of a line shown in red ink on the plans, and which is 22ft. 6in. back from Piccadilly. This is the new building line of Piccadilly. He contends that so much of the building as is north of that line must be left standing, at all events that portion in which he is interested, that care must be taken in pulling down the front portion, so as to support properly the back portion left standing. The result of doing what the plaintiff contends for would be to leave a portion of the house 25ft. wide by about 18ft. deep resembling a tower of four floors, with the whole front removed and exposed, and no means of access to it, as the staircase is in the front portion to be pulled down and there is not sufficient room to erect a fresh staircase. Some of the witnesses described this portion as about 18ft. square, but this is a mistake. The width of the building, so far as the plaintiff's interest extends, is only 18ft. on the Piccadilly front; but the entire width of the building, including the separate entrance to the floors, and the width of the upper floors, is 25ft., as plainly appears from the model verified by Mr. Andrew Young. This tower 25ft. by 18ft. would be of no use whatever. Mr. Alexander H. Turner, an experienced house agent now carrying on business in South Audley-street, but

(a.) Reported by C. H. CARDEN NOAD, Esq., Barrister-at-Law.

formerly of Piccadilly, nearly opposite the premises in dispute, a witness called by the plaintiff, said that he could not even suggest any manner in which the rear portion of the four floors could be utilized, after the front portion had been removed in the manner proposed by the plaintiff. The conclusions of fact to which I come are that it would be physically possible to pull down the front portion and leave the rear portion standing, but that the cost of so doing would be very excessive—that it could not be done without entering upon every floor of the rear portion remaining standing, and placing struts and ties to uphold it, when the front part had been removed, and also entering upon the adjoining land each side and placing raking shores there to afford the rear portion external support; and that the opinion of Mr. Stenning, the architect and surveyor, was well founded that when this had been done the district surveyor would immediately come in and condemn the back portion as a dangerous structure. It was also put in evidence that the plaintiff has another action pending in this court against the Piccadilly Hotel Co. (Limited), who, he alleges, have acquired the leasehold interest in the whole house, subject to his own underlease of a part. That company, he alleges, have acquired and pulled down the buildings surrounding No. 30, and to a small extent have commenced the demolition of No. 30. He claims that the premises in his lease are heated by means of four fireplaces, all provided with chimney flues passing up through the building (some six storeys in height) above the roof, and that the premises are provided with a water supply by means of a cistern placed immediately under the roof, with pipes passing down through the building to the plaintiff's said premises, providing him with an excellent supply of water at high pressure. The plaintiff in that action claims an injunction to restrain any interference with the upper portion of the premises No. 30 so as to interfere with his chimneys and flues, water tanks, and supply pipes. The position, therefore, is that the rear portion would be useless and probably dangerous to leave standing, but that the plaintiff is seeking to restrain its being pulled down, as thereby damage would be occasioned to the easements and appurtenances of his premises. There are other difficulties in the plaintiff's way. If the front portion only of his premises is acquired there must be a considerable time when he will be totally excluded from his premises by reason of the danger involved in pulling down, and when this is completed he would be cut off from access to the public street until the roadway and the path can be formed and made into a fit state to throw open to the public. The defendants explained that they have to construct vaults under the path, and to turn arches over them, and the headway above the arches where the men will be working is too low to allow of wooden gangways being placed in position so as to give temporary access to the plaintiff's shop over the heads of the workmen engaged.

The plaintiff based his case upon this: that as the whole ground area proposed to be taken under the notice to treat was not intended to be thrown into the public roadway, the defendants must be restricted to the part actually intended to be so dealt with, as he was willing to convey that part only. In my opinion, the plaintiff has not any absolute right to restrain the defendants from taking more land than is intended to be actually dedicated to the public. The statute contemplates that they may take more—section 80 empowers the local authority to lay the sites of houses, walls, and buildings, and also other lands, tenements, and hereditaments acquired by them "or so much thereof as they . . . shall think proper, into the said streets or public places." Lord Chelmsford pointed out in *Thomas* v. *Daw*, 15 W. R. 113, L. R. 2 Ch. 1, at p. 7, that the words "or so much thereof" must be construed to apply to houses as well as to lands, otherwise this absurdity would follow—that the commissioners would be imperatively bound to lay the whole of the sites of the houses into the streets. Again, section 96 of the Act enables the local authority to resell lands purchased by them, after they have first been offered for sale to the persons from whom they were purchased. This also shows that the statute contemplated that they might take more land than the actual strip required for street widening. In my judgment the question which I have to determine is whether the defendants have honestly and in good faith adjudged that the whole of the house or building No. 30 projects into, or obstructs, or prevents them from altering, widening, or extending Piccadilly, and that the possession, occupation, and purchase of the whole of the house will be necessary for that purpose. That is the adjudication which the defendants have made, and I have arrived at the conclusion that they have done this in good faith and that in their view the possession, occupation, and purchase of the whole building will be necessary to enable them to widen Piccadilly as they propose. The position and dimensions of the building, the structural arrangement of its contents, the considerable portion of its site actually intended to be thrown into the public street, and the sub-division of the house into portions held for different terms, with the claim to chimneys and flues going up the full height of the building, and to a water-cistern at the top with service pipes from it, all point to the wisdom and prudence of the course adopted by the defendants. With this, however, I am not concerned. If, however, it were necessary for me to form a judgment as to whether the possession, occupation, and purchase of the whole building were necessary to enable the defendants to widen Piccadilly to the extent proposed I should decide that question in the affirmative. It was insisted by the plaintiff that, as a matter of law, the defendants could not take compulsorily more than the site intended to be thrown into the street, if, as was the case, he was willing to part with that portion. Such a rule, if is existed, would be productive of the greatest inconvenience where a house is divided into different floors which, or parts of which, are leased separately, and where some of the lessees might require the whole of their interest to be purchased, while others took the opposite view and claimed to retain everything not intended to be thrown into the street. Moreover, such a rule would enable the owner of a very limited interest in a small part only of a house to require that part to be left, although the removal of the portion necessary to be pulled down might render the whole of the rest of the house perfectly useless. The language of the Act itself does not afford any support for such an argument. In *Teuliere* v. *Vestry of St. Mary Abbotts, Kensington*, 30 Ch. D. 642, Pearson, J., put the case of a vestry taking so much of the buildings that the portion left was a mere wall, or a staircase and one or two kitchens, and said that it would be unreasonable as regards the owners, for the vestry not to take the whole, and as regards the vestry to make them pay for all damage by severance. He certainly, therefore, took the view that if only a small portion of the building was left, not actually required for the street, the owner would have no right to restrict the vestry to the portion intended for the street and to make the vestry pay compensation for severance. Again, in *Gordon* v. *Vestry of St. Mary Abbotts, Kensington*, [1894] 2 Q. B. 742, it was said by the present Master

of the Rolls (at p. 754): "If a particular part of a house can be pointed to which the vestry, *bonâ fide*, find is the only part which obstructs the improvement, and that part is separable from the house, so that it can be removed without destroying the house as a house, then I should say that there is nothing to prevent the vestry from compulsorily taking that part only. If, on the other hand, the thing, in respect of which they form their judgment that it obstructs and is necessary to be removed is so indissolubly linked with the whole fabric of the house that, in the opinion of the jury, it cannot be removed without practically destroying the identity of the house as a house, then I think the vestry are not entitled to say that 'part thereof' only obstructs or that 'part thereof' only is necessary to be removed for the purpose of the improvement. Under those circumstances I am of opinion that the vestry could not stop short of taking the whole." In the present case it is quite clear that the portion of the building which is necessary to be removed, to lay the site of it into the street, is so indissolubly linked with the whole fabric of the house that it cannot be removed without practically destroying the identity of the house as a house. The identity is altogether gone when nearly two-thirds of the main building is removed and four upper floors are left as a mere shell with no means of access and no space to make one. Under these circumstances the defendants could not stop short of taking the whole. I may add that when once the conclusion of fact has been arrived at that it is essential for the defendants to acquire the whole building for the purpose of widening Piccadilly, the adjudication of the defendants to that effect does not become *ultrà vires*, nor can *mala fides* be attributed to the defendants, because, before the date of the adjudication, an arrangement had been come to with regard to the resale of so much of the site of the building as was not required for street widening. So far as the plaintiff's interest is concerned this is subject to his right of pre-emption; and upon the facts it is clear that the defendants are not putting in force their compulsory powers colourably only as regards street widening in respect of any part of the building. There is no ground for the contention that as regards the rear portion the ostensible purpose of the defendants is not the real one, and that the real purpose is to resell the back portion to the hotel company; I am quite satisfied that the real purpose of the defendants, the purpose for which their compulsory powers are being used—honestly and *bonâ fide*—is to acquire the whole building for the purpose alone of street widening. The result is that the action fails, and must be dismissed with costs.

Solicitors, *Mead & Sons; W. A. Blaxland.*

Chan. Div.
Swinfen Eady, J. } June 6, 9; July 12, 1905.

In re JAMES ALLEN.
HARGREAVES *v.* TAYLOR. (*a.*)

Will—Charity—Public institutions—Charitable institutions and other general purposes of locality.

A testator in the events which happened gave part of his residuary estate upon trust for charitable, educational, or other institutions of the town of Kendal, and also for such other general purposes for the benefit of the town of Kendal or its inhabitants as his trustees should think fit. Certain institutions at Kendal, a hospital, grammar school, and free library were suggested by the testator, without binding his trustees to adopt the suggestion, as suitable institutions.

Held, that the gift was a valid charitable trust.

Dolan *v.* Macdermott, 17 *W. R.* 3, L. R. 5 *Eq.* 60, 3 *Ch. App.* 676, *and* Mayor, &c., of Wrexham *v.* Tamplin, 21 *W. R.* 768, *followed.*

Summons.

A testator, James Allen, by his will, dated the 4th of January, 1896, appointed executors and trustees thereof and made certain specific and pecuniary bequests and gave his residuary estate in moieties, one moiety being given to his trustees to hold upon trust for his nephew, A. T. J. Walker, for life, and then to his children upon attaining twenty-one or marrying, and the other moiety to a niece upon like terms.

In clause 8 of the testator's will he directed as follows: "Subject to the trusts contained in the preceding paragraphs of this my will, I direct my trustees to stand possessed as well of my nephew's settled trust fund as also of my niece's settled trust fund and of the two half-parts of the trust fund given under clause 6 of this my will, upon trust for such charitable, educational, or other institutions of the town of Kendal, and also for such other general purposes for the benefit of the town of Kendal, or any of the inhabitants thereof, as my trustees shall in their absolute uncontrolled discretion think fit. And I desire, without in any way binding my trustees thereto, that the following institutions shall be carefully considered by them in such distribution—namely, (1) The Kendal Memorial Hospital, either by way of endowment or by way of enlargement or otherwise as to my trustees shall seem best; (2) the Kendal Grammar School, either by way of establishing one or more exhibition or exhibitions (to be called the James Allen exhibition) to the Universities of Oxford or Cambridge, or otherwise for the benefit of or the general endowment of the said grammar school as to my trustees shall seem best; and (3) the Kendal Public Free Library. I declare that any moneys dealt with under this clause may be paid over by my trustees to the treasurer, committee, or governing body of any institution or body which may be intended to be benefited, and the receipts of such treasurer, committee, or governing body shall be a sufficient discharge to my trustees, or the moneys may be retained by my trustees, and the income applied by them for the purposes aforesaid, or any of them."

The testator died on the 28th of February, 1896.

The testator's nephew, A. T. J. Walker, survived the testator but died without issue.

This was an originating summons taken out by the surviving trustees of the will of the testator for the determination of the question whether, upon the true construction of the will and in the events which had happened, any and which of the gifts under clause 8 were to any, and what, extent good charitable, and valid gifts.

T. T. Methold, for the trustees, stated the above facts.

Eve, K.C., and *A. B. Marten*, for the next-of-kin of the testator, contended that upon the true construction of the will the gifts in clause 8 were wide enough to include objects which were not charitable within the meaning of the statute of Elizabeth.

Sir R. B. Finlay, A.G., and *R. J. Parker*, for the Crown, argued that this was a good and valid charitable gift as being a gift to the inhabitants of a limited district for public purposes. The will must, on the authorities, be construed to refer to public

(*a.*) Reported by C. H. CARDEN NOAD, Esq., Barrister-at-Law.

purposes only, and the discretion given to the trustees was not wider than was permissible to a testator.

Cur. adv. vult.

SWINFEN EADY, J., in delivering judgment, stated the facts above-mentioned and read clause 8 of the will. He then continued as follows: It is first necessary to consider what is the true construction of the will. The trust for "such charitable, educational, or other institutions for the town of Kendal" is followed by the words "such other general purposes for the benefit of the town of Kendal, or any of the inhabitants thereof, as my trustees shall think fit." The context shows that the testator when specifying "other institutions of the town of Kendal" meant institutions of a public character for the general benefit of the town or its inhabitants. The enumeration of particular institutions which follows further shows the kind of objects which he was contemplating; he mentions an institution of each kind, not in any way binding his trustees thereto, but asking that they should carefully consider each one in the distribution. The first mentioned is the "Kendal Memorial Hospital," which is a charitable institution for the benefit of the town or its inhabitants, intended for the use of the suffering poor. The next mentioned —the Kendal Grammar School—is an example of an educational institution for the benefit of the town or its inhabitants. The third is the Kendal Public Free Library, and that is an example of another institution of the town of Kendal of a public character and for the general benefit of the town and those inhabiting it. The testator describes himself as of Kendal, and his obvious intention was to benefit the town in which he dwelt. In my opinion, the benefits conferred by clause 8 are (as a matter of construction) limited to general or public purposes for the town of Kendal and the persons dwelling in that town. Now a gift for public purposes in a specified locality is a valid charitable trust; although a gift for public purposes generally is void as being so general and undefined that it cannot be executed by the court. *Vezey* v. *Jamson*, 1 S. & St. 69, is an instance of the latter class of gift. This decision of Sir John Leach's was referred to with approval by Lord Davey in *Hunter* v. *Attorney-General*, 47 W. R. 673, [1889] A. C., at p. 323. Lord Davey there said that there is a long series of authorities extending from *Morice* v. *Bishop of Durham*, 9 Ves., p. 399, 10 Ves. 321, to *In re Macduff*, 45 W. R. 154, [1896] 2 Ch. 451, in which it has been held "that where charitable purposes are mixed up with other purposes of such a shadowy and indefinite nature that the court cannot execute them (such as 'charitable or benevolent' or 'charitable or philanthropic' or 'charitable or pious' purposes), or where the description includes purposes which may or may not be charitable (such as 'undertakings of public utility'), and a discretion is vested in the trustees, the whole gift fails for uncertainty." The cases of *Blair* v. *Duncan*, 50 W. R. 369, [1902] A. C. 37, where the gift was "for such charitable or public purposes as my trustee thinks proper," and *Grimond* v. *Grimond*, [1905] A. C. 124, 53 W. R. Dig. 184, where the gift was to and among "such charitable or religious institutions and societies" as the trustees might "select," may be mentioned as subsequent authorities of the same series as that to which Lord Davey referred. The reason why a trust for public purposes generally is void was pointed out by the Lord Chancellor in *Grimond* v. *Grimond*. He said: "The testator here has not given a class from which he allowed his trustees to select individually, but he has left his directions so vague that it is in effect giving someone else power to make a will for him instead of making a will for himself, which I conceive to be the objection always entertained when the directions are so extremely vague that you cannot say what it is that the testator meant. In this case the testator has not made any will himself; he has allowed someone else to make a will for him after his death, and that the law will not allow." On the other hand, a trust for public works, or objects of public utility at a particular place is sufficiently certain, definite, and limited, to be valid. In *Goodman* v. *Mayor of Saltash*, 31 W. R. 293, 7 App. Cas. 633, at p. 639, Lord Selborne stated that the fishery there in question might have been originally granted to the free burgesses of Essa, subject to a condition or proviso that the free inhabitants of ancient messuages within the borough should be entitled to fish, as they had been accustomed to do, in every year from Candlemas to Easter. He then continued: "In such a grant there would be all the elements necessary to constitute what, in modern jurisprudence, is called a charitable trust. . . . A gift subject to a condition or trust for the benefit of the inhabitants of a parish or town, or of any particular class of such inhabitants, is (as I understand the law) a charitable trust." There are many instances in the books in which such gifts have been held to be valid charitable trusts. In *Mitford* v. *Reynolds*, Ph. 185, the testator left "the remainder of his property to the Government of Bengal, to be applied to charitable beneficial and public works at and in the city of Dacca, in Bengal, for the exclusive benefit of the native inhabitants in such a manner as they and the Government might regard as most conducive to that end." Lord Lyndhurst held that such bequest was a valid charitable bequest, within all the authorities; and referred to the case of *Jones* v. *Williams* (Ambler, 651) before Lord Camden, where there was a bequest of £1,000 to supply water to the town of Chepstow for the use of the inhabitants, which was considered a charitable bequest within the statute of Elizabeth, and to the case of *Howse* v. *Chapman*, 4 Ves. 542, where Lord Loughborough decided that a gift for the improvement of the city of Bath was, from its general nature, a good charitable bequest. Again, in *Dolan* v. *Macdermott*, the bequest was "for such charities and other public purposes as lawfully might be in the parish of Tadmarton, in the county of Oxford." It was objected that the gift was bad on two grounds—first, because it was for public purposes, which were not charitable, and, secondly, because these purposes were simply defined to be in the parish, and not for the benefit of it, and that the gift was therefore too wide. Lord Romilly, however, pointed out that, although the will made a distinction between "charities" and "public purposes," yet numerous public purposes, such as mending or repairing the roads of a parish, supplying water for the inhabitants of the parish, making or repairing bridges over any stream or any culvert that might be required in the parish, although they are public purposes in the ordinary sense of the term, as distinguished from charities like almsgiving charities, and the like, yet are in a legal sense charities, as they are all charities within the statute of Elizabeth. Therefore, if the testator meant to promote public purposes for the benefit of the parish of Tadmarton, they were charities which could be carried into execution and were sufficiently defined. He then held that the words of the gift meant "for such public purposes for the benefit of the parish of Tadmarton as my trustees shall think fit," and that the gift was accordingly valid. This decision was affirmed by the Lord Chancellor (Lord Cairns) on appeal (17 W. R. 3, L. R. 3 Ch. 676). He said it was clear that the testator, when he used the word "charities," did not point to private charities, because he

accompanied the term with the words "and other public purposes," evidently implying that the word first used meant public charities. Therefore, that the will meant that the residue was to be laid out for the benefit of the parish of Tadmarton in "public charities," using that term in the popular sense, and in other public purposes *ejusdem generis*, being charities within the statute of Elizabeth and the technical doctrine of the court, although not within the popular meaning of the word "charities." That case bears a close resemblance to the present, and in principle is in no way distinguishable from it. There is one other case to which I will refer, as it is closely in point: *Mayor, Aldermen, and Burgesses of the Borough of Wrexham* v. *Tamplin*, 21 W. R. 768. The testator there bequeathed to the mayor, aldermen, and burgesses of the borough of Wrexham "a legacy or sum of £1,000, to be spent and applied in the discretion of the said mayor and the corporation in the best way, for the use or benefit of the said borough town or of the inhabitants thereof, or of the institutions in the said borough." The question was whether this was a good charitable gift. In opposition to the gift, reliance was placed on the alternate words "or of the institutions in"; and it was contended that there was nothing to limit the institutions to charitable institutions, in the legal sense of the term, but that the gift might be applied to a club or a co-operative store, and that, as consistently with the will the gift might be applied to other than strictly charitable purposes, the gift was bad. Wickens, V.C., however, decided otherwise. He thought it was clear that public institutions were meant, and that to hold that the expression might include a private institution would be to do what is deprecated by Lord Cairns in *Dolan* v. *Macdermott*; that the practical rule is whether, on the fair and natural construction of the words used, all the purposes are charitable or public purposes. If so, the gift would be good; and he held it to be so in that case. I am of the same opinion in the present case, and determine that the whole of the gift in question contained in clause 8 of the will is a valid charitable gift.

Solicitors, *Helder, Roberts, & Co.; Trass & Taylor*, for *T. H. Green*, Halifax; *The Treasury Solicitor*.

Chan. Div.
Warrington, J. } June 23, 1905.

LEWIS v. GREEN. (a.)

Practice—Originating summons—R. S. C., 1883, *ord.* 54a, *rr.* 1, 4—*Construction—Jurisdiction—Questions of fact.*

An executor handed over securities to a legatee by a deed of 1897 *upon terms which included a guarantee by the executor that until the* 31*st of December*, 1903, *the securities should be of a certain value. The legatee mortgaged his interest in the estate by a deed which did not mention the guarantee. The mortgagees, by a deed which recited the guarantee, sold the mortgaged property to L., who brought an action in the King's Bench Division against the executor claiming the alleged difference between the amount realized and the guaranteed value of the securities. By agreement the action was dropped and another action was brought in the Chancery Division. A deed was then executed by the mortgagees conveying all the premises comprised in the mortgage, by way of confirmation to L. L. then discontinued his action and took out an originating summons asking for a declaration that, according to the true construction of the deeds, the benefit of the guarantee had been assigned to and vested in him, and for an account.*

Held, that inasmuch as questions both of fact and of construction were involved, and a decision of the questions of construction would not, in whichever way they were decided, necessarily put an end to the litigation, an originating summons under order 54a *was not the proper mode of procedure.*

Originating summons.

The respondent to the summons, W. Hatfield Green, was the executor and trustee of a will under which his nephew, W. J. Hatfield Green, took an interest. Some doubt arose as to how far the gift to the nephew took effect, and by a deed of the 10th of December, 1897, W. Hatfield Green agreed to transfer certain securities to him. The nephew released the uncle except in respect of two items of property, indemnified him against claims by next-of-kin, and charged the transferred securities for that purpose. The certificates of the securities were to be held by the uncle during the continuance of the charge. The charge was to exist until the 31st of December, 1903, when, if no claim had been made by other persons, the uncle was to hand over the certificates to the nephew, and the uncle guaranteed that the annual income from the securities should be £123 1s. 8d. at least until the 31st of December, 1903, and that the aggregate value of the securities should then be not less than £2,461 13s. 6d.

The nephew executed a mortgage for £200 on the 9th of March, 1898, of all his estate and interest in the testator's estate and under the deed of the 10th of December, 1897, to F. Austin and J. A. Holdsworth. This mortgage recited in part the will and the deed of the 10th of December, 1897, but did not mention the guarantee. On the 29th of April, 1898, the nephew mortgaged the same property to the same mortgagees to secure another sum of £200. The guarantee was not referred to in this mortgage. By a deed of the 24th of March, 1899, which recited the will, the deed of the 10th of December, 1897, including the guarantee, and the two mortgages, Austin and Holdsworth, in consideration of £800, conveyed to the applicant, J. D. B. Lewis, "all the premises comprised in and assigned by the hereinbefore recited indentures of the 9th day of March, 1898, and the 29th day of April, 1898, as the same are more particularly described in the first schedule hereto," and all the interest of the nephew under the will. No reference to the guarantee was contained in the schedule.

Lewis issued a writ in the King's Bench Division on the 4th of November, 1904, against W. Hatfield Green, claiming £1,476 10s. 6d. under the guarantee, alleged to be the difference between the guaranteed value of the capital and income, and the amounts received and realized. The respondent pointed out that it was an inconvenient action to try in the King's Bench Division. That action was accordingly discontinued, and the costs were by agreement made costs in Chancery proceedings which it was arranged to commence. Lewis proposed to proceed by originating summons, but the respondent's solicitors replied that questions of fact would arise, and that the proper course was by writ. Accordingly on the 26th of November, 1904, Lewis issued a writ in the Chancery Division.

On the 3rd of January, 1905, Austin and Holdsworth executed a deed conveying and assigning to Lewis by way of confirmation all the premises comprised in the mortgages.

On the 10th of January, 1905, Lewis served notice discontinuing the Chancery action, and took out

(a.) Reported by PERCY H. WINFIELD, Esq., Barrister-at-Law.

an originating summons under order 54*a* against W. Hatfield Green asking for a declaration that according to the true construction of the above-mentioned deeds the benefit of the guarantee had been assigned to and was vested in him. The respondent's solicitors protested against this change of procedure, but Lewis persisted, and the summons now came on for hearing.

H. Terrell, K.C., and *C. Church*, for Lewis.

Rowden, K.C., and *Sargant*, for the respondent.

WARRINGTON, J., after stating the above facts, said: This summons is issued under the Rules of the Supreme Court, ord. 54*a*, r. 1, which provides this: "In any division of the High Court, any person claiming to be interested under a deed, will, or other written instrument may apply by originating summons for the determination of any question of construction arising under the instrument, and for a declaration of the rights of the persons interested." Then there are provisions for service which I need not mention, and rule 4 is as follows: "The court or judge shall not be bound to determine any such question of construction if in their or his opinion it ought not to be determined on originating summons." In the first place, the order is confined to questions of construction. Of course, in a sense, every question of construction may involve some question of fact. It may be a question about which there is no dispute, but in order to raise any question of construction some facts must be proved or admitted. But for all that, the order is confined to enabling the court to decide questions of construction and nothing else, and the order does not enable the court to grant any relief, it can only determine the question of construction, and declare the rights of the parties. So in any case I could not order the account to be taken which is asked for by the summons.

This originating summons now comes on for hearing, and the objection is at once renewed which was made as soon as it was issued, that the procedure under order 54*a* is not the appropriate procedure. What is said is this: "The construction of the deeds will not settle the matter, because on a case of mixed fact and law I, the respondent, have another defence to the action—namely, that the deed of the 3rd of January, 1905, in the circumstances which I shall prove when the action comes on for trial, was in fact and in law, quite independently of construction, ineffectual to pass the benefit of the guarantee to the applicant. Further than that, I shall say also when the matter comes on for trial that, even assuming that the benefit of the guarantee has passed to the applicant, I, the respondent, have a complete answer to the action, arising partly from the conduct of the person to whom the guarantee was given; and, further, I have also a complete answer, because I shall have to call upon the applicant to prove damages for breach of the guarantee, which he will not be able to establish."

Now under those circumstances, the applicant persists in asking me to determine these questions of construction. In my opinion I ought not to do so.

It seems to me that under such circumstances as those under which this summons was issued order 54*a* is not the appropriate mode of procedure. The result will be this: The court may, after considerable litigation, involving an argument in a court of first instance, an argument in the Court of Appeal, and possibly an argument in the House of Lords, come ultimately to the decision that on the questions of construction raised by this summons the applicant is right. Well, what then? No relief can be given on that. There are other points which have to be decided. They can only be decided by bringing an action, and in that action it may turn out that, notwithstanding the applicant is right on the questions of construction, he is ultimately found to be wrong. The respondent will have had to pay all the expenses of the litigation on the question of construction, which will be utterly useless. It seems to me that where one finds circumstances such as I find here the procedure under order 54*a* is improper. It is only intended to enable the court to decide questions of construction where the decision of those questions, whichever way it may go, will settle the litigation between the parties. It is not intended that questions of construction which, if they are decided in one way only will settle the dispute between the parties, should come up for decision on an originating summons. It would be most inconvenient to resort to the order in a case where it is quite uncertain what may be the ultimate decision on the point of construction, and where, if the decision is in one way, it involves further litigation. I think the summons in this case is misconceived, and, having regard to the warning which the applicant had from the respondent's solicitors, I think the only thing I can do is to refuse to make any order on the summons, except to order the applicant to pay the costs of it.

Solicitors, *J. D. B. Lewis; W. W. Wynne & Sons.*

K. B. Div.
(Lord Alverstone, L.C.J., and Lawrance and Ridley, JJ.) Aug. 2, 1905.

GILBERT v. JONES. (*a*.)

Common lodging-house—No charge made for lodging—Common Lodging-houses Act, 1851—*London County Council (General Powers) Act*, 1902, *Part I.*

The Common Lodging-houses Act, 1851, *being a sanitary Act, it is immaterial that any institution be carried on for gain, or that any charge be made to the inmates for the purpose of bringing the institution within the provisions of the Act.*

The principle laid down in Logsdon *v.* Booth, 48 *W. R.* 266, [1900] 1 *Q. B.* 401, *and* Logsdon *v.* Trotter, 48 *W. R.* 365, [1900] 1 *Q. B.* 617, *followed.*

Case stated by one of the Metropolitan police magistrates sitting at the Worship-street police-court.

On the 15th of November, 1904, two informations were preferred by the respondent against the appellant (*a*) for that he, the appellant, on the 1st of November, 1904, at a house known as the Providence-row Night Refuge, Crispin-street, Stepney, being a person having, or acting in, the care or management of the said house as a common lodging-house did, contrary the provisions of the Common Lodging-houses Act, 1851, when required by Horatius Arthur Jury, an officer of the local authority under the said Act, refuse to give him free access to the said house or any part thereof; and (*b*) for that he, the appellant, on the 1st and 2nd of November, 1904, did keep the same house as a common lodging-house and receive lodgers therein without having applied for and obtained a licence under Part IX. of the London County Council (General Powers) Act, 1902.

The appellant was convicted on the said informations and ordered to pay a fine of 1s. on each information, the magistrate having decided that the case came within the decisions of *Logsdon* v. *Booth*,

(*a*.) Reported by MAURICE N. DRUCQUER, Esq., Barrister-at-Law.

48 W. R. 266, [1900] 1 Q. B. 401, and *Logsdon* v. *Trotter*, 48 W. R. 365, [1900] 1 Q. B. 617, and that therefore the house in question was a common lodging-house within the meaning of the Acts above referred to. The question for the consideration of the court was whether he was right in so deciding.

The following proved or admitted facts at the trial appeared from the case stated: That the appellant kept the said house. That H. M. Jury, the officer above referred to, was refused access to the said house by the appellant on the date named. That the appellant had not applied for a licence in respect of the said house under Part IX. of the London County Council (General Powers) Act, 1902. That the persons admitted to the said house were destitute and of the very poorest class, but in other respects did not differ from the class who habitually frequent the cheapest common lodging-houses. That the persons admitted to the said house were, while they were in the said house, treated and dealt with in a manner similar to that in which the habitual frequenters of common lodging-houses are dealt with and treated, and that on the night of the 1st of November, 1904, about 150 men and seventy women slept in the said house. That the persons admitted slept in bunks placed in open dormitories, each dormitory containing about seventy persons: that separate dormitories were provided for men and for women. That each person admitted to the said house was provided with supper and breakfast; and that these meals were taken by such persons together in common rooms. That the said house was clean, well kept and well conducted. That the said house was known as the "Dormitory" among those admitted to it and others of the same class, to distinguish it from the ordinary houses used by frequenters of common lodging-houses. That no payment of any kind was made by or on behalf of any of the persons admitted

Ricketts, for the appellant.—It is entirely contrary to the ordinary meaning of a common lodging-house to include a house of this description, where no payment is made. [He read definitions from all the standard dictionaries.] In both the *Logsdon cases* some payment was required, and that was sufficient to bring the houses there within the received meaning of a common lodging-house. Both the Towns Improvement Clauses Act, 1847, and the City of London Sewers Act, 1885, can be usefully referred to, where it will be seen that "hire" is a term of the definition in each case: It will be argued here that the Act of 1851 is a sanitary Act, and therefore the fact that a payment is or is not made is immaterial; but it must be remembered that it is also strongly a penal Act, and therefore a most rigid construction is demanded. If I chose out of charity to open my kitchen for the accommodation of certain guests chosen on account of their destitute condition, would it be using ordinary language to describe it as common lodging-house?

Avory, K.C. (*Walter Ryde* with him), for the respondent, were not called upon.

Lord ALVERSTONE, L.C.J.—It is contended that we ought to place a different construction upon this case than was applied in the two cases referred to by the magistrates, and say that if no charge at all is made to the guests then none of the provisions of the Common Lodging-houses Act, 1851, apply. We must not fritter away the decisions in those cases. There had been a previous decision of Lord Coleridge, L.C.J., and Mathew, J., to the effect that if the undertaking was not carried on for the purpose of gain it was not a common lodging-house. That decision was closely considered by Lord Russell, L.C.J., and the other judges who constituted the court in *Logsdon* v. *Booth*, and they came to the conclusion that the fact that the institution was a charitable one, was not sufficient to differentiate the case so as to exempt it from the provisions of the Act. It was a strong case, because it overruled the previous case. That was further considered and approved in *Logsdon* v. *Trotter*. Now, as the question of gain is not material to the distinction, as it has in fact nothing to do with the question, I can see no difference between the case where a small payment is made, not intended to go into the pocket of the owner of the house, and the case where no payment at all is made. These are sanitary Acts. There is no intention to interfere with the work done by such institutions. But from the point of view of a sanitary Act I can see no distinction between this case and the cases to which I have called attention. I think the magistrates were right, and the appeal must be dismissed.

LAWRANCE and RIDLEY, JJ., concurred.

Appeal dismissed.

Solicitors for the appellant, *Bellord & Coveney*.

Solicitor for the respondent, *W. A. Blaxland*.

K. B. Div.
(Lord Alverstone, L.C.J., and Kennedy and Ridley, JJ.) May 16, 1905.

REX v. DRINKWATER. (*a*.)

Licensing law—Removal of licence—Power to attach conditions to licence—Licensing Acts, 1872 (35 & 36 *Vict. c.* 94), *s.* 50; 1874 (37 & 38 *Vict. c.* 49), *s.* 22; *and* 1904 (4 *Ed.* 7, *c.* 23), *s.* 4, *sub-section* 2.

Section 4, *sub-section* 2, *of the Licensing Act*, 1904, *does not apply to orders for removal of a licence, and licensing justices are, therefore, not entitled under that section to attach conditions to an order for removal, securing the monopoly value of an on-licence to the public.*

Rule *nisi* for a *mandamus*.

The rule called upon seven justices of the peace in and for the city of Coventry, being the licensing committee for the city, to show cause why a writ of *mandamus* should not issue commanding them to hold an adjournment of the general annual licensing meeting, and to hear and determine the matter of an application by Arthur Augustus Wincott that the licence theretofore granted in respect of a house and premises in Far Gosford-street, Coventry, known as the Hare and Hounds, might be removed to a house about to be erected upon a piece of land at Bramble-street, Coventry.

The following facts appeared from the affidavit of Mr. Wincott: At the general licensing meeting, held on the 8th of February, 1905, Wincott applied for an order under section 50 of the Licensing Act, 1872, and section 22 of the Licensing Act, 1874, for the provisional removal of the existing full on-licence of the Hare and Hounds, of which he was the owner, to a house and premises about to be erected at Bramble-street on land of which he was one of the owners.

The justices refused the application, and the following minute of their decision was drawn up and read out by the justices' clerk: "We are of opinion that upon the facts proved the removal of the Hare and Hounds to the proposed new site would be of public advantage, and should be permitted by the licensing justices. Acting, however, upon the opinion of their legal adviser, Mr. Wilks, the licensing

(*a*.) Reported by ALAN HOGG, Esq., Barrister-at-Law.

justices consider they cannot make the order asked for, except as upon an application for a new licence."

An affidavit in opposition to the rule was sworn by Mr. A. H. Drinkwater, the chairman of the licensing committee, as follows: "Upon the evidence before us we considered that a case had been made out for the provisional grant of a licence to premises to be constructed in Bramble-street, and that the removal or doing away with the licence to the said premises in Far Gosford-street would be an advantage. Although we had no specific evidence on the point, we were satisfied from our own knowledge of the district that the removal of the licence . . . would be a very great pecuniary gain to the applicant, and we were not disposed to make an order sanctioning the removal of the licence unless the pecuniary gain so acquired should be secured in the interests of the public. It was contended on behalf of the appellant that we had no power to attach any conditions as to requiring payment of the monopoly value in the making of an order sanctioning the removal of the licence. We were, however, advised that we have the same power to make an order sanctioning the removal of such licence as we have to grant a new licence; and as licensing justices in the grant of a new on-licence have power to attach to the grant of the licence such conditions both as to payments to be made and as to any other matters they think proper in the interests of the public, we consider that an order sanctioning the removal of such a licence should not be made unless some such conditions should be attached to the order, requiring, *inter alia*, a payment to be made by the applicant. We did not go into the question of amount, as we had no evidence before us to enable us to fix what the amount should be. As the applicant wanted an order sanctioning the removal free of all conditions as to payment we refused the application."

Avory, K.C., and *W. Mackenzie*, for the respondents, showed cause against the rule *nisi*.—The justices had under section 4, sub-section 2, of the Licensing Act, 1904, the same power to attach conditions to the making of an order or provisional order for the removal of an on licence as they would have had if the application had been for a new on-licence. Section 50 of the Licensing Act, 1892, gives the justices the same power to sanction a removal as they have to grant a new licence, and the definitions of new licence in section 74 (now repealed) and section 32 of the Act of 1874 cover the case of a removal of a licence.

Pickford, K.C. (*Bruce Williamson* and *H. Maddocks* with him) in support of the rule.—For thirty years a statutory distinction has existed between removal of licences and granting of new licences. The words in section 50 of the Act of 1872 were inserted to give the justices full discretion. Section 4, sub-section 2, of the Act of 1904 does not apply to removals at all.

Lord ALVERSTONE, L.C.J.—I am of opinion that this rule should be made absolute. If the grounds of the justices' decision were as stated in the affidavit in support of the rule, that they could not make an order for the provisional removal of the licence in question except as upon an application for a new licence, the matter would be almost too clear for argument, because their decision would be that the old law in regard to removal of licences was altered and that an application to remove the licence to a place which has not been previously licensed could only be dealt with as an application for a new licence. Such a decision would obviously go too far. It would be going much too far to say that in every case of an application to remove a licence no questions as to the value of the property, or as to new and improved conditions in respect of the new premises, or as to the desirability of removing the licence from a place where there are too many licensed premises to a place where there are few or none, and the like, may be considered, but that the application must be dealt with only as though it were an application for a new licence, and the fact that there was an existing licence must be wholly disregarded. To say that would, in my view, be to repeal the whole of the legislation in respect of the removal of licences. I confess I have difficulty in reconciling the affidavit made by one of the justices with the minute of their decision read out by their clerk; but it may be, as suggested, that they meant to say that they thought they were bound to deal, or had power to deal, with the application for a removal order upon the same basis and from the same point of view as if it were an application for the grant of a new licence, and that they were bound to impose, or entitled to impose, conditions upon the applicant for a removal, in order to secure a pecuniary gain for the benefit of the public. Whichever view they took, the state of the law as regards this matter is, in my opinion, this: There have been parallel lines of legislation, one with respect to orders sanctioning the removal of licences, and the other with respect to granting new licences. I agree that to a great extent the same considerations had to be applied to the one as to the other exercise of jurisdiction. In both cases it was necessary to consider the convenience of the public, the fitness of the premises, and other like matters. It is true that section 50 of the Licensing Act, 1872, says: "Subject as aforesaid, such justices shall have the same power to make an order sanctioning such removals as they have to grant new licences"; but I think there is something to be said for the view that, section 50 being the enabling section, some such words were required, and the insertion of them does not, to my mind, warrant the contention that the "same power" means that the justices' power is to make an order sanctioning a removal under all the circumstances, and exactly in the same way as in the case of a new licence. Again, section 22 of the Licensing Act, 1874, which enabled orders to be made for provisional removal, does not seem to me to destroy the argument that the legislation has run on parallel lines in respect of the power of making orders for removal and provisional removal, and in respect of grants of new licences, and that an absolute discretion has been preserved to the justices with regard to making these removal orders. Passing to the Licensing Act, 1904, it involves difficulties of construction which must be solved to a large extent by keeping in view its main object and extent, which were to give a value to existing licences, to secure them to the holders, and to secure for the benefit of the public the monopoly value of new licences. Section 4, sub-section 2, provides that the justices "on the grant of a new on-licence" may attach conditions to the grant. The language, therefore, does not in terms include within its operations an order sanctioning the removal of a licence, and it is a fair argument that, if the Legislature had meant to bring both classes of jurisdiction within the operation of that one section and make them subject to one condition, you would expect to find express words in the section such as "either on the grant of a new on-licence or on the removal of an existing on-licence," and the interpretation clause (section 9, sub-section 4) to some extent supports that view, because, in defining what is a "new on-licence" and an "existing on-licence" it draws a clear distinction between licences which were not in existence at the date of the passing of the Act, and licences which were in existence at that date. There is

another consideration, which, though not conclusive, has some weight in enabling us to determine whether section 4, sub-section 2, relates to and includes the case of a removal of a licence. Clause (*a*) of sub-section 2 deals with the question of monopoly value represented by the difference between the value which the premises will bear, in the opinion of the justices, when licensed, and the value of the same premises if they were not licensed. It is difficult to see how, if that is the problem to be dealt with and solved, the element that an existing on-licence has been removed from another house can properly enter into the calculation. In the case of the removal of an existing licence the public cannot be intended to get the monopoly value in respect of the new house as if there had been no licence in existence; they are only entitled to the monopoly value on the grant of a new licence. That, in my opinion, points to the conclusion that an order sanctioning the removal of an existing licence involves different considerations from those which arise with respect to the grant of a new licence, and supports the argument that the words "on the grant of a new licence" ought not to be construed as equivalent to "on the removal of an existing licence" simply because by earlier legislation the same powers were given to justices to make orders for removal as were given to them to grant new licences. I am therefore of opinion that upon an application for the removal of a licence the justices have not the power to impose the condition given to them in respect of granting new licences by section 4, sub-section 2, of the Licensing Act, 1904. I wish, however, to say that I do not indicate or suggest that the justices have not a discretion as to whether they will or will not make an order sanctioning the removal; and, speaking for myself, I think they are entitled and ought to take into consideration the circumstance, if it exists, that a great pecuniary gain would be conferred upon the applicant, and the public would lose that pecuniary gain, which might have been preserved to them if the application had been for the grant of a new licence. It must not be thought, therefore, that I suggest that the justices have not a discretion to refuse to make a removal order upon that ground amongst others. It is a matter for them to take into consideration, but they must consider it with reference to the question of making or refusing to make the removal order, and they must not attach conditions which they have no power to attach under the statute. The rule must be made absolute, and the justices must deal with the question of making or refusing the order for removal on its merits when it comes before them.

KENNEDY and RIDLEY, JJ., concurred.

Rule made absolute.

Solicitors for the prosecution, *Godden, Son, & Holme*, for *Band & Hatton*, Coventry.

Solicitors for the respondents, *Nicholson, Graham, & Graham*, for *Montague Wilks*, Coventry.

Court of Appeal.

Appeal.
(Collins, M.R., and Romer and Mathew, L.JJ.) Nov. 1.

ADAMS v. SHADDOCK. (*a*.)

Master and servant—Employers' liability—Accident—Compensation—Engineering work—Tramway, alteration of—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 7.

A workman was employed by a contractor who had entered into a contract with a telephone company to carry telephone wires across and under a certain street. The telephone company had statutory power to carry the wires under the street. Two tramway lines, one up and one down, were laid along the street. The contractor made a trench from one side of the street as far as the outside rail of the down line, and also a trench in the space between the up and down lines, and was proposing to connect these two trenches by means of a hole under the down line for the purpose of carrying the wires. One of his workmen was engaged in making the hole by means of an iron bar when a passing tramcar killed him. His widow claimed compensation under the Workmen's Compensation Act, 1897, *upon the ground that at the time of the accident the deceased workman was employed on or about engineering work—namely, the alteration of the tramway. The county court judge found that the work was not an alteration of the tramway, and that the Act did not apply.*

Held (*by* Collins, M.R., *and* Mathew, L.J., Romer, L.J., *dissenting*), *that the space between the up and down lines was part of the tramway, and that, as there was a physical alteration in the surface of the street at that place, the deceased man was employed on or about the alteration of the tramway, and the Act applied.*

Appeal from an award made by Judge Lush-Wilson, K.C., under the Workmen's Compensation Act, 1897 at the Plymouth County Court.

The applicant for compensation was the widow of a workman who was killed by an accident arising out of and in the course of his employment. The workman was in the employment of a contractor who had entered into a contract with a telephone company to carry a telephone wire across and underneath a road at Devonport along which an electric tramway was laid. The telephone company were acting under their statutory powers in having the wire laid across the road. There were two lines of tramway along the road, one up and one down. The contractor's workmen dug a trench for the telephone wire from one side of the road up to within about two feet of the outside rail of the down tramway line and also a trench in the space between the up and down lines, and it was intended to dig a similar trench on the far side of the up line to the opposite side of the road. It was intended to connect these trenches by holes or tunnels under the up and down lines. The deceased man was employed by the contractor in making a hole or tunnel with an iron bar under the down set of lines so as to connect the trench outside the rails with the trench between the up and down lines, when he was killed by a passing tramcar. The working of the tramway was not stopped or interfered with by the work.

His widow claimed compensation under the Workmen's Compensation Act, 1897, upon the ground that the deceased man at the time of the accident was employed "on or in or about engineering work"—

(*a*.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

namely, the "alteration of a railroad," within section 7 of the Act, a tramway having been held in *Fletcher* v. *London United Tramways Co.*, 50 W. R. 597, [1902] 2 K. B. 269, to be a "railroad" within the meaning of that word in section 7, sub-section 2, of the Act.

The county court judge held that the employer was not liable upon the grounds, first, that the words "work of alteration of a railroad" must probably be confined to work undertaken by or for and on behalf of the proprietors of the railroad, and was not intended to and could not include a collateral operation by or for and on behalf of a stranger in pursuance of an independent right, even though the operation might to some extent interfere with the railroad; and, secondly, that the work in question was not an alteration of a railroad. Putting it at its highest, the work could only be described as an interference with or alteration of the soil on which the rails rested. The proprietors of the tramway did not own such soil. They merely had a restricted right of user or easement over such soil. The property of the tramway company was not in any way altered by reason of the work. The result was that the deceased man was not employed on or in or about engineering work, and that therefore the applicant had no remedy under the Act. He accordingly made an award in favour of the employer.

The applicant appealed.

John Sankey, for the applicant.—The deceased workman was, at the time of the accident, employed on or in or about the alteration of the tramway, that is to say, a railroad, within the definition of engineering work in section 7, sub-section 2, of the Workmen's Compensation Act, 1897. The tramway includes the concrete and made soil upon which the rails rest, and also the space between the up and down lines. The repair of that part of the road is, by section 28 of the Tramways Act, 1870, imposed upon the owners of the tramway. The digging of the trench between the up and down lines was an alteration of the tramway. The county court judge arrived at his conclusion of fact by means of a misdirection.

He referred to *Coles* v. *Anderson*, 21 Times L. R. 204.

W. Shakespeare, for the employer.—The decision of the county court judge that the deceased workman was not employed on or in or about the alteration of the tramway was a decision upon a question of fact, and this court cannot disturb it unless there is no evidence to support it. The mere opening of the road between the up and down lines cannot be described in popular language as an alteration of the tramway. It did not in any way interfere with or affect the working of the tramway or the tramway lines. There was no intention on the part, either of the telephone company, which had statutory power to open up the road, or of the contractor to touch the tramway. It is impossible to say that there is no evidence to support the finding of the county court judge. Moreover, the decision was right. It has not been proved that the tramway company are bound by section 28 of the Tramways Act, 1870, to repair the part of the road between the up and down lines, because there is no evidence that the distance between those sets of lines is not more than four feet. Therefore no argument can be based upon the obligation of the tramway company to repair that part of the road.

COLLINS, M.R.—This is one of the numerous conundrums which the Act calls upon us to solve, and I cannot say that I have formed a very clear or entirely satisfactory judgment in the matter, particularly in view of the fact that the members of the court are not at one upon the point. I have not arrived at a conclusion with any great degree of certainty, because the Workmen's Compensation Act, 1897, does not admit of any very certain conclusion in the interpretation of its definitions. The workman here was employed by a contractor who had entered into a contract with a telephone company to carry a telephone wire across and under a public high road upon which tramway lines were laid. The deceased man was engaged on that work, and the question is whether he was engaged on "engineering work" within the Act. Employment on "engineering work" is one of those employments which come within the Act. Section 7, sub-section 2, defines engineering work, so far as material, as meaning "any work of construction or alteration or repair of a railroad." In this particular case the work which the workman was employed to do was not work with which the tramway company were concerned. The work was undertaken by strangers to the tramway company, who had statutory powers to carry the wire across and under the roadway. The contractor made a trench up to, or rather nearly up to—that is to say, to within about two feet of the outer tramline, at right angles thereto, and then, instead of continuing the trench, he made a small tunnel to carry the wire under one set of tramway lines and the road between those lines to the space between the up and down lines. In that intervening space between the up and down lines he made another trench, and then again he intended to make a tunnel under the other set of lines to carry the wire under those lines until it arrived outside the lines altogether, and then to make another trench to carry the wire to the other side of the road. That work undoubtedly involved an alteration of the physical condition of the surface of the roadway between the up and down lines of tramway. The contractor had in point of fact to cut an opening in the road which was part of the high road upon which the tramway was laid. The deceased workman was employed upon that work. The question is whether he was employed on or in or about engineering work, that is to say, the work of construction or alteration or repair of a railroad—namely, a tramway. We have to apply that definition; and I think that we are justified in looking at the scheme of the Act, which is to single out certain classes of employment and to place workmen engaged in those employments under the protection of the Act. It was obviously intended by the Legislature that there should be some distinction between different employments. It looks probable that the Act contemplates different elements of danger in different employments, and those employments which the Legislature thought to have special elements of danger were brought within the Act. Obviously the governing notion is that the work must be such as will bring the man employed upon it into specially dangerous relations. Therefore, by whomsoever the workman is employed, whether by the tramway owners or by somebody else, if he is employed upon work which entails a physical alteration of the railroad, in the present case a tramway, the employment is brought within the line of danger, and is one of the employments to which the Act extends its protection. In this case there was a physical alteration made in the surface of the road along which the tramway lines are laid, and the question is whether that can be described as a work of alteration of a railroad within the meaning of the Act. The argument that the definition of engineering work does not cover the particular work in question is mainly founded upon this, that the intervening space between the up and down lines of tramway, being upon the high road, is not part of the railroad within the meaning of the definition.

Properly speaking, the term railroad, when applied to a statutory tramway such as the one in question, might not embrace that part between the rails, but might be limited to the rails themselves. Inasmuch as the surface upon which the tramway was laid was originally part of the highway, and remains part of the highway, it was originally repairable by the highway authority, and now by statute it is only made repairable in the first instance by the tramway company, leaving with the highway authority the underlying obligation, or at all events the right, of themselves intervening and doing the repair, if the tramway company neglect to repair, upon giving the company a certain notice. It is contended that that part of the road between the up and down lines cannot, therefore, be described as part of the railroad, and that a person employed on or about the alteration of that part of the road cannot be said to be employed on or about the alteration of a railroad. I have come to the conclusion, not without hesitation and difficulty, that the definition must be taken to embrace the work which was done in this particular case, and which undoubtedly did involve an alteration of the physical condition of that part of the road where the tramway is laid. The question comes to this, was the alteration of the part of the road between the up and down lines of rails an alteration of a railroad? What does the word railroad embrace? Taking the word railroad as expressing what the ordinary man in the street would consider would come within that term, there are many things called railroads quite apart from what is included in the word "railway." It has been decided that a tramway comes within the term railroad. We are told by the House of Lords to give to the words of the Act a practical common-sense meaning, and not to put a strained or artificial construction upon them. It seems to me that the word "railroad" as applied to those old private tramways which existed before the Tramways Act, 1870, and which were common in certain colliery districts, would in ordinary parlance include the roadway upon which the tramway was laid as well as the rails upon which the wheels ran, and the whole thing, roadway and rails, would be included in the term railroad. It seems to me that in such a case an alteration of the space covered by the tramway would be an alteration of the railroad within the definition in the Act. Applying that to the present case, if the carrying of the wire involved the digging of a trench in the roadway between the up and down lines of the tramway, it seems to me that it would be an alteration of the railroad. I do not think that the case can depend upon whether or not there is an obligation upon the tramway company to repair that part of the highway. If that part of the highway can be fairly described as part of the railroad, it does not matter upon whom the obligation of repair rests. The workman was, by virtue of his employment, brought upon that thing, in respect of which the Legislature deems it right that there shall be special protection. He was employed on engineering work, although the tramway company were not the undertakers. The person who employed him was undertaking the work, which involved the physical alteration of what would, in the popular sense of the term, be deemed a railroad. It seems to me that, giving the word its fair meaning and construing it in favour of the workman, the county court judge has arrived at the conclusion in favour of the employer by a misdirection. The case seems to me to come within the Act, and the appeal must be allowed.

ROMER, L.J.—In my opinion the county court judge has come to a right conclusion. Certainly I do not for myself see how we can properly differ from the county court judge on the conclusion of fact at which he has arrived. The judge came to the conclusion that the workman was not employed upon the alteration of a tramway, that is to say, a "railroad," within the meaning of the Act. In my opinion, it cannot be said that, because a tramway is laid upon a public highway under statutory authority, the whole of the road becomes part of the tramway, so that any alteration of any part of the road is, as a matter of law, an alteration of the tramway within the meaning of the Workmen's Compensation Act, 1897. Nor, even if that part of the road between the up and down lines of the tramway has to be repaired by the tramway company (which was in fact not proved here, but I pass that by), would it, in my opinion, make that part of the road so much part of the tramway that every opening effected in that part of the road, or any dealing with it by a stranger to the tramway company, would of necessity and as a matter of law be work falling within the definition in section 7, sub-section 2, of the Act as work of alteration of the tramway. In my view, in considering whether an employment is on or in or about the alteration of a tramway within the Act, the language of the Act must be construed in a common-sense view. Looking at the Act from that point of view, I ask myself whether this workman was employed upon an alteration of a railroad—that is to say, the tramway—in any fair or reasonable sense of the term as used in the Act. I can only say that, in my opinion, the workman certainly was not so employed. No alteration of the tramway was contemplated or intended, and certainly upon the evidence none was effected. The workman was employed to lay a telephone wire for the purpose of the telephonic service. Every care seems to have been taken not to interfere with the tramway or the working of the tramway. What the workman did was this. He made an opening in the road between the side of the road and a distance of about two feet from the outer rail of the tramway, and he also made an opening in the road between the up and down tramway lines, and he was making a hole or tunnel under the down line connecting the two openings above described for the purpose of carrying the wire, when the accident happened. Was that in any fair and good sense of the word an employment upon the alteration of a tramway within the meaning of the Act? My answer is, No. It had nothing to do with the tramway. The man was not employed to construct, to alter, or to repair the tramway. On the contrary, he was employed upon work which did not necessitate any alteration of the tramway, and which did not affect the tramway or its working. In my view, from the mere fact that an opening in the road between the up and down lines was made and a wire was being carried under the tramlines, which did not affect the tramway or its working, the county court judge was not bound, as a matter of law, to find that the man's employment was on or in or about the alteration of the tramway. The word "alteration" must be construed with its context—"any work of construction or alteration or repair of a railroad, harbour, dock, canal, or sewer." I do not see how, upon any fair construction of the Act, it can be said that this workman was employed on the work of construction or alteration or repair of the tramway. In my opinion the county court judge's decision was right, and in any case I do not see how we can differ from him upon a question of fact where there is ample evidence to support his decision.

MATHEW, L.J.—I agree with the Master of the Rolls. I have no doubt myself that this workman was at the time of the accident employed on or about the alteration of the tramway. If he was so

employed he is protected by the Act. The work he was engaged upon was this: It was proposed to carry a telephone wire across and under a line of tramways in a street. That was being done by passing the wire under the down line by means of a small tunnel, then by digging a trench between the up and down lines, and then it was intended to make a tunnel under the up line, and then by means of a trench to the other side of the road. The work seems to me to be an alteration of the tramway. The tramway derived its main support from the concrete under the lines and the ballasting on each side, and that was interfered with and altered. In my opinion if the workman had been injured while engaged in filling in the trench and restoring the ground to its former condition, that would have been repair of the tramway. It appears to me that, if we apply the Act fairly, the work here was an alteration of the structure of the tramway, and therefore comes within the Act.

Appeal allowed.

Solicitor for the applicant, *H. Dobell*, for *J. P. Dobell*, Plymouth.

Solicitors for the employers, *William Hurd & Son*, for *Bond & Pearce*, Plymouth.

From K. B. Div. (Collins, M.R., and Romer and Mathew, L.JJ.) — Aug. 11, 1905.

SCARBOROUGH *v.* COSGROVE. (*a.*)

Landlord and Tenant—Lodger—Boarding-house keeper—Negligence—Duty to take care of guest's baggage.

The plaintiffs, husband and wife, were received as guests into the defendant's boarding-house. Having valuable jewelry with them, and finding that there was only one key to their bedroom door, they asked for a second key; but they were informed by the manageress that only one key was supplied, and that it must not be taken away, and that they need be under no apprehension for the safety of their valuables, as everyone living in the house was well known. They also complained of the absence of any key to the chest of drawers in their room, but no such key was provided. The jewelry was stolen from the room by another guest, who was a thief known to the police, and who had been received by the defendant as a guest into the boarding-house without any reference.

Held, that the defendant was under some obligation to take reasonable care in the matter of the protection of the plaintiffs' goods which they had with them in the boarding-house; and that the facts raised a question for a jury whether there had not been a failure of reasonable care on the part of the defendant to which the loss of the plaintiffs' jewelry was attributable.

Per Collins, M.R., *and* Mathew, L.J.—*A boarding-house keeper is under an obligation to take ordinary care of his guest's baggage.*

Per Romer, L.J.—*A boarding-house keeper is bound to carry on his business with reasonable care, having regard to the nature and normal conduct of the business as known to the guest, or as represented to the guest by him; and if by reason of a breach of that duty on his part the guest's baggage is lost, the boarding-house keeper is liable to the guest for the loss.*

Dansey *v.* Richardson, 3 *E. & B.* 144, *followed.*

Holder *v.* Soulby, 8 *W. R.* 438, 8 *C. B. N. S.* 254, *not followed.*

Application for a new trial of an action tried before Darling, J., and a jury.

(*a.*) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

The action was brought by a husband and wife against the keeper of a boarding-house in Bayswater to recover the value of certain articles of jewelry which belonged to the plaintiffs and were stolen whilst the plaintiffs were staying in the defendant's boarding-house.

In the spring of 1904 the plaintiffs were received by the defendant into her house as boarders upon weekly terms. Shortly after their reception they called attention to the fact that there was only one key to their bedroom door. They were informed by the manageress that only one key was ever used, and they were requested by her not to take away the key after locking the door, but to leave it so that it might be possible for the servants to enter the room. They told the manageress that they had valuable property in their possession which they wished to keep under lock and key, and they asked for a second key, but she answered that they need be under no apprehension as to the safety of their valuables, as every one living in the house was well known and the servants had been there a long time. The plaintiffs remained at the boarding-house for some time and then left, but returned again in the autumn and occupied the same room. There was then a chest of drawers in the room which had not been there before, but there was no key belonging to it. The plaintiffs complained of the absence of a key to the manageress, who said she would speak to the defendant, but no key was supplied. The female plaintiff had with her a jewel case, containing jewelry, which she was in the habit of wearing, of the value of about £200. This jewel case she kept locked in a locked handbag, which she placed in one of the drawers. On the evening of the 26th of November, the female plaintiff, after having been out of doors with her husband all day, found that the handbag had been cut open and the jewel case removed. It subsequently turned out that the jewelry had been stolen by a guest staying in the boarding-house, a man named Hofer, who disappeared on the following day. It was shown that Hofer had been previously convicted on several occasions, and that he was admitted into the defendant's boarding-house without any reference. It appeared that the defendant had said, in answer to a question put to her by a police sergeant, that she never took references and she never supplied keys. The defendant had had a card printed on which she stated that the proprietor would not hold herself responsible for lost property unless it was given into her charge, but the plaintiffs did not see this card until after the robbery.

The plaintiffs alleged that the loss of the jewelry had been occasioned by a breach of duty on the part of the defendant. The breach of duty on the part of the defendant of which the plaintiffs complained was (1) the failure to provide an additional key to the bedroom door; (2) the failure to provide a key to the chest of drawers; and (3) the statement that all the defendant's guests were well known, and, notwithstanding that representation, the admission of Hofer into the boarding-house without any reference.

At the close of the plaintiffs' case on the trial of the action before Darling, J., and a jury, the learned judge held that a boarding-house keeper was under no duty to take care of his lodgers' goods unless they were handed to him for safe custody, and was therefore only liable for misfeasance. He was accordingly of opinion that there was no case to go to the jury, and he directed judgment to be entered for the defendant.

The plaintiffs applied for a new trial.

Cababé, for the plaintiffs.—The keeper of a boarding-house, though he has not the liability of an insurer, has a duty to take reasonable care in the

matter of the protection of his guest's goods and chattels: *Dansey* v. *Richardson*, 3 E. & B. 144. If the subsequent case of *Holder* v. *Soulby*, 8 W. R. 438, 8 C. B. N. S. 254, is inconsistent with this, it ought not to be followed. The defendant's refusal to allow the plaintiffs to take away the key of the room, and her failure to supply a key for the chest of drawers, and her system of receiving guests into her house of whom she knew nothing, coupled with the assurance, which the plaintiffs might reasonably accept, that all the people in the house were well known, were matters which ought to have been submitted to the jury as evidence of want of reasonable care.

Duke, K.C., and *Herbert Jacobs*, for the defendant.—The keeper of a boarding-house has no duty to take care of his guest's goods unless they are specially given into his custody as bailee: *Holder* v. *Soulby*. In this case there were no special circumstances giving rise to such duty. Even if such duty existed, there was no evidence of a breach of it; it was not negligence on the part of the defendant either to fail to supply two keys for the room, to fail to supply a key for the chest of drawers, or to fail to make inquiries about the guests. The statement that all the people in the house were well known ought not to be treated as an assurance that there was no risk. Even if there was negligence on the part of the defendant, the proximate cause of the loss was not that negligence, but the act of the thief.

Cur. adv. vult.

Aug. 11.—COLLINS, M.R., read the following judgment: This is an appeal by the plaintiffs from the judgment of Darling, J., for the defendant in an action brought by the plaintiffs for damages for the loss of jewelry, due, as they alleged, to the negligence of the defendant, in whose boarding-house the plaintiffs were guests. It was admitted that the jewelry was stolen by another guest, who was received into the boarding-house while the plaintiffs were stopping there, and who turned out to be a thief well-known to the police. The plaintiffs had been stopping in the house some months earlier; and there was evidence that the female plaintiff had told the manageress that she had some property with her that she wished to keep under lock and key, and had asked for a second key of the bedroom door; that she had been told in answer that only one door key was supplied, and that it must not be taken away, as it was required for the purpose of giving the servants access to the room, and that the room would be perfectly safe, as the people in the house were all known. Some months later the plaintiffs came a second time to the house, and were put again into the same room, in which a chest of drawers had been in the meantime placed, but there were no keys for any of the drawers, nor was there any receptacle capable of being locked. The plaintiffs complained to the manageress, who said she would speak to the defendant. The female plaintiff had with her a jewel case containing jewelry which she required for personal use. She placed the jewel case locked in a locked satchel, which she deposited in one of the drawers. During the plaintiffs' absence from the house in the course of the day of the 26th of November the satchel was cut open and the jewel case abstracted, and it was for this loss that the action was brought.

The plaintiffs contended that the defendant was bound to take reasonable care of the persons and chattels of her guests, and that the system of one key only for the bedroom, which guests were debarred from taking away, the absence of keys for drawers, &c., alone or coupled with the fact that no steps were taken to ascertain the respectability of guests before admission, disclosed a want of due care on the part of the defendant which had led to the loss of their jewelry. Darling, J., withdrew the case from the jury, holding that to found liability in a boarding-house keeper "there must be something more than negligence, that there must be something which the law calls misfeasance, and that negligence in this case was not enough." He therefore gave judgment for the defendant. In doing so, he acted on the authority of *Holder* v. *Soulby*, 8 W. R. 438, 8 C. B. N. S. 254.

The questions, therefore, are, was the defendant exempt from liability for negligence short of misfeasance? If not, was there evidence of such negligence fit for the consideration of the jury? I think the case cited does go the full length of the proposition laid down by the learned judge; but before examining it I desire to refer to the earlier case decided in the Court of Queen's Bench which seems to me to be in conflict with it, and which I think must be admitted to be of at least equal authority—*Dansey* v. *Richardson*, 3 E. & B. 144. There the action was brought by a guest at a boarding-house for the loss of a dressing-case stolen while the plaintiff was a guest. There was evidence that the theft was facilitated by the defendant's servant having left the street door ajar. Erle, J., who tried the case, in substance directed that a boarding-house keeper was bound to exercise due and reasonable care as to the guests' property to the same extent that a prudent person would take care of her own; but he told the jury that it would not be enough to fix the defendant, if they thought the servant was negligent, unless they thought the defendant was aware of anything which made it negligent in her to keep that servant. On a rule to show cause, the court, Lord Campbell, C.J., and Coleridge, Wightman, and Erle, JJ., were, according to the headnote, agreed that a boarding-house keeper "undertakes by implication of law, although nothing is expressed, to take due and proper care of a guest's baggage," but they were divided on the question of the extent of the liability of the mistress for the servant's negligence, Wightman and Erle, JJ., holding that she was exempt unless proved to have been guilty of negligence herself, Lord Campbell, C.J., and Coleridge, J., holding that there was no distinction between the negligence of the defendant and of her servant in the course of her employment. As to the duty, therefore, there is the authority of the full court that the boarding-house keeper is bound by implication of law to take ordinary care of her guests' baggage. It is true that in the subsequent case of *Holder* v. *Soulby*." Erle, C.J., who had directed the jury as above stated, said that he "did not intend to say that a lodging-house keeper was bound to take such care of a lodger's goods as a prudent owner would take of his own property." But, even with this qualification, the first proposition affirmed in *Dansey* v. *Richardson* has the authority of three judges, at all events. *Holder* v. *Soulby* was decided on demurrer, and related to a lodging-house only, though I confess this does not seem to me to make any difference in principle. Erle, C.J., begins his judgment with these words: "In the first count the plaintiff claims to be entitled to recover on the mere relation of lodger with the landlord, and assumes that the law creates a duty on the part of the latter to take due and proper care of his lodger's goods. . . . Now it is clear that no case or treatise or judge has ever affirmed that proposition." This is strange, as six years before, Lord Campbell, C.J., in *Dansey* v. *Richardson*, 3 E. & B., at p. 164, had said, "I think that the application for a nonsuit was properly refused and that the defendant was not entitled to a verdict on the fourth plea denying that the plaintiff was received

into the boarding-house with her goods on the terms mentioned in the declaration"—*i.e.*, to take due and reasonable care of the plaintiff's goods whilst they were in the house and whilst the plaintiff was such guest for hire and reward to the defendant. "The defendant did receive the plaintiff with her goods on the terms . . . of taking due and reasonable care of her goods while they were in the said house and plaintiff remained such guest therein." Coleridge, J., says, at p. 158, "unless it can be established that the defendant was not bound to take any care, it must be admitted she was bound to take due and reasonable care. It seems to me perfectly clear she was bound to take some care, and that my brother Erle was quite right in refusing to nonsuit"; and again, at p. 159, "I agree that it"—*i.e.*, the liability of an innkeeper—"cannot be extended in all respects to the boarding-house keeper. But the liability of this last must be measured by what is reasonable." Wightman, J., said, at p. 155, "I can find no authority for holding that a boarding-house keeper . . . is bound to take more care about the goods of his guest, which are no further given into his care than by being in his house with the guest, than he, as a prudent owner, would take in respect to his own. If he is bound to no more care than that, my brother Erle's direction seems to me to be perfectly right." The direction was as shown above. It is certainly strange that, in view of the passages which I have cited, Erle, C.J., should have made the observation which I have quoted. It seems obvious, too, that the other members of the court were under a misapprehension of the true effect of *Dansey* v. *Richardson*. Byles, J., does not allude to it at all, presumably on the ground stated by Keating, J., at p. 270: "After the explanation given by my lord, that case is clearly no authority for the maintenance of this action." But accepting Erle, C.J.'s, qualification of his own judgment, the passages I have cited from the other judgments cannot be explained away, and, unless they can be explained away, they are decisive of the main point in this case, even if it were assumed that the view of Erle and Wightman, JJ., as to the limit of the master's liability for the servant's negligence were to prevail.

The case here was withdrawn from the jury, and if the standard of the defendant's duty was reasonable care, the facts proved might have raised a question for the jury whether they did not establish personal negligence within the limits laid down by Erle and Wightman, JJ., in the manageress of the boarding-house or in defendant herself. I think, however, the court, having been equally divided on this particular aspect of the case, and *Holder* v. *Soulby* not touching it at all, we are at liberty to choose for ourselves between the two conflicting opinions. To my mind, the reasoning of Coleridge, J., and Lord Campbell, C.J., seems conclusive on the whole question, both as to the existence of the duty and the incidental responsibility of the master for the negligence of the servant delegated by the master for the performance of some part of that duty. I think there is a fallacy in the suggestion that because a boarding or lodging-house keeper does not come under the full liability of an innkeeper, he is exempt from all obligation to take care. The instance in *Calye's case*, 8 Co. Rep. 32, of a man "lodged with another who is not an innholder, upon request, if he be robbed in his house by the servants of him who lodged him or any other he shall not answer for it," does not establish it, and is not inconsistent with a duty to take ordinary care. The object of the illustration is merely to show that a guest lodging with another is not entitled to the same degree of protection as he would be entitled to in an inn. But the instance confers no immunity upon lodging-house keepers from such liability as would otherwise arise from their receiving into their charge for reward a guest and his baggage. Nor does there seem any reason in principle why they should be so exempt. The general control of the house must be in the keeper. By the nature of the arrangement itself the custody of the lodger's effects must be in him when the lodger is not in his room, and the consideration paid ought as a matter of business to secure some protection to the lodger where the ordinary conditions to which he is expected to conform put it out of his own power to look after his effects himself. I can see no reason why there should be a presumption of immunity in his case from the common duty of a person accepting a charge to exercise at least ordinary care; *a fortiori* where he undertakes it for reward. The guest and baggage are both in a house of which he has the control, and his obligations to both of them arise in the same way out of the relation itself. It seems to me that the *onus* lies on those who affirm there is no duty. I cannot help thinking that the notion that such is the law arises from a misunderstanding of the passage about a lodger in *Calye's case*, to which I have already referred.

For the reasons I have given I think *Holder* v. *Soulby* cannot countervail the authority of *Dansey* v. *Richardson*, and that the judgments of Lord Campbell, C.J., and Coleridge, J., ought to prevail where they differ from the other members of the court.

To come to the facts of this case, if the reason upon which the learned judge acted in withdrawing the case from the jury cannot prevail, I think the evidence raised a question for the jury whether there was a failure of reasonable care on the part of the defendant to which the loss of the plaintiff's jewelry was attributable. I think they were the proper tribunal to decide it, and that we should be usurping their functions if we withheld it from their consideration. I abstain from commenting further on the inferences which might be drawn from the evidence, as I am of opinion the case must go down to a new trial.

ROMER, L.J., read the following judgment: After the full way in which the Master of the Rolls has dealt in his judgment with the cases of *Dansey* v. *Richardson* and *Holder* v. *Soulby*, I do not propose to examine in detail those cases or the judgments delivered in them. But certainly those cases have not left the law concerning the liability of a boarding-house keeper to a paying guest in respect of the latter's luggage in a perfectly settled or satisfactory state, and I think it right, therefore, to state my opinion on the subject.

One thing is clear—namely, that the liability of the landlord of the boarding-house in respect of the luggage is not co-extensive with the liability of an ordinary innkeeper; but what the extent of the liability is remains to be considered. It appears to me that, before that can be ascertained, it is necessary, at any rate to a certain extent, to inquire into the particular circumstances of each case. It may be that some of the luggage has been committed temporarily, or during the stay of the lodger, into the sole custody of the landlord. In that case, clearly, there would be a duty on the part of the landlord to take reasonable care of it. On the other hand, there may be cases where, by arrangement between the parties, the guest has taken upon himself solely the care of his luggage; and in those cases, whatever may be the duties of the landlord towards his guest, they could not be treated as based on the footing that in any sense he had the custody or partial custody of the luggage. The difficulty as to the law arises in cases like the present, which are intermediate

between the two I have just mentioned, and where the luggage cannot be said to be in the sole custody of either the landlord or the guest. In the present case the luggage was placed in a room which was appropriated as a bedroom for the sole use of the guest, but the guest had not the sole control of the room. The servants of the landlord had the duty and right of coming to the room for all necessary or proper purposes of cleaning and so forth. The key of the room was committed to the care of the guest during the night, or during her visits to the room in the daytime, but at other times the key had to be in the custody of the landlord's servants. The question then arises as to what, if any, is the duty of a landlord in such a case towards his guest in respect of the care of the luggage left in the room. Now I think that it cannot be said that the landlord is under an absolute duty to take reasonable care of the luggage if by the word "care" it is implied that the landlord is in the same position as if the care and custody of the luggage had been committed solely to him. That, in my opinion cannot be implied, without further knowledge of the facts, merely from the position of a boarding-house keeper towards his paying guest; and I think this was the view taken by Erle, C.J., in the cases of *Dansey* v. *Richardson* and *Holder* v. *Soulby*, and accounts for many of the observations in his judgments. On the other hand, it appears to me not correct to say that in such a case there is not some duty by the landlord to his guest which may affect the question as to liability for loss of the luggage. Seeing that the landlord carries on his business of a boarding-house keeper for reward, I think he is bound to carry on that business with reasonable care, having regard to the nature and normal conduct of the business as known to the guest, or as represented to the guest by him; and if by reason of a breach of that duty on his part the luggage is lost I can see no reason why he should not be held liable for the loss to the guest. Now in the present action was there or not on the evidence such a sufficient case made by the plaintiffs, the guests, of such breach and consequent loss, as to call upon the defendant, the keeper of the boarding-house, for an answer? On the whole, though at one time I felt considerable doubt on the point, I have come to the conclusion that such a sufficient case was made out, so that, if the defendant did not meet it, the matter was fit for the consideration of the jury, and should have been left to them. Seeing that there is to be a new trial it is not advisable that the evidence given on behalf of the plaintiff should be elaborately discussed by us. But I may say that one of the considerations which has pressed on me is that, on the evidence as it stands, unanswered at present by the defendant, the business appears to have been represented by the defendant to the plaintiffs as one where the guests staying in the house were known to the defendant, and where, consequently, there was comparatively little risk in the system adopted by the defendant in the management of the business as to only one key being kept both for the purposes of the guest and the purposes of the defendant's servants. Whereas it now appears from the evidence, as it at present stands, that the defendant admitted the guest who stole the plaintiff's chattels without any knowledge of him, and without any references or introduction, or inquiry as to his respectability. I think, therefore, there should be a new trial.

COLLINS, M.R.—Mathew, L.J., has read, and agrees with my judgment.

New trial ordered

Solicitor for the plaintiff, *J. Westcott.*

Solicitor for the defendant, *T. V. Fox.*

High Court of Justice.

Chan. Div. } Buckley, J. } Nov. 3.

In re SIR H. M. STANLEY.
TENNANT v. STANLEY. (*a.*)

Will—Investment clause—"Any corporation or company, municipal, commercial, or otherwise" — Company formed or registered in the United Kingdom, but carrying on business abroad—Company formed or registered abroad.

A will authorized trustees to invest in the securities of "any corporation or company, municipal, commercial, or otherwise."

Held, (1) *that the clause authorized investments in the securities of* (a) *any corporation or company formed or registered in the United Kingdom, though carrying on business abroad; and* (b) *any corporation or company formed or registered outside the United Kingdom;* (2) *that the expression "company" is not limited to incorporated associations.*

Summons.

By his will dated the 29th day of November, 1899, Sir Henry Morton Stanley appointed Charles Coombe Tennant and Robert Bright Marston to be his executors and trustees, and after several specific and pecuniary legacies devised and bequeathed all the residue of his real and personal estate to his above-named trustees upon trust for conversion but with full power to postpone such conversion for so long as they should think proper without being responsible for loss. And after declaring that income arising from his estate before conversion should be treated as well during the first year after his death as afterwards as if the same were income arising from investments of the proceeds of such conversion, he directed that his trustees should after payment of his funeral and testamentary expenses, debts, and legacies invest the residue of the proceeds of conversion in their names "in or upon any of the parliamentary stocks or public funds or in government securities of Great Britain or India or any British colony or dependency or any foreign country or state or upon freehold, copyhold, leasehold, or chattel real securities in Great Britain, but not in Ireland (such leasehold and chattel real securities to be upon hereditaments held for a term of which no less than fifty years should be unexpired at the date of investment) or on life interests in real or personal property, together with a policy or policies on the life on which the property is held, or in the capital stock of the Bank of England or in the stocks, funds, and securities not payable to bearer of any corporation or company, municipal, commercial, or otherwise, or in any annuity whether permanent or terminable and whether now existing or hereafter to be created the payment of which is charged on the revenues of India, or in any other mode of investment for the time being authorized by English law for the investment of trust funds," with power to vary the same. Sir Henry Stanley further directed his trustees during the joint lives of Lady Stanley and his adopted son Denzil Morton Stanley to retain out of the trust funds an annuity of £150 for the benefit of Denzil Morton Stanley and subject thereto to pay the income to Lady Stanley during her widowhood and after her re-marriage during the remainder of the joint lives of Lady Stanley and D. M. Stanley to retain the further annuity of £350 for the

(*a.*) Reported by T. PAKENHAM LAW, Esq., Barrister-at-Law.

benefit of D. M. Stanley and subject thereto to pay the income to Lady Stanley during the remainder of her life, and after her decease to hold the trust funds as to one moiety thereof for D. M. Stanley if he should attain twenty-one years of age, and as to the other moiety thereof upon certain trusts under which a general power of appointment, determinable in certain events, was given to Lady Stanley with a gift in default of appointment to D. M. Stanley if he should attain twenty-one years of age, and subject to the preceding trusts he directed his trustees to hold the trust funds in trust for such persons as Lady Stanley should by deed or will appoint.

Sir Henry Stanley died on the 10th of May, 1904, and his will was proved by C. C. Tennant and R. B. Marston on the 29th of June, 1904.

Denzil Morton Stanley was an infant of the age of ten years or thereabouts.

This summons was taken out by the trustees for the purpose of determining (*inter alia*) whether the power given by the testator to his trustees to invest moneys liable to be invested under the will "in the stocks, funds, and securities not payable to bearer of any corporation or company, municipal, commercial, or otherwise," authorized the trustees to invest any such moneys in the stocks, funds, or securities not payable to bearer of (*a*) any corporation or company formed or registered in the United Kingdom but carrying on business abroad, or (*b*) any corporation or company formed or registered outside the United Kingdom.

Northcote, for the trustees.

R. J. Parker, for Lady Stanley.—Companies formed or registered in the United Kingdom, though carrying on business abroad, are clearly within the clause. The expression "company" includes any association of persons and is not limited to a corporate body, still less to a company under the Companies Acts, 1862-1900. The clause extends also to companies formed or registered abroad.

W. E. Hollams, for Denzil Morton Stanley.—It is difficult to contend that the clause does not include a company formed or registered in England though carrying on business abroad, but it does not include a company formed or registered abroad. It is impossible to say what is and what is not a company where it is formed or registered abroad. Except where it is expressly stated to the contrary, the clause only contemplates investments in the United Kingdom: *In re Castlehow*, [1903] 1 Ch. 354, 51 W. R. Dig. 183.

BUCKLEY, J.—No reason has been suggested why a company formed or registered in England is outside the clause because it carries on its business abroad. I think, therefore, that the first part of the question can be answered in the affirmative. The second part of the question is more difficult. Had the expression been "corporation" alone, that, it may be, would have meant a corporation according to English law. Here, however, the expression is "corporation or company." Now, the expression "company" has no strict technical meaning, but includes any unincorporated association of persons so numerous as not to be fittingly described as a firm. There is nothing in the investment clause expressly limiting it to companies formed or registered in England. Suppose I wished to speak of the New York Central Railway Co., how could I describe it but as a company and not as a firm. If I gave the expression any other construction, I would have to say that the debentures of a Canadian or American railway were not the securities of a commercial company. It was suggested that if you read the whole investment clause you will find that the investments are impliedly limited to English investments except where otherwise expressly stated, and that consequently the words before me should be also so limited. I do not think that there is any sufficient context to impose that restriction. Accordingly the trustees may invest in the securities of a company not formed or registered in England.

Solicitors, *Trower, Still, Freeling, & Parkin.*

Chan. Div.
Swinfen Eady, J. } Oct. 25; Nov. 8.

In re GIST.
GIST *v.* TIMBRILL. (*a.*)

Administration—Lunatic intestate—Allowances to presumptive next-of-kin.

Sums were advanced to brothers and sisters, presumptive next-of-kin, of a lunatic intestate during his life under orders in lunacy, and were expressed to be advanced as part of the shares of such next-of-kin to which they would become entitled upon surviving the lunatic, and were directed to be taken into account if they so survived.

Held, that the children of one of the next-of-kin dying in the lifetime of the lunatic were not liable to bring into hotchpot the sums so received by their parent.

Proud *v.* Turner, 2 *P. W.* 560, *and* Lloyd *v.* Tench, 2 *Ves. sen.* 215, *discussed.*

Statute of Distributions (22 *&* 23 *Car.* 2, *c.* 10) *explained and discussed.*

Adjourned summons.

This was an originating summons taken out by the administrator of a lunatic under the following circumstances:

In 1852 Samuel Gist was found a lunatic and so remained until he died in 1904 intestate and a bachelor. His presumptive next-of-kin at the time of his lunacy were his brother, H. W. Gist, who was the plaintiff in this summons, and his three sisters, M. W. Du Pré, A. Timbrill, and E. Gist. By an order in lunacy of the 21st of March, 1874, £200 was allowed to H. W. Gist out of the income of the lunatic's estate, with no direction as to bringing this sum into hotchpot. By an order of the same date £300 a year was allowed to Mrs. Du Pré until further order to be paid out of income, and the order, after stating the consent of both Mr. and Mrs. Du Pré to the form of order then made, provided "that the sums which shall be so advanced as aforesaid shall be taken and considered as part of any share to which the said M. W. Du Pré may become entitled of and in the estate of the said lunatic at the time of his death in the event of her surviving the lunatic." Similar orders in 1875 and 1877 granted allowances to H. W. Gist and Mrs. Timbrill, and all these allowances were reduced and otherwise dealt with by subsequent orders, some of which did not contain the clauses inserted in the original orders as to bringing advances into account.

Mrs. Du Pré died in 1895, in the lifetime of the lunatic, leaving three children surviving her, all of whom attained the age of twenty-one years and survived the lunatic. Miss E. Gist died in the lifetime of the lunatic and thus, on his death in 1904, his next-of-kin were (1) H. W. Gist, (2) Mrs. Timbrill, (3) the children of Mrs. Du Pré—a brother, a sister, and three nieces of the lunatic. Under the orders in lunacy H. W. Gist had received about £8,300, Mrs. Timbrill £5,400, and Mrs. Du Pré £4,600.

This summons asked for the determination of the

(*a.*) Reported by C. H. CARDEN NOAD, Esq., Barrister-at-Law.

question whether, upon the true construction of the orders in lunacy and in the events which had happened, any and what sums advanced or paid under such orders or any of them ought to be taken and considered as advanced or paid on account and as part of, the respective shares of the plaintiff and the defendants respectively or any of them in the personal estate of the lunatic as his next-of-kin.

J. K. Young, for the plaintiff in the summons.

Micklem, K.C., and *Johnston Edwards*, for Mrs. Timbrill, contended that the children of Mrs. Du Pré ought to bring into hotchpot the sums advanced to their parent under the orders in lunacy as they "legally represented" their parent, and could only under the Statute of Distributions take the share to which that parent was entitled: *Proud* v. *Turner*, 2 P. Wms. 560; *Lloyd* v. *Tench*, 2 Ves. sen., p. 215.

Gatey, for a child of Mrs. Du Pré.

Eve, K.C., and *H. B. Howard*, for the other children.

Cur. adv. vult.

Nov. 8.—SWINFEN EADY, J., delivered judgment as follows: The claim that Mrs. Du Pré's children are to bring into hotchpot, on the division of the estate of the intestate, the sums advanced or paid to their mother, under orders of the Court in Lunacy, is based on the contention that, under the Statute of Distributions, where the intestate has left a brother or sister surviving him, children of a deceased brother or sister stand in the place of their parent, and take only the share which their deceased parent would have taken if living; that they do not take any share in their own right, but as "legally representing" their parent, and can only receive what their parent would have received if living. The order of the Lords Justices of the 21st of March, 1874, under which moneys were paid to Mrs. Du Pré, recites the consent of Mr. and Mrs. Du Pré that the sums which should be advanced to her pursuant to that order should be taken and considered as part of any share to which she might become entitled of and in the estate of the said Samuel Gist, the lunatic, at the time of his decease in the event of her surviving the said lunatic, and the same order directs that the sums which should be so advanced are to be taken and considered as part of any share to which Mrs. Du Pré might become entitled of and in the estate of the lunatic at the time of his death, in the event of her surviving the lunatic. The contention is that if Mrs. Du Pré had survived the lunatic she would have to bring these sums into account, and as her children "legally represent" her within the meaning of the statute, they can only take the share, which she, if living, would have been entitled to. In my opinion the answer to this argument is that the children take the share to which the parent would have been entitled under the statute, and without reference to any bargain made by the parent in his lifetime, or any alienation or disposition of any expectant interest or possibility of succession. The payments to Mrs. Du Pré were payments to a person in narrow circumstances for maintenance, and as between father and child would not have been advancements by portion within the statute. There is not any provision in the statute requiring these sums to be brought into account. The order in lunacy only directs these sums to be brought into account if Mrs. Mrs. Du Pré survive the lunatic, an event which did not happen. Mr. and Mrs. Du Pré could bind the interest of the latter if she survived to take a share in the estate of the lunatic; but she could no more bind her children, on her dying in the lifetime of the lunatic, leaving a surviving brother or sister, than she could bind her children in the event of all the brothers and sisters dying in the lifetime of the lunatic, and all nephews and nieces taking equal shares *per capita*. With regard to the authorities, in *Proud* v. *Turner*, 2 P. Wms. 560, the deceased child would have been bound, if living, to bring into hotchpot under the statute the amount of the advancement; and as the child's issue stood in his place and stead it was decided that they were bound to bring in the like amount, as they could not be in any better position. Much reliance was placed on a passage in *Lloyd* v. *Tench*, 2 Ves. sen., p. 215: "But it is now settled that, though the children of one brother stand in place of the parent, in sharing with the other brother, and take *per stirpes*, yet if no brother is alive, that representation *in loco parentis* is at an end." This passage, however, has no reference whatever to the amount of a nephew's or niece's share being reduced by anything done in the parents' lifetime. It merely points out when a distribution between nephews and nieces is *per stirpes* and when *per capita*. The plaintiff and Mrs. Timbrill must bring into account the amounts received by them respectively, as they have agreed to do so and have survived the lunatic. The reduced amounts mentioned in the subsequent orders stand exactly on the same footing. Although the directions were not repeated in each order, the amounts allowed were in substitution for the previous allowances, and must be taken to have been made on the same footing. The first advance to the plaintiff—namely, the £200 under the order of the 21st of March, 1874—will not be brought into account, as there is no direction to that effect, and no consent or undertaking by the plaintiff in that behalf. The costs of all parties of this application are to be paid out of the estate.

Solicitors, *Routh, Stacey, & Castle*, for *Stapleton & Co.*, Stamford; *Belfrage & Co.; Bloxam, Ellison, & Co.*, for *Bryan & Helps*, Gloucester.

K. B. Div. (Warrington, J.) Nov. 30.

ROBBINS v. WHYTE. (a.)

Mortgage—Lease by mortgagor in possession—Power to accept surrender—Concurrence of mortgagee—Action by mortgagee for recovery of rent—Conveyancing Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 18 (1).

A lease for twenty-one years, granted by a mortgagor in possession under the statutory power conferred upon him by section 18 (1) *of the Conveyancing Act*, 1881, *cannot be effectively surrendered so as to affect the rights of the mortgagee under the lease without the concurrence of the latter.*

Trial of action.

This was an action by the mortgagee of freehold premises to recover arrears of rent due from the lessee under a lease for twenty-one years granted by the mortgagor under section 18 (1) of the Conveyancing Act, 1881, and the question turned upon whether a surrender of the lease, accepted by the mortgagor without the concurrence of the mortgagee, effectually barred the claim of the latter.

By an indenture dated the 9th of September, 1889, W. M. Samson mortgaged the freehold premises No. 3, Marlborough-place, St. John's Wood, to John Robbins to secure the sum of £1,800 and interest.

By an indenture dated the 18th of February, 1892,

(a.) Reported by E. WAVELL RIDGES, Esq., Barrister-at-Law.

Samson, under the statutory powers conferred upon the mortgagor by section 18 (1) of the Conveyancing Act, 1881, demised the mortgaged premises to Lady Ellen Bennett for the term of twenty-one years at a rental of £120 per annum.

A counterpart of this lease was executed by the lessee and delivered to the mortgagee as required by section 18 (2) of the Conveyancing Act, 1881.

Mr. Samson died in November, 1892, having by his last will devised the mortgaged premises to his executors therein named, and this will was duly proved by the executors. Mr. Samson, until his death, and after his death his executors, continued in possession of the rents and profits of the mortgaged premises down to the 22nd of February, 1905, when the executors of the mortgagee Robbins required the rent to be paid to them.

Lady Bennett died in September, 1904, having by her will appointed the defendant Whyte her sole executor.

On the 25th of November, 1904, the defendant, acting as executor of Lady Bennett, executed an indenture purporting to surrender the demised premises to the executors and devisees of Mr. Samson.

In April, 1905, the executors of the mortgagee commenced this action against the defendant as executor of Lady Bennett, claiming £60 arrears of rent due under the demise of the 18th of February, 1892. By way of defence to this action the defendant pleaded the surrender of the lease under the indenture of the 25th of November, 1904.

By section 18 (1) of the Conveyancing Act, 1881, it is provided that "a mortgagor of land while in possession shall, as against every incumbrancer, have, by virtue of this Act, power to make from time to time any such lease of the mortgaged land or any part thereof as in this section described and authorized."

Section 18 (3) (i.) of the same Act authorizes "an agricultural or occupation lease for any term not exceeding twenty-one years."

By section 10: "The rent reserved by a lease and the benefit of every covenant . . . shall go with the reversionary estate expectant upon the term granted by the lease."

Richard Neville, for the plaintiff.—Before the Conveyancing Act, 1881, a mortgagor could not grant a lease without the concurrence of the mortgagee. All that section 18 (1) does is to give the mortgagor a power of leasing without the concurrence of the mortgagee, it does not give the mortgagor a power to accept a surrender of the lease so granted. The reversion expectant on the lease is vested in the mortgagee, and no surrender is effectual unless it be made to the person in whom that reversion is vested. *Matthews* v. *Usher*, 49 W. R. 40, [1900] 2 Q. B. 535; *Municipal Permanent Investment Building Society* v. *Smith*, 37 W. R. 42, 22 Q. B. D. 70; *Miles* v. *Murphy*, Ir. R. 5 C. L. 382, were referred to in support of this contention.

Dunham, for the defendant.—Under section 18 the reversion is not in the mortgagee, but in the mortgagor. The Act has given the mortgagor power to make a lease, but it has left a good deal to be supplied by the imagination. The power to accept a surrender is a necessary corollary to the power to grant a lease. *Municipal Permanent Investment Building Society* v. *Smith* is the only case cited by my learned friend which has any bearing upon this case. The facts there were not similar to the present case, and all that was decided was, that an agreement collateral to the lease made between the mortgagor and the lessee in derogation of the rights of the mortgagee was not good against the mortgagee, but that the lease itself was good and binding. The true *ratio decidendi* in that case was, that before the rent accrued due the property in it had passed to the mortgagee, and therefore the agreement between the mortgagor and the lessee entered into before the rent accrued due to set off the rent against moneys owing by the lessee to the mortgagor could not be a valid discharge for payment of the rent as against the mortgagee. Moreover, the judgment of Lord Esher, M.R. (22 Q. B. D., at p. 71), is in my favour. He says: "The lease being valid under section 18 against the mortgagee established a relationship between him and the tenant, but until something more is done the tenant may safely deal with the mortgagor." It would entail great hardship upon the defendant if effect were given to the plaintiff's contention.

WARRINGTON, J.—After stating the facts as above and the provisions of sections 18 and 10 of the Conveyancing Act, 1881, proceeded: The question in this case is whether the lease made by the mortgagor still subsists in spite of the surrender of the 25th of November, 1904. Now what is the effect of section 18 of the Conveyancing Act by itself? The mortgagor, as is well known, after the execution of the mortgage has no estate in the land but only an equitable right to have the land reconveyed to himself on payment off of the mortgage debt and interest, the legal estate being vested in the mortgagee. Before the passing of the Conveyancing Act, 1881, the mortgagor had no power to grant a lease—that is to say, to carve a particular estate out of the fee simple. If he did grant a lease it operated only against himself by way of estoppel, and had no effect as against the mortgagee. What is the effect of the power of leasing conferred upon the mortgagor by section 18 (1) of the Conveyancing Act, 1881? It gives him a power to carve a term of years out of the mortgagee's larger estate, and to render that estate a reversion expectant upon the term. But there is no authority on the point as to whether the mortgagor has power to accept a surrender of the lease. In *Municipal Permanent Investment Building Society* v. *Smith*, 37 W. R. 42, 22 Q. B. D. 70, the facts were quite different, but it was necessary to the decision for the Court of Appeal to express its views as to the legal effect of section 18 of the Conveyancing Act. I will take the judgment of Fry, L.J. (22 Q. B. D., at p. 72), because his language is the most useful for the present purpose: "The question turns on the Conveyancing Act of 1881, and the effect of section 18 is that Davis, while in possession as mortgagor, had power to make this lease and to bind the plaintiffs. The statute in fact gives the mortgagor power to create a term out of the estate of the mortgagee, and so to convert that estate into one expectant on the term granted by the lease. That would seem to show that it was intended that the mortgagee should have the rights of a lessor under the lease. If this were not so it would follow that the mortgagee's estate would be diminished, and he be turned into a reversioner, but without any compensating rights. I find, however, in the same section evidence confirmatory of the conclusion I have arrived at, for by sub-section 11 it appears that the mortgagor is to deliver to the mortgagee a counterpart of the lease, which would be useless unless the latter has some rights under it." If that view is correct, as I think it is, the relation of lessee and reversioner was created between the lessee and the mortgagee immediately upon the execution of the lease by the mortgagor. Now, the effect of a surrender is to merge the particular estate into the larger estate out of which it was carved, and there can no be no merger unless the surrender is made to the person in whom the larger estate is vested. In

this case it is vested in the mortgagee, and therefore there can be no merger unless the surrender is made to him. The result is that the surrender of the 25th of November, 1904, was inoperative in law, and the plaintiff is entitled to recover the arrears of rent claimed. Judgment acccordingly.

Solicitors, *Malkin & Co.*, for the plaintiffs; *Hunter & Davies*, for the defendant.

K. B. Div.
(Lord Alverstone, L.C.J., and Wills and Darling, JJ.) Nov. 6, 28.

REX AND DAVID DAVIES. (a.)

Contempt of court—Newspaper—Publication tending to prejudicial trial—Publication prior to committal to quarter sessions or assize court—Publication after committal to quarter sessions—Jurisdiction of High Court to attach.

The King's Bench Division of the High Court has a summary jurisdiction to attach for a contempt of court in respect of the publication of matter calculated to prejudice the fair trial in an inferior court, not only when, prior to committal, it is uncertain whether in the event of a committal the case will be sent to quarter sessions or the assize court, but also when the publication complained of is after committal to the quarter sessions.

Rex *v.* Parke, 52 *W. R.* 215, [1903] 2 *K. B.* 432, *followed and extended.*

Rule *nisi* to show cause why a writ of attachment should not issue against David Davies, the editor, printer, and publisher of a certain newspaper entitled the *South Wales Daily Post*, for his contempt in printing and publishing, or causing to be printed and published in the said newspaper of the 5th, 8th, 9th, and 12th days of September last respectively certain comments calculated to prejudice one Henrietta Hunter upon her trial at the next assizes for the county of Glamorgan upon a charge of the attempted murder of a certain child, and also upon a further charge of abandoning the same child.

Henrietta Hunter was first charged before the magistrate with abandoning her child on the 1st of September, and the case was remanded from time to time. On the 27th of September the Treasury intervened and she was then further charged with the attempted murder of the child.

Bankes, K.C. (*Ellis Hill* with him), showed cause. —The first charge made against the woman was one of abandoning the child, which, if she were committed, would almost inevitably go the quarter sessions and not to the assizes for trial, in which case the High Court would have no jurisdiction in respect to a contempt of court; it would not be a contempt of the High Court at all. The last article complained of was published on the 12th of September, and it was not until the 27th of September that she was charged with a crime which would be tried at assizes. It is useless to argue that the articles complained of would not amount to a contempt of court, and if they had been published after the 27th of September then there would have been no answer since *Rex* v. *Parke*, 52 W. R. 215, [1903] 2 K. B. 432, where in a considered judgment this court decided that where a person having been charged before the petty sessions with an indictable offence triable only at the assizes, matter published to prejudice the fair trial would give the High Court jurisdiction to attach for contempt of court notwithstanding that the person charged had at the time of the publication not been committed for trial. In that case the judgment dealt with the two rules which were discharged in respect to trials pending at the Central Criminal Court. In both cases the rules were discharged because the court at the hearing did not have it brought to its notice that the judges sit at the Central Criminal Court under similar commissions as at the assizes. The remedies of criminal information or indictment are the only remedies in this case. The court would not readily assume a jurisdiction which it cannot justify. It would no doubt be desirable that the High Court should be able to protect inferior courts from abuse of this nature, but that must be a matter for legislation.

E. Vaughan Williams, in support of the rule.—The charge might have been sent to the assizes for trial, and that possibility is sufficient to give jurisdiction to the court. In any case there is no actual authority on the point, and the court will therefore have regard to the principle which applies—namely, that no person may take steps to prejudice in any way the course of justice.

Cur. adv. vult.

Nov. 28.—WILLS, J., read the judgment of the court, which was to the following effect: This is an application to commit the defendant for contempt of court. The circumstances which have given rise to it are as follows: A woman was arrested on the 2nd of September, 1905, on a charge of abandoning a child at Morriston, in the county of Glamorgan. She was brought before the magistrates at Swansea on the 5th of September. The defendant is the editor, printer, and publisher of the *South Wales Daily Post*, a newspaper published at Swansea. In the issue of his paper published on the evening of the 5th of September there appeared a report of the proceedings before the justices, followed by a statement headed "Antecedents of the Accused," and in the issue of the 8th of September another article entitled "Traffic in Babies," and in the issues of the 9th and 12th of September further articles relating to the accused person. They contained a great number of statements calculated to give an exceedingly unfavourable impression of the prisoner, and notably the article of the 8th of September stated that she had been guilty of wholesale child farming and alleged her identity with one Dora Johnson, who, it was alleged, had more than once been convicted of fraud; but it is not necessary to give any more specific account of their contents, inasmuch as Mr. Bankes, who appeared for the defendant, admitted that nothing could be said in defence or even in palliation of the act of publishing such articles concerning a person under remand upon a charge which might lead to her committal. He confined his argument to denying the jurisdiction of this court to deal with the present application on the ground that as the offence charged could be tried at quarter sessions, the offence was one against the quarter sessions and could not be dealt with summarily by this court. It would perhaps be enough to say that, inasmuch as the question whether the committal should take place to the assizes or quarter sessions depended in all probability upon the mere accident of which tribunal might hold its sittings before the other, it was just as much a contempt of the assize court as of quarter sessions, and if so our judgment in *Rex* v. *Parke*, 52 W. R. 215, [1903] 2 K. B. 432, applies. We adhere to the view we expressed in that case, that the publication of such articles is a contempt of the court which ultimately tries the case after committal, though at the time when they are published it cannot be known whether there will be a committal or not. Their tendency is

(a.) Reported by MAURICE N. DRUCQUER, Esq., Barrister-at-Law.

to poison the stream of justice in that court, although at the time of their publication the stream had not reached it, and as such articles are calculated to interfere with the power of the court (whatever it be) that tries the case to do effective justice, it is a contempt of any court which very well may try the case, but in fact does not do so, as well as of the court which actually tries it. What actually happened was that ultimately, some time after the publication of the articles now complained of, the prisoner was committed on a charge of attempting to murder the child who was the subject of the original charge, and, of course, upon such a charge she was committed to the assizes. We think that, although the charge has been altered, it is still intimately connected with the original charge and relates to the same subject-matter, that the articles in question are equally calculated to prejudice the fair trial of the accused whatever form the charge might ultimately take, and that their publication does constitute a contempt of the assize court to which the woman has been committed. It matters not whether the uncertainty at the time the articles were published extended only to the forum to which the case should be sent or to the question whether a committal would take place at all, or to both. In each of such cases the mischief is the same, and the court which might have to try the case would find its authority equally undermined beforehand. We think it right to repeat in this connection a passage in the judgment in *Rex* v. *Parke* (at p. 436), which expresses the deliberate opinion of the court as constituted when this case was argued, as well as of the court as constituted when *Rex* v. *Parke* was decided: "It has been argued that publication of articles of the kind in question cannot be treated as a contempt of the assize court unless the committal has actually taken place and a bill been found, when only, it is urged, is there a case pending in the assize court, and when, it is also urged, the jurisdiction ought to be exercised by that court itself. A moment's consideration, it seems to us, is sufficient to dispose of such a proposition. The reason why the publication of articles like those with which we have to deal is treated as a contempt of court is because their tendency, and sometimes their object, is to deprive the court of the power of doing that which is the end for which it exists—namely, to administer justice duly, impartially, and with reference solely to the facts judicially brought before it. Their tendency is to reduce the court which has to try the case to impotence, so far as the effectual elimination of prejudice and prepossession is concerned. It is difficult to conceive an apter description of such conduct than is conveyed by the expression 'contempt of court.' If it be once grasped that such is the nature of the offence, what possible difference can it make whether the particular court which is thus sought to be deprived of its independence and its power of effecting the great end for which it is created be at that moment in session or even actually constituted or not? It is perfectly certain that by law it will and must be constituted, and that when constituted it and it alone can take cognizance of the particular offence which is the subject of the preliminary inquiry. The wrong can hardly be the less because the purpose or the tendency of the act complained of is that the assize court never shall have undisturbed power to fulfil its functions satisfactorily. The High Court exists always. To provide beforehand that one of its branches, which, although it does not at the moment exist yet must, both according to immemorial custom and now also by statutes and by rules having the same effect, come into existence, shall be hampered and hindered in the effectual discharge of its duties as soon as it is constituted, if called upon to try a particular case which it is at all events proposed to bring into that court, is surely an offence against the High Court itself." It is true that, in the case of *Rex* v. *Parke*, the only uncertainty was whether the accused person would be committed to any court, the offence charged being one which in case of committal must go to the assizes. We cannot see that the additional element of uncertainty, in that the case could be tried at quarter sessions, makes any difference in principle; or prevents the interference with the due course of justice, in a case which may come to the assizes, from being a contempt of that court; and we are of opinion that upon these grounds alone the present application ought to be granted.

But inasmuch as a further question of great and growing importance—viz., the jurisdiction of this court to treat attacks of this kind upon the independence and usefulness of inferior tribunals as offences to be dealt with by this court in its summary jurisdiction—has been raised and argued, we think it desirable to deliver a judgment upon this point also, and to treat the case as if a committal had actually taken place to quarter sessions. The present King's Bench Division of the High Court stands in the place of the three ancient superior courts of common law, and besides representing the powers and exercising the authority of the Courts of Common Pleas and Exchequer, inherits all the jurisdiction and powers of the Court of King's Bench. From the most ancient times, that court exercised functions which belonged to no other court in the kingdom. The high nature of those functions is described in emphatic language by Lord Coke in 4th Inst. c. 7, on The Court of King's Bench, and in Hawkins' Pleas of the Crown under the same title, book 2, c. 3, to which we refer only to show the supreme place in the judicature assigned to that court. There is no doubt that the great functions of this court as of all others must be exercised, as pointed out by Lord Coke, "according to due course of law." His general attribution to it of the power to "correct errors and misdemeanours extra-judicial tending to the breach of the peace or oppression of the subjects or any other manner of misgovernment," as well as Hawkins's wider and more elaborate description of the like powers, refers to every kind of misdemeanour, including those which are properly the subject of indictment or criminal information, as well as those which are punishable summarily by attachment, and therefore throws no light upon the question whether a particular offence falls under the one head or the other or both. They do serve to show the very great trust reposed in the Court of King's Bench in respect of its control and superintendence of all inferior courts, and that it is in a special manner the guardian and protector of public justice throughout the kingdom. Offences of the exact kind in question in this case are necessarily of modern origin. They could not exist to any appreciable extent, if at all, before printing was greatly resorted to, and, as long as it was unlawful even to publish reports of proceedings before magistrates on account of their supposed tendency to interfere with a fair trial, persons who knew that this was unlawful were not very likely to go to the further length of announcing and commenting upon supposed facts, to the prejudice of a prisoner, which had not even come before the magistrate. Down to 1792 the judge at the trial determined as a matter of law whether a particular writing was a libel or not, and, looking to the legal definition of a libel, it is obvious that writers of all kinds stood in far greater danger than they have done since the Act of 32 Geo. 3, c. 60; and for a long time after that there is no

ubt that persons who published libels of any kind in more peril than at present. We have pointed the judgment in *Rex* v. *Parke*, at p. 438, that 11 to 1888 but one case has been recorded in publication of reports of proceedings before ing to committal, or of extraneous ed with such reports, has come under e. That case occurred in 1886, and for vill give later on we are of opinion n be placed upon it. We mention impossible it is that precedents y years ago for cases like the d or expected, and, if there is direct athority in favour of the an offence is summarily punishable by it is at all events conceded by Mr. Bankes has been able to find none to the ntrary. We are therefore driven to consider the question in the first instance from the point of view of principle, and in the second in the light of the reported cases during the last twenty years with such small help as can be gathered from older authorities. There is no doubt that almost all the cases of contempt of court to be found in the books are cases in which the act so called and so dealt with has been some act in defiance of one of the superior courts, in which case, of course, no one of these courts interfered with the other. Each of the three courts of common law and also the Court of Chancery possessed ample powers to protect itself and to punish conduct which it deemed to be so derogatory of its own authority as to constitute contempt of court. It is very natural, therefore, that the language generally used in such cases should refer to the power of the Supreme Court to ensure respect for itself or its orders, and should not go beyond that. The almost total absence of any recorded case in which a contempt of an inferior court has come into question is an abundant proof that serious offences of this kind were very rare. They were also always punishable by indictment, and in old days, when means of communication were slow, uncertain, and expensive there was an inducement to refrain from appealing to the Court of King's Bench, which no longer exists. In these circumstances the absence or scantiness of precedent is not to be wondered at, and in this connection we may cite a passage from Hawkins's P.C., book 2, c. 3, in which, speaking of the Court of King's Bench, after a general description of the jurisdiction of the court to prevent abuses and oppression, he says: "Neither is it necessary in a prosecution of any such offence in this court to show a precedent of the like crime formerly punished here agreeing with the present in all its circumstances, for this court, being the *custos morum* of all the subjects of the realm, wherever it meets with an offence contrary to the first principles of common justice and of dangerous consequences to the public if not restrained, will adapt such a punishment to it as is suitable to the heinousness of it," observations which are as applicable to the exercise of summary jurisdiction as to the proceeding by indictment. What, then, is the principle which is the root of and underlies the cases in which persons have been punished for attacks upon courts and interference with due execution of their orders? It will be found to be, not for the purpose of protecting either the court as a whole or the individual judges of the court from a repetition of the offence to them, but protecting the public, and especially those who either voluntarily or by compulsion are subject to its jurisdiction, from the mischief they will incur if the authority of the tribunal be undermined or impaired: see the judgment prepared by Wilmot, C.J., in *Rex* v. *Almond* in 1768, but not delivered because the case was allowed to drop—Wilmot's Opinions, p. 256. The word "authority" is used by him to express the deference and respect which is paid to the judges of a court and their acts, from an opinion of their justice and integrity. These words are apt with respect to the particular case with which he was dealing. But what possible difference in principle can there be in respect of direct attacks upon courts or judges and of writings the tendency of which is to deprive the inferior courts beforehand of the possibility of doing even-handed and impartial justice according to the due course of law? To hold that there was a distinction would give colour to the notion, which cannot be too strongly repudiated, that the offended dignity of a particular court or of the persons who compose it is the subject of punishment in such a case. "The object of the discipline enforced by the court in case of contempt of court," says Bowen, L.J., "is not to vindicate the dignity of the court or the person of the judge, but to prevent undue interference with the administration of justice" (*Helmore* v. *Smith*, 35 W. R. 157, 35 Ch. D. 449, 455); and a considerable part of the undelivered judgment of Wilmot, C.J., to which we have referred, is devoted to showing that the real offence is the wrong done to the public by weakening the authority and influence of a tribunal which exists for their good alone. He adds that such conduct is preeminently the proper subject of summary jurisdiction. "Attacks upon the judges," he says, "excite in the minds of the people a general dissatisfaction with judicial determinations . . . and whenever men's allegiance to the laws is so fundamentally shaken it is the most fatal and most dangerous obstruction of justice, and in my opinion calls out for a more rapid and immediate redress than any other obstruction—not for the sake of judges as private individuals, but because they are the channels by which the king's justice is conveyed to the people. To be impartial and to be universally thought to be so are both absolutely necessary for the giving justice that free, open, and unimpaired current which it has for many years found all over this kingdom." With a few verbal alterations these eloquent words will apply with at least equal force to writings whose direct tendency is to prevent a fair and impartial trial, or at least one that can be so considered, from being had in courts of inferior jurisdiction which have not the power of protecting themselves from such encroachments upon their independence. The public mischief is identical, and in each instance the undoubted possible recourse to indictment or criminal information is too dilatory and too inconvenient to afford any satisfactory remedy. It is true that the summary remedy with its consequent withdrawal of the offence from the cognizance of a jury is not to be resorted to if the ordinary methods of prosecution can satisfactorily accomplish the desired result—viz., to put an efficient and timely check upon such malpractices. But they do not. "I am," said Wilmot, C.J., "as great a friend to trials of facts by juries as any judge who ever did or now does sit in Westminster Hall, but if to deter men from offering any indignity to courts of justice" (and we may well add from interfering with the due course of justice) "it is a part of the legal system of justice in this kingdom that the court should call upon the delinquents to answer for such indignities" (to which we add "misconduct") "in a summary method, we are as much bound to execute this part of the system as any other." "The several parts of the system," he adds, "act in combination to attain the only end and object of all laws, the safety and security of the people," words which it appears to us are as appropriate to the question we have in hand as they were, in the case with which he was dealing, to the application under different circumstances of the

same great principle that courts for the administration of justice exist for the benefit of the people, that for the benefit of the people their independence must be protected from unauthorized interference, and that the law provides effective means by which this end can be secured. If it is to be secured at all in the case of the inferior courts, it can only be secured by the action of this court, for they have not the power to protect themselves, and, if it be true that the King's Bench is any sense the *custos morum* of the kingdom, it must be its function to apply, with the necessary adaptations to the altered circumstances of the present day, the same great principles which it has always upheld. The constant use of the term "contempt of court" has tended to obscure both the foundation and object of the jurisdiction and to throw into the shade the essential difference between the jurisdiction exercised by the Court of King's Bench and that of the other courts. It is no departure from principle, but only its legitimate application to a new state of things if others whose conduct tends to prevent the due performance of their duties by those courts have to be corrected as well as the courts themselves. Of old cases of this character we have found but two: *Burgh* v. *Blunt*, 10 Mod. 349, and *Rex* v. *Burchett*, 1 Str. 567. If the former is to be taken as suggesting that the Court of King's Bench will never interfere in such a case, it is contrary to a great body of ancient law (see Hawkins, book 2, c. 22, s. 25), and it is so far removed from the case before us in its circumstances and in the principles involved that it cannot be regarded as any authority against the applicant. *Rex* v. *Burchett* cannot be considered a decision of great weight, and the circumstances of that case cannot be compared with those with which we have to deal, nor was there then any appreciable risk of the class of inroads upon the independence of the inferior tribunals which the altered conditions of to-day have brought into prominence and which have made it necessary for us to consider very seriously and anxiously the nature of the jurisdiction we are asked to exercise and the principles upon which it is based. The modern cases are those three enumerated in *Rex* v. *Parke*. Until the argument of *Rex* v. *Parke*, the Central Criminal Court had been looked upon as a court of separate jurisdiction, and in that light alone can the decisions be duly estimated. The authorities, such as they are, leave the question entirely open for our decision. The necessity of caution in dealing with a matter where the liberty of the subject is concerned has been fully present to our minds. It is because we think that we are creating no new jurisdiction, but acting strictly in conformity with the cardinal principles upon which the jurisdiction to commit for conduct tending improperly to interfere with the administration of justice rests, that we have come to the conclusion at which we have arrived. To hold that, because in time long gone by the chief, if not the only, danger to be guarded against was the illegal exercise of arbitrary power by inferior courts, therefore the King's Bench cannot afford them protection, as well as administer correction, would we think, be to mistake the application of a principle for the principle itself. The danger is perhaps greater to inferior courts than it is to the superior courts of having their efficiency impaired by publications such as those which have given rise to present proceedings. As the application asks for nothing more than the legitimate application to new circumstances of the old principles of the common law, we have come to the conclusion we ought to grant the remedy invoked. The articles contain statements respecting the person charged, of a character likely seriously to prejudice her case, to create a feeling against her, and to affect the minds of persons who might take part in her trial; and we order David Davies to pay a fine of £100 and costs.

Rule absolute.

Solicitors for the complainant, *Smith, Rundell, & Dods*, for *Harold Lloyd & Cross*, Cardiff.

Solicitors for the defendant, *Soames, Edwards, & Jones.*

K. B. Div. (Channell, J.) — May 10, 1905.

In re DURHAM COUNTY COUNCIL AND WEST HARTLEPOOL CORPORATION. (*a*.)

Local government—Creation of county borough—Adjustment of financial relations—Compensation to county—Local Government Act, 1888 (51 & 52 *Vict.* c. 41), *ss.* 32, 62.

By a provisional order and confirmation Act a borough which then formed part of a county was separated from the county and constituted a county borough. The provisional order provided for an adjustment respecting financial relations between the county and the borough, and for that purpose applied section 32 *of the Local Government Act*, 1888, *with the substitution of the Local Government Board or an arbitrator appointed by them for the commissioners referred to in the section.*

Held, that the liability of the borough to contribute to the maintenance of the county bridges, main roads, and other county expenses which had thus ceased was a matter with respect to which the arbitrator appointed to adjust the financial relations between the county and the borough under section 32 *of the Local Government Act*, 1888, *had power to award compensation to the county.*

Caterham Urban District Council *v.* Godstone Rural District Council, 52 *W. R.* 625, [1904] *A. C.* 171, *distinguished.*

Award of Sir Hugh Owen, G.C.B., stated with regard to certain claims in the form of a special case.

The award, so far as material to the questions raised for the decision of the court, was as follows:

"By the Borough of West Hartlepool Order, 1902, which was confirmed by the Local Government Board's Provisional Orders Confirmation (No. 12) Act, 1902, it was provided:

"Article II.—'The borough' (of West Hartlepool in that order referred to as the borough) 'shall be constituted a county borough, and all the provisions of the Local Government Act, 1888' (in that order referred to as the Act) 'respecting county boroughs shall apply to the borough as if the borough had been named in the third schedule to the Act and as if Durham had been specified in that schedule as the county in which the borough should be deemed for the purposes of the Act to be situate . . .'

"Article III.—'(1) An equitable adjustment shall be made respecting the distribution of the proceeds of the local taxation licences of the estate duty and of the local taxation (customs and excise) duties and respecting all other financial relations or questions between the administrative county' (of Durham, in that order referred to as the administrative county) 'and the borough . . .

"(2) 'Any such adjustment between the administrative county and the borough shall be made by agreement between the council of the administrative county and the' (mayor, aldermen, and burgesses of the county borough of West Hartlepool, acting by the council, in

(*a*.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

that order referred to as the) 'council of the borough within six months from the commencement of this order . . . In default of agreement between the parties concerned in the case of any such adjustment as aforesaid the adjustment may be made by the Local Government Board or if that board think fit by an arbitrator appointed by them.

"(3) 'For the purpose of any such adjustment as aforesaid the provisions of the Act relating to adjustments between administrative counties and county boroughs shall apply with the necessary modifications, and the Local Government Board or an arbitrator appointed by them as the case may be shall be substituted in such provisions for the commissioners appointed under the Act, and notwithstanding anything in the provisions of this order or of the Act any such adjustment and the determination of any matter incidental or in relation thereto or consequent thereon shall when made by the Local Government Board be deemed to be made by them otherwise than as arbitrators and any arbitrator appointed by them shall be deemed to be an arbitrator within the meaning of section 62 of the Act and the provisions of the Act shall apply accordingly:

"Provided—(*a*) That in lieu of sub-section 6 of section 61 of the Act sub-sections 1 and 5 of section 87 of the Act shall apply to any inquiries which may be directed by the Local Government Board under this article and to the costs of such inquiries; and (*b*) that sub-section 6 of section 32 of the Act shall apply to any agreement or any award made under this article."

[The award then recited sections 32 and 62 of the Local Government Act, 1888, which contain the provisions relating to adjustments between administrative counties and county boroughs.*]

No equitable adjustment having been made by agreement between the County Council of Durham and the council of the county borough of West Hartlepool within the six months specified in the order, the Local Government Board appointed Sir Hugh Owen as arbitrator to make the equitable adjustment. The arbitrator duly made his award, and with regard to a large portion of the sums directed by the award to be paid by the county council and the council of the county borough respectively no question arises, but with regard to certain other payments claimed by the parties respectively the arbitrator was requested to state his award in the form of a special case.

The particulars of the claims in question and the facts which the arbitrator found with regard to them were as follows:

The county council claim that they shall be paid by the council of the county borough, in addition to the sums which under the foregoing clauses of this award are to be paid by that council, the following sums, that is to say:

(1) £5,928 in respect of the repair, maintenance, and improvement of county bridges;

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* By section 32 of the Local Government Act, 1888:

Sub-section 1: "An equitable adjustment respecting the distribution of the proceeds of the local taxation licences, and probate duty grant, and respecting all other financial relations, if any, between each county, and each county borough specified in the said schedule as being deemed for the purposes of this Act to be situate in that county, shall be made by agreement, within twelve months after the appointed day, between the councils of each county and each borough, and in default of any such agreement, by the commissioners appointed under this Act; and such adjustment shall provide, in the case of any expenses which may in future be incurred by the county wholly or partly on behalf of the borough for the liability of such borough to contribute, and, save as provided by this Act, any existing liability to contribute or to incur expense shall, after the appointed day, cease, and an equitable provision for such cessation shall be made in the adjustment."

Sub-section 3: "In such adjustment regard shall be had to the existing property, debts, and liabilities (if any) connected with the financial relations of the county and borough, and to the consideration that the county is not to be placed in any worse financial position by reason of the boroughs therein being constituted county boroughs, and that a county borough is not to be placed in a worse financial position than it would have been if it had remained part of the county and had shared in the division of the sums received by a county in respect of the licence duties and the probate duty grant, as provided by this Act, and to the amount of benefit and value of the services which the borough receives in return for existing contributions, if any, and to all the circumstances of each case which it appears equitable to consider."

Section 62, sub-section 1: "Any councils and other authorities affected by this Act or by any scheme, order, or other thing made or done in pursuance of this Act, may from time to time make agreements for the purpose of adjusting any property, income, debts, liabilities, and expenses, so far as affected by this Act or such scheme, order, or thing, of the parties to the agreement, and the agreement and any other agreement authorized by this Act to be made for the purpose of the adjustment of any property, debts, liabilities, or financial relations, may provide for the transfer or retention of any property, debts, and liabilities, with or without any conditions, and for the joint use of any property, and for the transfer of any duties, and for payment by either party to the agreement in respect of property, debts, duties, and liabilities so transferred or retained, or of such joint user, and in respect of the salary, remuneration, or compensation payable to any officer or person, and that either by way of a capital sum, or of a terminable annuity for a period not exceeding that allowed by the commissioners under this Act or the Local Government Board."

Sub-section 2: "In default of an agreement as to any matter requiring adjustment for the purpose of this Act, or any matter which, in case of difference, is to be referred to arbitration, then, if no other mode of making such adjustment or determining such difference is provided by this Act, such adjustment or difference may be made or determined by an arbitrator appointed by the parties, or in case of difference as to the appointment, appointed by the Local Government Board."

Sub-section 3: "An arbitrator appointed under this Act shall be deemed to be an arbitrator within the meaning of the Lands Clauses Consolidation Act, 1845, and the Acts amending the same, and the provisions of those Acts with respect to an arbitration shall apply accordingly; and, further, the arbitrator may state a special case, and notwithstanding anything in the said Acts, shall determine the amount of the costs, and shall have power to disallow as costs in the arbitration the costs of any witness whom he considers to have been called unnecessarily, and any other costs which he considers to have been incurred unnecessarily."

Sub-section 4: "Any award or order made by the commissioners or any arbitrator under this Act may provide for any matter for which an agreement might have provided."

(2) £32,610 in respect of the repair, maintenance and improvement of main roads; and

(3) £8,174 in respect of discontinuing contributions to miscellaneous expenses, such expenses (which are hereinafter referred to as "miscellaneous expenses") being the expenditure of the county council on salaries, registration of voters other than parliamentary ownership voters, law charges, printing and stationery, weights and measures department, health department, election expenses, county rate basis expenses, petty sessional courts in the county, and office expenses.

The county council claim the sums specified above and numbered 1, 2, and 3, on the ground that, owing to and since the constitution of the county borough, they have been deprived of, and will for the future be deprived of, all contributions for the area within the county borough towards the expenses incurred by them in respect of the several purposes to which the claim relates, and the liability for such expenses is now and will continue to be imposed solely on the area of the county as diminished by the area which has been formed into the county borough.

It is admitted by the council of the county borough that there are no county bridges or main roads within the area of the county borough, and that the contributions from the area within the county borough towards miscellaneous expenses have in past years prior to the constitution of the county borough exceeded the amount of such expenses incurred by the county council for that area.

The council of the county borough claim that they shall be paid by the county council, in addition to the sums which under the foregoing clauses of this award are to be paid by that council, the following sums, that is to say:

(4) £3,225 in respect of children in industrial schools and in reformatories;

(5) £3,214 in respect of subsidized roads; and

(6) £305 in respect of fines.

With regard to the item numbered (4), the council of the county borough claim the said sum of £3,225 on the ground that, owing to and since the constitution of the county borough, an increased burden has been thrown on the area within the county borough in respect of the expenses of the maintenance of children in industrial schools and reformatories, and the burden on the area now comprised in the county has been thereby diminished.

It is admitted by the county council that the contributions from the area within the county borough towards such expenses have in past years, prior to the constitution of the county borough, been much less than the actual expenditure of the county council in respect of the maintenance of the children sent to industrial schools and reformatories from that area.

With regard to the item numbered (5), the council of the county borough claim the said sum of £3,214 on the ground of the loss which the area within the county borough has sustained by reason of the discontinuance of the contributions which, prior to the constitution of the county borough, were made by the county council under section 11 (10) of the Local Government Act, 1888, towards the cost of the maintenance, repair, enlargement and improvement of highways (not being main roads) in the area within the borough.

It is admitted by the county council that, during the three completed years next before the 1st day of October, 1902, they made under the powers conferred on them by the said Act voluntary contributions towards the cost of highways (not being main roads) in the area within the county borough, and that since the constitution of the county borough such contributions by the county council have necessarily ceased.

With regard to the item numbered (6), the council of the county borough claim the said sum of £305, on the ground that, prior to the constitution of the county borough, the share of the area within that borough in the proceeds of the fines levied at petty sessions throughout the county was on the basis of its rateable value in excess of the fines so levied in that area; that since the county borough was constituted the area within that borough has lost the allocation of that excess, and that in consequence an additional sum is available for allocation to the county.

It is admitted by the county council, that prior to the constitution of the county borough the share in the proceeds of the said fines which, on the basis of its rateable value, was allocated to the area within the county borough, was in excess of the fines actually levied in that area.

It is agreed by the county council and the council of the county borough that if under an adjustment under the said Borough of West Hartlepool Order, 1902, and the provisions of the Local Government Act, 1888, therein referred to, either of those councils has a valid claim against the other in respect of any of the items of claim above-mentioned in consequence of the loss sustained by reason of the constitution of the county borough, the sum stated above in connection with such item shall be deemed to be the sum which represents the amount of the loss.

The questions for the opinion of the court are:

(1) Whether the loss sustained by the county council is, under article 3 of the said Borough of West Hartlepool Order, 1902, and the provisions of the Local Government Act, 1888, therein referred to, the subject of a valid claim against the council of the county borough in the case of any of the items of claims numbered 1, 2, and 3, and, if so, which?

(2) Whether the loss sustained by the council of the county borough is, under the said order and provisions, the subject of a valid claim against the county council in the case of any of the items of claim numbered 4, 5, and 6, and, if so, which?

Shearman, K.C., and *R. I. Simey*, for the Durham County Council.—The question is whether, upon a borough being taken out of the county and constituted a county borough the loss to the county of that productive rate-paying area is a matter for compensation under section 32 of the Local Government Act, 1888. Until recently it was considered that there could be an adjustment under section 62 of that Act or section 68 of the Local Government Act, 1894, which is substantially to the same effect. The leading decision on the question was *In re Rochdale Union and Haslingden Union* 47 W. R. 322, [1899] 1 Q. B. 540. However, in *Caterham Urban District Council* v. *Godstone Rural District Council*, 52 W. R. 625, [1904] A. C. 171, it was held by the House of Lords that where a parish was taken out of a rural district and constituted an urban district by an order made under section 57 of the Act the loss of the contributions from that parish to the highway rates of the rural district was not a matter of adjustment under section 62. Their lordships' decision was, therefore, that section 62 of the Act of 1888 did not authorize a claim to compensation in the case of a loss of a profitable area. Therefore the question in the present case is whether the principle of the *Caterham case* applies to section 32 of the Act as well as to section 62. It is submitted that it does not, since the language of section 32 is much wider than that of section 62. Sub-section 3 of section 32 shows that the Legislature intended that matters of this kind should be the subjects of adjustment.

Cripps, K.C., *Macmorran, K.C.*, and *Fleetwood Pritchard*, for the county borough.—No distinction in

substance can be drawn between section 62 and section 32, and therefore the decision of the *Caterham case* applies. The county council are really claiming compensation for the loss of a rate-paying area, but section 32 only provides for "adjustment," which is not an apt word to express the idea of "compensation." Section 32, like section 62, deals only with the adjustment of existing property and liabilities, and the same principles apply whether the area divided is a county or a rural district. Lord Halsbury, L.C., in the *Caterham case* points out that the word "adjustment" as distinguished from "compensation" means a division of existing assets while "compensation" would quite rightly be interpreted to mean the loss of some right to obtain income by rating, or of some area which would furnish the right to get income. The words "financial relations" in section 32 do not assist the other side, for those words are also to be found in section 62. Whichever section is considered, the problem to be dealt with is the same. The substantial reason why a borough seeks to be taken out of the county and constituted a county borough is because it has been unfairly treated by the county in the amount that had to be contributed towards the county expenditure. If, then, compensation is to be allowed for loss of the excess of rating over expenditure the greater that excess has been in the past the greater will be the compensation.

Shearman, K.C., in reply.—Section 62 does not authorize the adjustment of "financial relations." The section where it uses the words is speaking of an adjustment under section 32. Those words as used in section 62 merely refer back to section 32. That, however, is a small matter. The real contention of the county council is that section 32, though not very skilfully drafted, was intended to be as wide as possible and intended to provide for the adjustment being so made as to protect the ratepayers either in the borough or the county from having their burdens increased.

CHANNELL, J.—In my view there is a substantial difference between section 32 of the Local Government Act, 1888, and the section (section 62) which was before the House of Lords in *Caterham Urban District Council* v. *Godstone Rural District Council*, and in particular the difference is in the last part of sub-section 1 of section 32. The sub-section begins by providing for an adjustment "respecting" certain specified matters and "all other financial relations." Those words are so vague and unsatisfactory in every way—they do not speak of adjusting financial relations, but of an adjustment "respecting" financial relations—that I myself should be wholly unable to put any definite meaning on them if they stood alone. But I think it was intended that there should be an adjustment of financial relations generally, and that Mr. Shearman correctly explained the reason why the words financial relations are inserted in section 62—namely, that agreements there mentioned as made for the purposes of adjusting financial relations are agreements authorized elsewhere than in section 62; in other words that they refer back to section 32. Those words are, as I think, extremely difficult to construe. But the words which I do not think difficult to construe are those of the latter part of sub-section 1 of section 32. That part of the sub-section provides, first, that "such adjustment shall provide, in the case of any expenses which may in future be incurred by the county wholly or partly on behalf of the borough for the liability of such borough to contribute." Before 1888 a very large number of things had been done for the boroughs by the county, and, if it was a quarter sessions borough, those things were paid for not by way of direct rating, but by way of money contributions raised by the borough upon precepts. The sub-section says that, notwithstanding the passing of the Act, some things will still continue to be done by the county for the borough, and that as to those matters the adjustment is to provide. The sub-section then continues: "And save as provided by this Act, any existing liability to contribute or to incur expense shall, after the appointed day, cease, and an equitable provision for such cessation shall be made in the adjustment." That seems to say that provision must be made that certain things are to cease; for instance, the liability to maintain the main roads. I think there can be no doubt that the Act provides that in the future the liability to maintain the main roads within the borough is to be borne by the borough, and that the liability of the county to incur expense in connection with main roads within the borough is to cease, and equally the liability of the borough to contribute to the expenses of the county in respect of the roads outside the borough is to cease. The adjustment may not alter that. What it is to do is to make an equitable provision for such cessation. That must mean that it is to be taken into consideration somehow or other from a money point of view.

Personally, I very much doubt whether in making that provision it is right to capitalize the existing difference between the expenditure in the recent years and the contributions of the recent years, but it is for the arbitrator to consider what is equitable. That is perhaps a matter of personal opinion, but he has to make some provision upon the subject, and that that is to be an equitable one seems to me to be provided by the Act. Then I think that the words in sub-section 3 are important: "In such adjustment regard shall be had to the existing property, debts, and liabilities (if any) connected with the financial relations of the county and borough and to the consideration that the county is not to be placed in any worse financial position by reason of the boroughs therein being constituted county boroughs, and that a county borough is not to be placed in a worse financial portion than it would have been in if it had remained part of county and had shared at the division of the sums received by a county in respect of the licence duties and the probate duty grant as provided by this Act, and to the amount of benefit and value of the services which the borough receives in return for existing contributions, if any, and to all the circumstances of each case which it appears equitable to consider." I cannot think that the words referring to the preservation of the financial position can be meant to be limited to financial position in respect of licence duties and probate duty grant. That matter is mentioned somewhat inartistically as an illustration of one of the things contemplated, but the sub-section is not confined to these duties. I think the scheme was not to alter the financial position as between counties and the boroughs that were made county boroughs further than could possibly be helped. It was intended, as it seems to me, to start the county boroughs and the counties so that the ratepayers would be practically as nearly as could be at starting in the same position as they had been in before, but it was not intended that that should be so for all time. It was not intended, for example, that account should be taken of the fact that in all probability West Hartlepool would be a very growing place, and that some of the smaller villages in Durham might not be, and things of that sort, but it was intended to alter the machinery, and, as between large boroughs to which this section relates and the counties, to start them as far as possible in the same position as they were in before. I think,

therefore, that it was within the power of the arbitrator to make an equitable provision of some kind for the cessation of the liability to repair the main county bridges and main roads. And the same thing applies to the miscellaneous expenses and to the cross-claim against the county council.

Questions of arbitrator answered in the affirmative.

Solicitors for the county council, *Maude & Tunnicliffe*, for *Ralph Simey*, Durham.

Solicitors for the county borough, *Baker & Co.*, for *Higson Simpson*, Town Clerk, West Hartlepool.

House of Lords.

From C.A. (England). Aug. 1, 1905.

CLOUGH *v.* SAMUEL AND OTHERS. (*a.*)

Bankruptcy—Act of bankruptcy—Notice to creditors that debtor could not meet his engagements—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-section* 1 (h).

A declaration by a debtor that he is unable to pay in full, made to his Stock Exchange creditors, and permission given to them to close their accounts,

Held, not sufficient notice within the meaning of section 4, *sub-section* 1 (h), *of the Bankruptcy Act,* 1883, *that the debtor had suspended or was about to suspend payment of his debts.*

Decision of the Court of Appeal *in* In re Reis, Ex parte Clough, 53 *W. R.* 122, [1904] 2 *K. B.* 769, *affirmed.*

Appeal from an order of the Court of Appeal (Vaughan Williams, Stirling, and Cozens-Hardy, L.JJ.) which discharged a decision of Wright, J. (52 W. R. 302, [1904] 1 K. B. 456).

The appellant was the trustee in bankruptcy of one Arthur Reis, and the question considered in the judgments of their lordships was whether Reis had committed an act of bankruptcy within the terms of section 4, sub-section 1 (*h*), of the Bankruptcy Act, 1883.

In 1879 Reis, the bankrupt, had executed a settlement in consideration of marriage, whereby he covenanted to convey to the trustees all future acquired property, except business assets, to be held upon the trusts of the settlement.

In 1880 Reis became bankrupt, but obtained his discharge in 1882.

By the year 1901 Reis had made large profits, and he invested some £17,000 in purchasing and furnishing a freehold house in which he resided.

On the 23rd of May, 1903, the trustees of his marriage settlement gave him a written notice requiring him to convey the house and furniture to be held on the trusts of the settlement.

On the 10th of June, 1903, he, by an instrument in writing, conveyed the house and furniture as required.

In the interval—*i.e.*, on the 26th of May, 1903—Reis summoned his two largest creditors to meet him in presence of his solicitor, who told the principal creditors, who were members of the Stock Exchange, that Reis was in difficulties and would have difficulty in meeting his engagements, and that they might close their accounts at once so as to diminish the loss as much as possible.

The Lord Chancellor and Lord Macnaghten deal with what happened at this meeting in their judgments.

Reis was subsequently made bankrupt on non-compliance with a bankruptcy notice founded on a judgment of the 22nd of June.

The question resolved itself into, Was the statement of the debtor an act of bankruptcy so that the instrument of the 10th of June, 1903, might be set aside? The Court of Appeal held that it was insufficient to constitute an act of bankruptcy.

The trustee in bankruptcy appealed.

Herbert Reed, K.C., and *A. J. David* (*Berthold Adler* with them), for the appellant.

Horridge, K.C., and *E. W. Hansell*, for the respondents.

Herbert Reed, K.C., replied.

Earl of HALSBURY, L.C.—There is only one point in this case upon which your lordships called upon the respondents to support the judgment of the Court of Appeal, and that was how far the facts in this case show an act of bankruptcy committed by Mr. Reis before the execution of the instrument sought to be impeached by the trustee in bankruptcy. That, in fact, depends upon the facts as relevant to the new act of bankruptcy created by the Bankruptcy Act, 1883. That Act for the first time made it an act of bankruptcy if the debtor gives notice to any of his creditors that he has suspended, or that he is about to suspend, payment of his debts. In order to be an act of bankruptcy it must be a notice, and although the statute does not require any particular form of notice, still it must be a notice. I do not know that the word "notice" can be made clearer than it is by any verbal explanation, but it must be a notice. The statute might have said that an admission of insolvency should be enough, or that a present state of insolvency should be enough; but it is sufficiently clear that neither one nor the other will be sufficient as an act of bankruptcy. In earlier times bankruptcy was a crime; and in dealing with our law, to commit the crime it was necessary to commit an act of bankruptcy. Two most distinguished judges, Lord Selborne and Lord Watson, have pointed out in this House that a declaration of inability by a debtor does not of itself and without reference to context or circumstances satisfy the statute; and if I look to the circumstances or the words used, I concur with the Court of Appeal here that the debtor neither did nor intended to do any such thing as to give notice to his creditors or to any of them that he intended to suspend the payment of his debts.

What happened is, to my mind, very clear. Some speculative purchases on the Stock Exchange had been depressed in value, and the pay day was very near; and Mr. Reis, foreseeing difficulties in the future, went and consulted his solicitor. This solicitor was also solicitor to two of Mr. Reis's largest creditors, who were brokers, and a conversation ensued between the solicitor, who, having Mr. Reis with him at the time, procured these two creditors to come to him at once as he was in telephonic communication with them both. "It was," says Mr. Spyer, the solicitor, "rather in the nature of a friendly meeting, so far as Mr. Lumsden and Mr. Hart were concerned" (the two creditor in question), and Mr. Spyer being asked the question in plain terms whether he said anything about Mr. Reis's other creditors, or not being able to meet his other creditors, Mr. Spyer, referring to his professional experience in bankruptcy, says, "I was rather careful to say nothing of the sort." The two friends were intended to get authority from Reis to close their accounts so as to diminish the loss as much as possible when pay day came. It was then suggested

(*a.*) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

that two other brokers were in the same condition, with accounts open, and it would be only fair to let them have the same liberty, and Mr. Spyer undertook to communicate to them his client's consent; but, to my mind, the last thing Mr. Reis had in his mind was a notice that he intended to suspend payment of his debts; his whole object was time, and what he thought he explained himself was, that two days might make all the difference, and that "a rise was due because the depression was the result of a slump." I have no doubt he was hopelessly insolvent. I have no doubt his expectations of a rise were vain, but I suspect people who gamble on the Stock Exchange very often have vain expectations. But I think he had no intention of giving notice that he intended to suspend payment, either in express words or in anything he said, from which an ordinary business man would infer that what Spyer said on his behalf, or what he said himself, was a notice of intention to suspend payment of his debts. I daresay a business man would infer that he was likely to do it, or perhaps that he was likely even to become bankrupt, but he would infer that from the circumstances, and not from anything said by either Spyer or Reis. I move, therefore, that the appeal be dismissed.

Lord MACNAGHTEN.—The real point of the case has, I fear, been rather obscured by the length of the argument. The question lies in the narrowest compass.

The Bankruptcy Act, 1883, by section 4, sub-section 1, creates a new act of bankruptcy. It declares that a debtor commits an act of bankruptcy if he "gives notice to any of his creditors that he has suspended or that he is about to suspend payment of his debts."

Why was this provision introduced? Certainly not in order to afford the debtor an opportunity of communicating to his creditors the fact of his insolvency, so that they might, if they should think proper, take proceedings to make him bankrupt. A declaration by a debtor of inability to pay his debts filed in the prescribed manner was an act of bankruptcy already. The object of the new departure is stated, and stated, I think, correctly, in the case of *In re Wolstenholme*, 2 Morrel 216, by one of the counsel in the course of his argument. "Before the year 1883," Mr. Yate Lee is reported to have said, "it was common practice for a trader to send out notices saying he was about to suspend payment. Afterwards, however, dealings often took place between the debtor and his creditors. That was felt to be unfair, and the object of the new Act was to meet the evil by making the notice of suspension a new act of bankruptcy in order to prevent these unfair dealings." I do not, of course, cite this passage as an authoritative exposition of the meaning of the Legislature, although it seems to have been accepted by the court, and the learned counsel, as some of your lordships may remember, was a gentleman of great experience in bankruptcy and the author of a well-known treatise on the subject. But I cannot conceive that this enactment could have had any other origin or any other purpose. Now, when this provision first came under the consideration of the courts a very narrow construction was put upon it. It was said that the notice must be in writing and must declare an intention on the part of the debtor to suspend payment. It was said that the notice must be a notice intended to be communicated to all the creditors or to the body of creditors, and that the state of circumstances as disclosed must be such as to render it not merely improper, but actually fraudulent for the debtor afterwards to pay anybody. All these glosses, for which there seems to be no foundation in the Act, were, I had thought, swept away by the decision of the Court of Appeal in *In re Lamb*, 55 L. T. 817, 35 W. R. Dig. 13, and by the decision of the majority of the same court in *In re Cook*, 24 Q. B. D. 320, affirmed in this House *sub. nom.*: *Crook* v. *Morley*, [1891] A. C. 316, 40 W. R. Dig. 15. The notice need not be in writing. It is enough if notice is given to any one of the creditors. No particular form is required. There is nothing said in the Act about the debtor's intention. The question is, what effect would the communication have on the minds of the persons to whom it is addressed. That is the test as laid down in this House. It is only a matter of common sense, as A. L. Smith, L.J., observed. All that is required is that a communication proceeding from the debtor, made seriously, should give the creditors or any of the creditors to understand from the state of circumstances as disclosed at the time that the debtor has suspended, or that he is about to suspend, payment. If it comes to this—I borrow the illustration from the judgment of Fry, L.J., in *In re Lamb*, which was referred to by Lord Selborne in *Crook* v. *Morley*—that the debtor has said in effect, "I am in a position at the present moment in which it is impossible for me to go on paying my creditors who may apply to me in the ordinary course of trade, and if I pay the first who apply there will be nothing left for the rest," that is an intimation that he will either immediately suspend payment, or that he is "about to suspend payment" as soon as he reaches the end of his resources.

And now, what was the case here? An outside stockbroker has some uncollected debts calculated on a sanguine estimate to produce a few hundred pounds, and which ultimately brought in £60. He has £7 at his bankers and not another penny in the world. The trustees of his marriage settlement have laid their hands on everything. Within a few hours he must find a sum already ascertained and known to exceed £10,000, or be proclaimed a defaulter. He communicates with his creditors on the Stock Exchange. He makes his solicitor, a Mr. Spyer, his mouthpiece. Mr. Spyer explains to his creditors on the Stock Exchange the state of affairs and his client's hopeless insolvency, with the view, apparently, of inducing them to accept a composition of something under 2s. in the pound, to be paid, not by the debtor himself, but out of a sum of £1,000 which he hoped to obtain from the trustees of his marriage settlement. There can be no dispute about the facts. I am not setting the recollection of one witness against the recollection of another. I accept the statement of Mr. Spyer. Mr. Spyer made at the time in his bill of costs a record of what occurred. That record states that he was requested by Mr. Reis to interview the brokers with whom he did business for the purpose of explaining the position; that he did attend Messrs. Lumsden and Hart, both of them together, and afterwards Mr. Harris and Mr. Elliott separately; and that he did explain the position to each of them. The position I have already described. I have no doubt Mr. Spyer put it before the creditors honestly and truthfully. When the offer or suggestion of the £1,000 was rejected and the brokers closed their accounts, refusing to allow Mr. Reis to gamble any longer with their money, it seems to me that it must have been clear to these four stockbrokers, if they were persons of ordinary intelligence and knew anything about business, that Mr. Reis was about to suspend payment. The end was in sight. It might come to-day or it might come to-morrow or the day after. But come it must. The age of miracles was past. There was nothing for it but suspension. I would hold that Mr. Spyer's communication was notice that Mr. Reis was about to suspend payment of his debts. However, your lordships think differently, and the result will be

that the order under appeal will be affirmed, and the authority of *Crook* v. *Morley*, I am afraid, to some extent impaired.

Lord ROBERTSON.—This is a delicate case; but, after hearing the argument, I have come to a definite opinion in favour of the respondents.

It seems to me that in the conception of section 4, sub-section 1 (*h*), with which we have to deal, the suspension of payment of his debts is a specific and deliberate (in the sense of intentional) act of the debtor, and the suspension, actual or intimated, must apply to all the creditors. It is something different from and over and above inability to pay. It is one of the several courses which a debtor may elect among, when he finds himself insolvent. A man faced by a balance-sheet which means certain and speedy ruin may try to arrange with his more pressing creditors; or he may put off the evil day and stagger on, leaving the stoppage of his career to be brought about by the action of others. Either of these courses is different from suspending payment of his debts. It is, of course, entirely consistent with this view that the question whether notice of suspension has been given must depend on the import of what was said or written and is relied on as notice.

Now the question is, did Mr. Reis give notice that he had suspended payment of his debts or was about to suspend it? It seems to me that he did nothing in that direction except to show (to two of his creditors) his circumstances to be such that suspension of payment was one of the courses open to him. The occasion and object of the interview founded on, was to arrange with two brokers about closing the account. It is true that at that interview disclosure was made of a state of affairs which would have justified suspension of payment. But to me it is equally clear that what is relied on as having been said did not, in its reasonable sense, import notice of an intention to take that step, and it is at least doubtful whether the tenor of the communication did not rather point in the opposite direction. Nor did the other persons present act as if a suspension was announced.

I agree in the judgments of the learned Lords Justices.

Appeal dismissed.

Solicitors for the appellant, *W. H. Martin & Co.*

Solicitors for the respondents, *Nordon & De Frece.*

Court of Appeal.

From Chan. Div. (Vaughan Williams, Stirling, and Cozens-Hardy, L.JJ.) — Oct. 30, 31; Nov. 9.

In re WEST COAST GOLD FIELDS (LIMITED). (*a*.)

Bankruptcy—Trustee—Right to participate in surplus assets of liquidating company as representing bankrupt—Shares partly paid up—Proof in bankruptcy not payment—Company—Liquidation—Distribution of surplus assets.

A shareholder liable as a contributory to a company must discharge his obligation before he can participate in a distribution of surplus assets of the company. Thus, where the holder of partly paid-up shares in a company becomes bankrupt, and the company proves in the bankruptcy for the amount of unpaid calls on the bankrupt's shares, the trustee cannot, although the company has received a dividend on their proof, participate in a distribution of surplus assets of the company until the holders of the fully paid-up shares therein have received the amount paid by them in excess of that paid by the holder of the partly paid-up shares.

In this case the trustee in bankruptcy of a person who held partly paid-up shares in the West Coast Gold Fields (Limited) claimed that he should in respect of such shares, as representing the bankrupt, be entitled to participate in a distribution of surplus assets of the company among its contributories.

It was held by Buckley, J., that, there being a liability on such shares for which the company had proved in bankruptcy, the liability must be discharged before the trustee could participate as claimed, and that proof in bankruptcy, even if followed by a dividend, was not payment in cash.

The trustee appealed.

The facts are fully stated in the judgment.

Buckmaster, K.C., and *Felix Cassel*, for the appellant.—Proof for the total liability and payment of a dividend constitute payment of the shares in full.

They cited *In re McMahon*, [1900] 1 Ch. 173; *Stammers* v. *Elliott*, 16 W. R. 489, (1868) L. R. 3 Ch. 195; *Ex parte Solomon*, (1821) 1 G. & J. 25; *Ex parte Hornby*, (1819) Buck. 351; *Ex parte West Riding Union Banking Co.*, (1881) 19 Ch. D. 105.

Astbury, K.C., and *P. M. Walters*, for the respondent.—The company's remedy against the debtor or his estate is extinguished by the proof in bankruptcy; the payment of a dividend in the proof only operated as payment *pro tanto* on the shares, but the shares are not fully paid. The decision in *Grissell's case*, 14 W. R, 1015, L. R. 1 Ch. 528, should be followed.

Cur. adv. vult.

Nov. 9.—STIRLING, L.J., read the judgment of the court: The facts which give rise to the question now to be decided may be stated very briefly. The capital of the company was divided into shares of £1 each. At the end of 1902 Rowe held 1,800 of these shares, on each of which 10s. only had been paid up. On the 8th of January, 1903, the company made a call of 1s. per share on each of the 1,800 shares. On the 19th of January, 1903, a receiving order was made against Rowe, and on the 22nd of January he was adjudicated bankrupt. Subsequently the company carried in a proof against Rowe's estate in respect as well of the unpaid call of 1s. per share as of the future uncalled liability of 9s. per share. This proof was ultimately admitted at £819, on which sum the company received from the trustee a dividend of 1s. 6d. in the pound. No further dividend has up to the present time been paid; but it is expected that the estate will yield a further 1s. 6d. in the pound. In April, 1904, the company went into voluntary liquidation. After payment of all debts and liabilities a surplus remains. On the majority of the shares in the company the full nominal value of £1 per share has been paid, and the liquidator proposes to apply the surplus in repayment to the holders of those shares of 3s. per share, which will exhaust the fund. The trustee in Rowe's bankruptcy contends that, although cash to the amount of 11s. 6d. per share only has come to the hands of the company, nevertheless the 1,800 shares ought for the purpose of any distribution of surplus assets among the contributories of the company to be treated as fully paid up; and has taken out a summons in the winding up seeking a declaration that this is his right. Buckley, J., has decided that the contention of the trustee is not well founded, and has dismissed the summons. From this decision the trustee has appealed.

(*a*.) Reported by HENRY STEPHEN, Esq., Barrister-at-Law.

By section 133 of the Companies Act, 1862, it is provided that subject to satisfaction of the liabilities of the company the property of the company (where, as is the case here, there is no provision to the contrary by the regulations of the company) is to be "distributed amongst the members according to their rights and interests in the company." In *Ex parte Maude*, L. R. 6 Ch. App. 51, it was decided that where some shares have been fully paid up and others have not, the holders of the fully paid-up shares are entitled in a distribution of surplus assets in a winding up to receive the amount paid by them in excess of that paid on the other shares, before the holders of the latter receive anything. If, then, the 1,800 shares are to be regarded as being paid up only to the extent of 11s. 6d. per share, the decision under appeal is fully justified. The appellant contends that the proof in the bankruptcy alters the case and entitles him to say that the shares are fully paid up. In support of this contention cases are referred to such as *Ex parte Hornby*, Buck. 351, in which it is laid down that "proof is payment." No doubt it is true that proof deprives the creditor of any other remedy against the debtor or his estate, and in that sense proof is payment; but is proof payment in the sense that a company incorporated under the Companies Acts is to be treated as having received, in cash, a portion of its capital which it does not receive? If so, then immediately upon the admission of the proof the shares became fully paid up, and, as was argued at the bar, the trustee might have transferred them as such, to a purchaser even though no dividend was ever paid in the bankruptcy. But section 25 of the Companies Act, 1867, provides that every share of a company shall be held subject to the payment of the whole amount thereof in cash, unless otherwise provided by contract in writing. Proof is not payment in cash unless followed by dividend, and then only to the extent of the dividend paid. And though the enactment just mentioned has been repealed, shares must still be paid up in money in the absence of a valid agreement for payment in money's worth. This view is, we think, in accordance with that taken by the Court of Appeal and the House of Lords of the general scope of the provisions of the Companies Acts with respect to the capital of companies, in the recent case of *Randt Gold Mining Co.* v. *New Balkis Eersteling (Limited)*, 51 W. R. 391, [1903] 1 K. B. 461, [1904] A. C. 165; see in particular the observations in the judgment of Lord Halsbury, L.C., at pp. 466-7 of the report in [1903] 1 K. B.

What has been said suffices to dispose of this appeal, but it may be well to add a few remarks on some points which were pressed upon us in argument. Our attention was directed to the fact that the distribution of the bankrupt's estate is not yet closed, and that there is a possibility of future dividends. It was asked, while this state of things continues, how is the liability on the shares to be defined in the event of a sale by the trustee of these shares? It was said, and with truth, that the company cannot have both the benefit of the proof and the liability of the purchaser for what remains unpaid on the shares. The question so asked does not arise in the present case, but it seems to us that one answer may be this. The trustee's duty is to transfer to the purchaser all the interest of the bankrupt in the shares: see Bankruptcy Act, 1883, s. 50, sub-section 3. That interest comprises both that which has arisen from the payment actually made in respect of each share and the benefit which will accrue by the increase of value in the shares by the payment of further dividends under the proof in the bankruptcy. The liability, therefore, would be the amount which remains unpaid on the shares, *but with the benefit of any further dividends* under the proof; and the right to such benefit would properly be recognized by the company in the certificate given to the purchaser. Certainly there appears to be no insuperable difficulty in defining, in this or some other way, the liability in question. Again it was said that several courses were open to the company when the proof was carried in; that the course actually selected threw the greatest burden on the bankrupt's estate; and that in these circumstances injustice would be done to the other creditors of the bankrupt if the company were not held to be precluded from saying that the shares were not fully paid up. No doubt under the provisions of the Bankruptcy Act the company might have taken any one of several courses; but we fail to see that the adoption by one creditor of that which he considers the most advantageous to himself gives the other creditors any right as against him, even although that course may be the most disadvantageous to them. Further, each dividend paid to the company, though it takes away something from the other creditors, at the same time would, as a general rule, add something to the value of the shares of which the other creditors would on a sale get the benefit; and, in our opinion, less than justice would be done to the company if that benefit were carried to the extent of treating the shares as fully paid up. In any case, we are unable to see that the company is estopped from saying that the shares have not been fully paid in cash. The company has never represented that the shares have been fully paid up in cash; neither the trustee in bankruptcy nor any of the creditors has acted on such a representation in ignorance of the truth, and there is no room for the application of the doctrine which formed the basis of the decision in *Burkinshaw* v. *Nicolls*, 26 W. R. 819, L. R. 3 App. Cas. 1004. Lastly, the case of *Stammers* v. *Elliott*, L. R. 3 Ch. App. 195, which was much relied upon, does not govern the present, for the simple reason that the question there arose with reference to the rights *inter se* of the residuary legatees of a testator's estate, and did not in any way involve the consideration of the peculiar rights and liabilities created by the Companies Acts on which the decision in this case turns. In our opinion the appeal fails, and must be dismissed with costs.

Solicitors for appellant, *Morley, Shirreff, & Co.*

Solicitors for respondent, *Dollman & Pritchard.*

Appeal.
(Collins, M.R., and Romer and Mathew, L.JJ.) — Oct. 26.

OSMOND *v.* CAMPBELL & HARRISON (LIMITED). (*a.*)

Master and servant—Employers' liability—Accident—Compensation — Dependants — Partial dependency — Amount of compensation—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *Schedule I., clause* 1 (a) (*ii.*).

A workman was killed by an accident arising out of and in the course of his employment. During the last three years his weekly earnings had been 19s. 10½*d., and his wife earned* 1s. 10½*d. a week in addition. They had no other means of living. His widow having claimed compensation under the Workmen's Compensation Act,* 1897, *as in part dependent upon his earnings within Schedule I., clause* 1 (a) (*ii.*), *to the Act, the employers contended that in order to arrive at the sum which would be "reasonable and proportionate to the injury to" the*

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

widow within the meaning of the clause, the amount required to maintain him in his lifetime must be deducted from his earnings, and the maximum sum payable as compensation must be proportionately reduced. The county court judge awarded £150.

Held, that the principle for the assessment of compensation was the same as in the case of total dependency, except that in the case of partial dependency the applicant's other source of income should be taken into account; that the amount required to maintain the deceased man in his lifetime did not enter into the calculation, and that the county court judge had not misdirected himself in assessing the compensation at £150.

Appeal from an award under the Workmen's Compensation Act, 1897, made by Judge Bompas, K.C., sitting at the Bradford County Court.

The applicant was the widow of a deceased workman who met with a fatal accident arising out of and in the course of his employment. It was admitted that the employmnt was one to which the Act applied. The applicant claimed compensation as having been in part dependent upon his earnings at the time of his death. The deceased man's wages were 19s. 10½d. a week, and the applicant used to earn 1s. 10½d. a week. The county court judge awarded her £150.

The employers appealed.

J. A. Compston, for the employers.—The county judge calculated the compensation upon a wrong principle. Clause 1 (*a*) (i.) of Schedule I. to the Workmen's Compensation Act, 1897, deals with the case of a workman leaving dependants wholly dependent upon his earnings at the time of his death, and in that case the compensation is to be a fixed sum equal to the deceased workman's earnings during the three years next preceding the injury, such sum not to be less than £150 and not to exceed £300. That clause provides for compensation apart from any consideration of the loss or injury to the dependants. Clause 1 (*a*) (ii.) deals with the case of partial dependency, which is the present case. There a different principle is applied, and the injury to the dependants comes into the calculation, because the compensation is to be such sum, not exceeding in any case the amount payable under the preceding clause, as may be determined to be "reasonable and proportionate to the injury to the said dependants." In order to ascertain the injury to the applicant caused by her husband's death, the amount required for his maintenance in his lifetime must be deducted from his wages, and the maximum sum payable as compensation in the case of total dependency must be proportionately reduced. The reason why the clause contemplates that the maximum sum may be payable in the case of partial dependency is that the workman may have had an annuity terminating on his death, which would have been sufficient to maintain him apart from his wages, and in such a case the amount required for his maintenance cannot be deducted from his earnings. The county court judge has not deducted anything from the deceased man's earnings for his maintenance, as he has awarded £150, which is about £5 less than the maximum sum payable. It is absurd to suppose that this sum of £5 could have been deducted from the maximum sum—namely, three years' wages, as the amount required to maintain the deceased workman during the three years. The judge therefore acted upon a wrong principle in awarding £150.

He referred to *Main Colliery Co.* v. *Davies*, [1900] A. C. 358, 48 W. R. Dig. 114.

J. J. Wright, for the applicant, was not called upon.

COLLINS, M.R.—In my opinion this appeal fails. The applicant is the widow of a workman who was killed by an accident arising out of and in the course of his employment, and she was at the time of her husband's death in part dependent upon his earnings. The only question before the court is as to the amount of the compensation to which the applicant is entitled. That is regulated by clause 1 (*a*) (ii.) of Schedule I. to the Workmen's Compensation Act, 1897. Clause 1 (*a*) (i.) deals with the compensation payable where the deceased workman leaves dependants wholly dependent upon his earnings, and it provides that "the amount of compensation shall be a sum equal to his earnings in the employment of the same employer during the three years next preceding the injury, or the sum of £150, whichever of those sums is the larger, but not exceeding in any case £300, provided that the amount of any weekly payments made under this Act shall be deducted from such sum, and if the period of the workman's employment by the said employer has been less than the said three years then the amount of his earnings during the said three years shall be deemed to be 156 times his average weekly earnings during the period of his actual employment under the said employer." The scheme of compensation established by the Act is to be found in that clause of the schedule as well as in the next clause, which deals with the case of partial dependency. The scheme, as appearing in clause 1 (*a*) (i.), is not an attempt to appraise the precise amount of the loss and to award an equivalent amount of compensation. It is a rough-and-ready scheme for fixing compensation, with a maximum beyond which the compensation must not go, and that is probably the mode adopted for fixing the amount of the compensation, because perhaps it may be payable by persons who are not morally responsible for the accident. The scheme does not purport to be a scheme for complete and exact compensation, but it proceeds upon somewhat arbitrary lines. That is the case where the claim for compensation is made by a person who was at the time of the death wholly dependent upon the deceased man's earning. It ignores all considerations as to what part of the deceased man's wages were spent upon the man himself either for his maintenance or for other purposes. Then comes clause 1 (*a*) (ii.), which provides: "If the workman does not leave any such dependants, but leaves any dependants in part dependent upon his earnings at the time of his death, such sum not exceeding in any case the amount payable under the foregoing provisions as may be agreed upon, or in default of agreement may be determined on arbitration under this Act to be reasonable and proportionate to the injury to the said dependants." The applicant here comes within that clause, as she was only partly dependent upon the deceased man's earnings. That clause, however, does not introduce a new principle or mode of calculating the compensation. It only differs in one respect from the preceding clause—namely, that it deals with a case where there was another source of income to the applicant besides the deceased man's earnings. That is the only element of difference introduced into the calculation of the compensation. That other source of income in the present case was almost inappreciable, and the county court judge has given consideration to it. There is no evidence that the judge misdirected himself upon this point. With reference to the case of *Main Colliery Co.* v. *Davies*, that case is not in point. The question in that case was whether the father could be described as dependent upon his son. The question of dependency is admitted here, and we begin the discussion with that admission. The dependency here was in fact almost total

dependency, except for a small sum, and the county court judge has awarded compensation upon that footing. In my opinion the award of the county court judge cannot be interfered with, and the appeal must be dismissed.

Romer, L.J.—I agree. The present case seems to me to be an attempt to appeal upon a question of fact. There was no misdirection on the part of the county court judge, the compensation was not awarded upon any wrong principle, and the sum awarded did not exceed the maximum allowed by the Act. No ground has been shown for interfering with the decision of the judge.

Mathew, L.J.—I am of the same opinion. The amount payable in the case of total dependency would have been £156. The present is not a case of total dependency, and the county court judge took that into account. I agree with the Master of the Rolls that clause 1 (*a*) (i.) and clause 1 (*a*) (ii.) must be construed together.

Appeal dismissed.

Solicitors for the applicant, *Wrensted, Hind, & Roberts*, for *Scott, Eames, & Mossman*, Bradford.

Solicitors for the employers, *William Hurd & Sons*, for *J. Lister Booth*, Bradford.

High Court of Justice.

Chan. Div. } Farwell, J. } Aug. 9, 10, 1905.

In re Hunt's Settled Estates and Settled Land Act. (*a*.)

Settled land—Capital moneys in the hands of trustees—Direction as to investment by tenant for life—Control of court—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *ss.* 21, 22, *sub-section* 2; *s.* 53.

A tenant for life directed the trustees to invest £2,650, part of moneys derived from the sale of settled property, in the purchase of eight leasehold houses. These houses were held for terms, of which more than sixty years were unexpired, but they were proved to be not worth more than £1,400. The trustees took out a summons for the direction of the court under section 44 of the Settled Land Act, 1882, *asking whether they were bound to carry out the purchase as directed by the tenant for life.*

Held, that the trustees were not bound to make such purchase.

Originating summons.

In this case the plaintiffs were the trustees for the purposes of the Settled Land Acts of the settlement created by the will of the testatrix dated the 28th of September, 1868.

A freehold estate in Devon was settled by the said will.

The defendants were the tenant for life under the said settlement and the assignee of his interest as tenant for life.

The testatrix died on the 28th of June, 1869.

The tenant for life was adjudicated bankrupt on the 2nd of March, 1880, and by an indenture of the 30th of April, 1898, the official receiver in bankruptcy assigned the property of the tenant for life to John William Leppard.

By an order of the 2nd of July, 1898, the life estate of the tenant for life was vested in the said assignee.

By an indenture of the 18th of January, 1904, the tenant for life in exercise of his power under the Settled Land Act, 1882, sold the said estate for £5,000, and later, in 1904, he agreed to buy eight leasehold houses for £2,650, part of the said £5,000.

In May, 1904, the tenant for life gave a formal direction to the trustees to apply the said sum of £2,650 in the purchase of the said eight leasehold houses. This the trustees refused to do, and they took out this summons for the direction of the court pursuant to section 44 of the Settled Land Act, 1882, asking whether they were bound to apply the said moneys as directed by the tenant for life. It was proved that the said leasehold houses were not worth more than £1,400, and were in every respect a most undesirable trustee investment.

Upjohn, K.C., and *Jolly*, for the remaindermen.

J. Rolt, for the trustees.

Butcher, K.C., and *R. J. Parker*, for the tenant for life.

Peterson, for John William Leppard.

Farwell, J., in giving judgment, said that by section 53 of the Settled Land Act, 1882, a tenant for life was in the same position as a trustee. *In re Lord Coleridge's Settlement*, 44 W. R. 59, [1895] 2 Ch. 704, only decided that the discretion given by the Act was to be exercised by the tenant for life and not by the trustee. The court could, therefore, restrain him from making an improper investment. In this case the tenant for life and his assignee have shown no consideration for the remaindermen, and have made no honest attempt to protect their interests. The trustees need not comply with the direction of the tenant for life.

Solicitors for the remaindermen and trustees, *Morgan, Upjohn, & Leech.*

Solicitor for the tenant for life and John William Leppard, *H. C. Knight.*

(*a*.) Reported by P. John Boland, Esq., Barrister-at-Law.

K. B. Div. (Lord Alverstone, L.C.J., and Wills and Darling, JJ.) } Nov. 7.

Kirby and Another *v.* Barber. (*a*.)

Election law—Registration—Parliamentary franchise in county—£10 occupation qualification—Claim of two joint occupiers—Value of premises only £20—Third person already on overseers' list, unobjected to, for same premises—Representation of the People Act, 1867 (30 & 31 *Vict. c.* 102), *s.* 27—*Representation of the People Act*, 1884 (48 *Vict. c.* 3), *s.* 5.

The Representation of the People Act, 1867, *s.* 27, *enacts: "In a county where premises are in the joint occupation of several persons as owners or tenants, and the clear yearly value of such premises is such as would, if divided amongst the several occupiers, so far as the value is concerned, confer on each of them a vote, then each of such joint occupiers shall, if otherwise qualified . . . be entitled to be registered as a voter. . . ."*

Section 5 of the Representation of the People Act, 1884, *enacts: "Every man occupying any . . . tenement in a county, of a clear yearly value of not less than £10, shall be entitled to be registered as a voter . . .*

(*a*.) Reported by Erskine Reid, Esq., Barrister-at-Law.

in respect of such occupation, subject to the like conditions as a man is at the passing of this Act, entitled to be registered as a voter . . . in respect of the county occupation franchise."

K. and W. claimed to have their names inserted in Division I. of the occupiers' list in a parliamentary county, in respect of a £10 occupation qualification, the nature of their qualification as described in their claims being "offices (joint)." The qualifying premises consisted of a house, of the clear yearly value of only £20, of which the claimants were lessees, and they used, for the purpose of their business, three rooms and a cellar in said house, and also one bedroom, occasionally. The remainder of said house, consisting of three rooms, was, as the barrister found, "occupied" by G. and his wife, G.'s wife being employed and paid by the claimants as their caretaker. G.'s name had been entered by the overseers in Division II. of the occupiers' list in respect of the said house, and no objection had been taken to that entry. There was no evidence, or finding of fact, that G. occupied by virtue of service merely.

The claims of K. and W. were objected to on the grounds that, as the clear yearly value of the whole house was only £20, and inasmuch as G.'s name was already entered, without objection, in Division II. of the list of occupation electors, in respect of the same premises, the provisions of section 27 of the Act of 1867 and section 5 of the Act of 1884 rendered the claims inadmissible. The revising barrister having allowed the objection to the claims,

The Court, upon the facts of the case as above stated—and refraining to express any opinion as to what its decision would have been if G.'s occupation of the premises had been found to be an occupation by virtue of service merely—affirmed the decision of the revising barrister.

Appeal from the decision of the revising barrister of the Petersfield division of the county of Hampshire.

The material facts found by the revising barrister in the case stated were as follows:

"Henry Kirby and James Warner duly claimed to be inserted in the occupiers' list (Division I.) of the parliamentary and local government electors for the parish of Bishop's Waltham, in the Petersfield division of the county of Southampton, in respect of the occupation of offices (joint) situate in St. George's-square, Bishop's Waltham. The claimants carry on in partnership the business of solicitors under the style of Charles Warner & Kirby, at Winchester and Bishop's Waltham. The premises in respect of the occupation of which they claim to be inserted in the list of voters consists of a house situate in St. George's-square, Bishop's Waltham, which they hold under a lease (which was produced before me) at a rental of £20 per annum. For the purposes of their business they use three rooms in the house and a cellar; they also use one bedroom from time to time; the remainder of the house, consisting of three rooms, is occupied by one William Gamblin and his wife. Mrs. Gamblin, the wife of William Gamblin, is employed and paid by Messrs. Warner & Kirby as their caretaker. The name of the said William Gamblin stands on the occupiers' list, Division II., of the parliamentary electors for the parish of Bishop's Waltham in respect of the occupation of the said premises. No objection had been taken to the name of the said William Gamblin remaining on the list. The claims were opposed on the ground that the claimants could not be placed upon the list in respect of the occupation of the tenement in question so long as William Gamblin remained upon the list as qualified to vote in respect of the occupation of the same premises; as the effect of placing the names of Messrs. Kirby & Warner on the list would be to put three voters on the register in respect of the occupation of premises of the clear value of £20 and no more, contrary to the provisions of section 27 of the Representation of the People Act, 1867 (30 & 31 Vict. c. 102), as read with section 5 of the Representation of the People Act, 1884 (48 & 49 Vict. c. 3). I agreed with this contention and decided that inasmuch as William Gamblin was already on the list of voters in Division II. in respect of the occupation of the same premises, and no objection had been made to his being so qualified, I had no power to place the names of Henry Kirby and James Warner upon the list in respect of the occupation of the same premises."

Due notice of appeal was given by the claimants to the revising barrister, and he accordingly stated the above case.

Lister Drummond, for the claimants.—The claimants have a lease of premises of the clear "yearly value of £20," and are in actual occupation of the premises; *primâ facie*, therefore, they are both entitled to be registered as joint occupiers in respect of a £10 occupation qualification in Division I. The franchise they claim is a totally different franchise from that in respect of which, rightly or wrongly, William Gamblin's name now stands in Division II. in respect of the same premises; Gamblin's qualification (or supposed qualification) was that of inhabitant occupier of a dwelling-house under the service franchise. The service franchise only arises in respect of a "household qualification," and value is no material element for that qualification. The contention, therefore, that placing the claimants' names on the list would be to put three voters on the register in respect of the occupation of premises only worth £20 a year, and therefore contrary to section 21 of the Act of 1867 as read with section 5 of the Act of 1884 is one that is untenable. The revising barrister went wrong in thinking that section 27 of the Act of 1867 in some way dealt with Gamblin's qualification, whereas it applies only £10 occupation voters. In considering the right of the claimants to be inserted in Division I., the fact that Gamblin—who is in the position of an inhabitant occupier of a dwelling-house by virtue of the service franchise, as to which the question of value does not enter—happens to be on the list in Division II. in respect of the same premises really does not affect the claimants' right at all. In *Warren* v. *Maule*, (1894) Fox & Smith's Reg. Cas. 400, it was held that it was no ground for objecting to a voter who was on the overseers' list in respect of a good qualification that some other person whose name was also on the list for the same property, unobjected to, was retained on the list. Lord Russell, L.C.J., in effect there said that a man already on the list could not be taken off on objection merely because someone else was on too, and the same principle *mutatis mutandis* applies here. *Druitt* v. *Gossling*, (1888) Fox & Smith 123, 58 L. J. Q. B. 109, 37 W. R. Dig. 76, was referred to during the argument.

Daldy, for the respondent.—The claimants' case is that they jointly occupy a house which is found to be of the value of £20, and no more; and they say they are both entitled to be placed on the register. The only way in which the revising barrister can take any account, if I may say so, of the position of Gamblin in the matter, is that he might draw some inference from it as to whether Gamblin in fact occupied his part of the premises as a tenant or not. The moment it is found that Gamblin "occupies" any part of these premises, however small the value of that occupation may be to him, the claimants' case is gone, for they *ipso facto* cease to

have the necessary qualification, because it makes the value of their qualifying property something less than £20. Some value must be apportioned to Gamblin's occupation, and the finding that the premises in question are worth "£20 and no more" ends the matter, on a mere question of arithmetic.

Lord ALVERSTONE, L.C.J.—I express no opinion as to what should be our view in the event of a claim being made by two persons to get on as joint occupiers in respect of a house the value of which is only £20, and the claim being objected to on the ground that there is some other person who gets a parliamentary vote for the same premises by virtue of the service franchise. I can foresee that difficulties may arise if, as Mr. Drummond contends, the element of value does not enter into that consideration at any rate for all purposes. But it seems to me that that is really not the point that has been raised in this case; and upon the case as stated I think the decision of the revising barrister is quite right. It must be taken upon this case that he has found the house to be worth not more than £20. He states the contention that the house was of clear yearly value of £20 and no more, and he says in his reasons: "I agreed with this contention (the objector's contention), and decided that inasmuch as William Gamblin was already on the list of voters in Division II. in respect of the occupation of the said premises and no objection had been made to his being so qualified, I had no power to place the names of Henry Kirby and James Warner upon the list in respect of the occupation of the same premises." I think that must mean, as he has made a reference to section 27 of the Act of 1867, that the value of the premises (£20) would not be sufficient to allow the two claimants being put on the list as long as there was an occupation by Gamblin of a part of the house. Now, as Mr. Daldy has pointed out, the case states that "the remainder of the house, consisting of three rooms, is occupied by one William Gamblin and his wife," and it goes on to say, "Mrs. Gamblin is the caretaker and is paid by Messrs. Kirby & Warner as caretaker." It seems to me, therefore, as the case is stated, the value of the house, £20, would not admit of three persons being put on the list as occupiers of it. We must take it on this case as stated that Gamblin was an occupier. The claimants' claim was a joint one and there was no claim made by one as distinct from the other of the two. Therefore, in my opinion, the revising barrister was right in saying he could not put Kirby and Warner on the list as long as Gamblin was on the list as an occupier of part of this house. Therefore the appeal must be dismissed.

WILLS, J.—I am of the same opinion. It is one of the many cases in which the moment you have got an accurate view of the facts the law settles itself.

DARLING, J.—I am of the same opinion. I should only like to add that I hope this case will never be cited as an authority against the contention put forward very ingeniously, as it seemed to me, by Mr. Drummond. This decision goes on the facts of this particular case, and concludes nothing against the contention of Mr. Drummond in his argument.

Appeal dismissed, with costs; leave to appeal refused.

Solicitors for claimants, *Rawle, Johnson, & Co.*, for *A. F. Mackenzie Downie*, Alton, Hants.

Solicitor for objector, *Gibson & Weldon*, for *P. C. Burley*, Petersfield.

Court of Appeal.

From P. D. & Ad. Div. (Vaughan Williams, Stirling, and Cozens-Hardy, L.JJ.) — June 29; July 3, 4, 5, 1905.

CONSTANTINIDI v. CONSTANTINIDI AND LANCE. (a.)

Divorce—Variation of settlement—Wife's adultery—Husband's adultery—Discretion of court—Conduct of parties—Interests of public morality—Retrospective order—Wife's protected life interest—Jurisdiction—Matrimonial Causes Act, 1857 (20 & 21 *Vict. c.* 85), *s.* 45—*Matrimonial Causes Act*, 1859 (22 & 23 *Vict. c.* 61), *s.* 5—*Matrimonial Causes Act*, 1878 (41 & 42 *Vict. c.* 19), *s.* 3.

In exercising the discretionary jurisdiction of varying settlements, after a dissolution of marriage, conferred upon the court by the Matrimonial Causes Acts, regard is to be had both to the conduct of the parties and to the interests of society and public morality. Consequently, where the successful petitioner for dissolution of marriage has been guilty of flagrant misconduct, the court will take such misconduct into consideration on a subsequent application to vary the marriage settlements, and may decline to exercise its discretion by reason thereof. The Matrimonial Causes Acts do not give the court power to award anything in the nature of damages as between husband and wife, or to inflict any fine or penalty upon the party guilty of a matrimonial offence. The principle upon which the discretion of the court will be exercised is that the loss which a husband—if himself innocent—has sustained by reason of the misconduct of the guilty wife, may be repaired by giving him means to the scale of which he may have learnt to accomodate his mode of life. Though the desire to prevent a co-respondent profiting by his own iniquity may justify turning the scale against a guilty wife, this consideration is not to be carried to the extent of depriving her of everything beyond the bare necessities of life in the condition in which she has been brought up.

March *v.* March, 15 *W. R.* 799, *L. R.* 1 *P. & M.* 440, *considered and applied.*

The powers given to the court by section 5 of the Matrimonial Causes Act, 1859, *cannot be exercised retrospectively.*

A wife's protected life interest—i.e., *a life interest which is to cease upon the happening of certain events, cannot be dealt with by the court under the Matrimonial Causes Acts.*

This was an appeal from a judgment of the late Sir Francis Jeune, P., varying the registrar's report on a petition for variation of settlements after a decree absolute for dissolution of marriage.

The circumstances in which the decree *nisi* was pronounced are reported 52 W. R. 190, [1903] P. 246.

The facts, so far as material, may be shortly stated as follows:

The parties were married on the 26th of October, 1889, and made the acquaintance of the co-respondent in 1896. Before that time the husband and wife had lived on terms of great affection, but in the autumn of that year the respondent and co-respondent met in the country at the house of her father, whose medical adviser the co-respondent was, and when the husband returned from a visit to Switzerland in October, 1896, a marked coldness was exhibited by the wife towards the husband and matrimonial intercourse was refused by her.

The wife left her husband and went to Ireland in 1897, clearly with the intention of never returning to him.

(a.) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

In December, 1899, the husband obtained a decree of judicial separation on the ground of desertion, the wife offering no real defence.

In February, 1901, she went to Sioux Falls, Dakota, U.S.A., and so commenced what was no doubt a residence intended to qualify for a divorce under the law of Dakota. She obtained such a divorce in February, 1902, and almost immediately after married the co-respondent, who had joined her in Dakota, and thenceforward cohabited with him.

The petition for dissolution of marriage and damages was presented by the husband on the 3rd of July, 1902.

In December, 1902, the respondent filed her answer charging the petitioner with having committed adultery with a woman of notoriously loose character on five specific dates in August, 1901, and also with further acts of adultery with the same woman committed in September, 1902, after the presentation of the petition.

The petitioner contented himself simply with a reply denying the charges of adultery; but at the trial he did not venture to tender himself for cross-examination, and it was proved that he had committed adultery with the woman named in the respondent's answer, and in fact his counsel admitted the accuracy of the various allegations of adultery.

The damages were assessed at £25,000. Upon these findings a decree *nisi* was pronounced dissolving the marriage.

The respondent and co-respondent each gave notice of appeal, but their appeals were abandoned.

There had been no issue of the marriage.

On the 11th of March, 1904, the husband presented a petition for the variation of the settlements made on his marriage with the respondent. One of these settlements was an ante-nuptial settlement made by the respondent and dated the 23rd of October, 1889; the other a post-nuptial settlement made by the petitioner and dated the 1st of February, 1890.

By the respondent's settlement securities to the value of £51,000, yielding an income of £2,200 per annum, were settled upon trust, after the then intended marriage, to pay the income to the respondent during her life, but during her intended coverture without power of anticipation; and after her death upon certain trusts, both as to capital and income, for her children; and in default of children of the respondent to pay the income to any husband surviving her during his life; and subject thereto upon trust as to capital and income for the respondent's father. And the settlement contained an agreement for the settlement upon the same trusts of any after-acquired property of the respondent.

By the petitioner's settlement securities of the value of £10,000, yielding an income of nearly £400 per annum, were settled upon trust to pay the income to the respondent during her life for her separate use without power of anticipation, and after her death to the petitioner for his life, and after the death of the survivor, as to both capital and income, upon trusts for the children of the marriage, with an ultimate trust in default of children for the petitioner's next-of-kin.

The respondent's father died in April, 1902, and the respondent thereupon became entitled, under his will, during her life for her separate use, but subject to the life interest of her mother, to the income arising from one-seventh, about £150,000, of his residuary estate, but her interest was made determinable if (among other things) she "shall do or suffer any act or thing or any event shall happen whereby, if the said income were made payable to her for life, she would be deprived of the right personally to receive and enjoy the same or any part thereof, or some other person might become entitled to receive the said income or part thereof."

The petition for the variation of the settlement stated the above facts and alleged that the petitioner's total net income from all sources was about £250; that since the 31st of January, 1897, when the respondent deserted him, she had been in receipt of the income of the whole of the property comprised in the two settlements with the exception of four payments made in 1901 and 1902 amounting altogether to £1,234, while the petitioner continued liable for the annual sum of £430 for rent and taxes in respect of the house in London which had been taken on the footing of the joint income, besides heavy expenses for the upkeep of the house; that the co-respondent had paid no part of the £25,000 damages assessed by the jury at the trial of the petition for dissolution of marriage, and had no property out of which the same could be satisfied; and also that neither the respondent nor the co-respondent had paid any part of the costs to which the petitioner was entitled under the proceedings. The petition then asked that the respondent's settlement might be varied by extinguishing all her interests and powers during the petitioner's lifetime, and that the trustees of the settlement might be ordered to pay to the petitioner during his life the annual income of the settled property; and that the trustees of the petitioner's settlement might be ordered forthwith to reconvey to him the property thereby settled freed from the trusts of the settlement and for his own use and benefit. In her affidavit filed against the petition the respondent again charged the petitioner with having committed repeated acts of adultery, and these were not denied by him.

On the 20th of June, 1904, the decree *nisi* was made absolute, and shortly afterwards the respondent married the co-respondent according to English law.

On the 9th of November, 1904, the registrar to whom the petition for variation had been referred for report made his report, which commenced by stating that the decree *nisi* obtained by the petitioner dissolving his marriage with the respondent, "notwithstanding the verdict that the petitioner, was also guilty of adultery," had been made absolute. The report went on to state that there was no issue of the marriage, that by her settlement the respondent had brought into settlement property of the present value of £51,000, and had covenanted to settle after-acquired property, and that subject to the life interest of her mother (then living) the respondent was entitled to a one-seventh share of her father's residuary estate, stated to be upwards of £1,068,000 in value; also that under the petitioner's settlement £10,000 brought into settlement by him was held in trust for the respondent for life, on her death for the petitioner for life, and on the death of the survivor, in default of issue, for the persons entitled to the estate of the petitioner as if he had died intestate a widower; that the income from the £10,000 was now £400 per annum, and that the petitioner admitted an income of about £250. The registrar then submitted that the court should, with consent, order that from and after the date of such order all the interests and powers of the respondent under the petitioner's settlement should be extinguished as if the respondent had died in the lifetime of the petitioner, and that the trustees of that settlement should reconvey the property comprised therein to the petitioner. The report then proceeded: "It is contended on behalf of the petitioner that he should be put in an equal position with the respondent as to means, and that the respondent's settlement should also be varied so that the petitioner should

receive the whole, or at least a portion of the income arising from the respondent's trust funds; and attention was called to the fact that the respondent has now married the co-respondent, and that the damages of £25,000 and the costs against the respondent have not been paid. But, having regard to the verdict of the jury of adultery against the petitioner, to there being no issue of the marriage, and to no necessity being shown for providing for the petitioner out of the wife's trust funds, it is submitted that no order should be made as to variation of the respondent's settlement of the 23rd of October, 1889."

The petitioner moved to vary the report except so far as it, by consent, extinguished the interests and powers of the respondent under the petitioner's settlement.

Sir F. Jeune, P., made an order varying the report of the registrar by directing that the trustees of the respondent's settlement should (after retaining their costs), "as from the date of that order, during the joint lives of the petitioner, the respondent, and her mother, pay to the petitioner out of the income of the funds for the time being subject to the said settlement, the annual sum of £1,000, and from and after the death of the mother do thenceforth, during the remainder of the life of the petitioner, pay to him out of the said income, in lieu of the said annual sum of £1,000, the annual sum of £2,000, and do further pay to the petitioner out of the said income the capital sum of £2,000, the said sum to be paid by equal annual instalments of £500, if and so long as the said income, after payment of the said costs and any other annual sum for the time being payable under this order, will extend to the payment of annual instalments of that amount; and, if and so long as the said income will not so far extend, then by such smaller annual instalments as may be necessary." And it was further ordered that the trustees of the petitioner's marriage settlement should forthwith reconvey to him the property thereby settled, freed from the trusts of that settlement, for his own use and benefit absolutely; and the respondent (in respect of her separate estate) and the co-respondent were condemned in the costs incurred and to be incurred by or on behalf of the petitioner of and incidental to that application and the carrying into effect of that order.

This order was made in virtue of the jurisdiction conferred on the court by the following Acts: The Matrimonial Causes Act, 1857, s. 45: "In any case in which the court shall pronounce a sentence of divorce or judicial separation for adultery of the wife, if it shall be made appear to the court that the wife is entitled to any property either in possession or reversion, it shall be lawful for the court, if it shall think proper, to order such settlement as it shall think reasonable to be made of such property or any part thereof for the benefit of the innocent party and the children of the marriage, or either or any of them."

The Matrimonial Causes Act, 1859, s. 5: "The court, after a final decree of nullity of marriage or dissolution of marriage may inquire into the existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and may make such orders with reference to the application of the whole or a portion of the property settled either for the benefit of the children of the marriage or of their respective parents as to the court shall seem fit."

The Matrimonial Causes Act, 1878, s. 3: "The court may exercise the powers vested in it by the provisions of section 5 of the Act of 1859, notwithstanding that there are no children of the marriage."

The respondent, Mrs. Lance, appealed from so much of the order as dealt with the income of the trust funds comprised in her settlement.

Rufus Isaacs, K.C., *Barnard, K.C.*, and *Raymond Asquith*, for the appellant.

Lawson Walton, K.C., and *Priestley, K.C.*, for the petitioner.

Rowlatt, for the trustees of the respondent's settlement.

Barnard, K.C., replied.

The following cases were referred to in the course of argument: *Thomson* v. *Thomson*, 45 W. R. 134, [1896] P. 263; *Chetwynd* v. *Chetwynd*, 14 W. R. 184, L. R. 1 P. & D. 39; *Synge* v. *Synge*, [1900] P. 180, 48 W. R. Dig. 56; *March* v. *March and Palumbo*, 15 W. R. 799, L. R. 1 P. & M. 440; *Beauchamp* v. *Beauchamp and Watt*, 20 Times L. R. 273; *St. Paul* v. *St. Paul*, 17 W. R. 1111, L. R. 2 P. & D. 93; *Noel* v. *Noel*, 33 W. R. 552, 10 P. D. 179; *Hartopp* v. *Hartopp*, [1899] P. 65, 47 W. R. Dig. 52; and *Symons* v. *Symons*, [1897] P. 167, 45 W. R. Dig. 46.

VAUGHAN WILLIAMS, L.J.—This is an appeal from the judgment of the late Sir Francis Jeune as President of the Probate, Divorce, and Admiralty Division, given on a petition for the variation of marriage settlements presented by the petitioner in the divorce action, Mr. Constantinidi, who obtained a decree for divorce against his wife on the ground of her adultery with the co-respondent, Dr. Lance. The judgment was given by Sir Francis Jeune, who tried the divorce action, in the exercise of his discretion as the judge who tried that action. It is not disputed in the arguments before us that the Court of Appeal has jurisdiction to review the discretion so exercised under the provisions of section 5 of the Matrimonial Causes Act, 1859, as amended by section 3 of the Matrimonial Causes Act, 1878, and I think counsel were right in not raising that point, because in my opinion we have jurisdiction. But it is plain that the Court of Appeal ought not to review the discretion of the judge who heard the case and saw the witnesses, and who must necessarily have a knowledge of the facts and of the inferences to be properly drawn greater than the Court of Appeal could have, unless the Court of Appeal can see plainly that the discretion which has been exercised by the judge who tried the case had been exercised on principles not consistent with the spirit of the enactment conferring the discretion, or the principles recognized in the courts as governing the exercise of discretion in the matter of variation of marriage settlements after a decree absolute for divorce.

Now I shall take the facts of this case for the purpose of my judgment from the statement of facts at the commencement of the judgment of Sir Francis Jeune on the hearing of the divorce petition, subject, however to the addition of certain facts which I will mention. These are the words of the President: "In this case adultery was proved to have been committed both by the petitioner and the respondent, and the question is whether, in the exercise of the discretion vested in me by the thirty-first section of the Act of 1857, I ought to pronounce a decree against the wife. The facts as far as they are material are as follows: The parties were married on the 26th of October, 1889. They made the acquaintance of the co-respondent in 1896. Before that time the husband and wife had lived on terms of great affection, but in the autumn of that year the respondent and the co-respondent met in the country house of her father, whose medical adviser the co-respondent was, and when the husband returned from a visit to Switzerland in October, 1896, a marked coldness was exhibited by the wife

towards the husband, and matrimonial intercourse was refused by her. The wife left her husband and went to Ireland in 1897, declaring her intention of never returning to him. In December, 1899, the husband obtained a decree for judicial separation on the ground of desertion, the wife offering no real defence. In February, 1901, she went to Sioux Falls, in the State of Dakota, and so commenced what was no doubt a residence intended to qualify for divorce under the law of that State. She obtained such a divorce in January, 1902, and almost immediately after married the co-respondent, who had joined her in Dakota, and thenceforward cohabited with him. It was proved that in July and August, 1901, and also in 1902, the husband committed adultery with a woman of loose character." It is convenient that I should add at this point that the adulteries charged and admitted were not only adulteries at a date prior to the commencement of the suit, but also that they actually continued after the commencement of the suit. The learned President goes on: "From the facts proved in the case I draw the following conclusions—(1) that when the wife left her husband in 1897 she did so because she had transferred her affections to the co-respondent, and the petitioner believed this at the time; (2) that the husband's conduct did not cause or conduce to that of the wife, inasmuch as, without inferring any act of adultery on her part before the bigamous marriage with the co-respondent, no such adultery was either proved or charged, there can, I think, be no doubt that, at least when she went to Dakota in February, 1901, and probably some time before, she was contemplating an American divorce from her husband, and consequently a marriage to and adultery with the co-respondent; (3) that the wife's conduct in leaving her husband in order after an interval to commit adultery with the co-respondent may in the sequence of events have caused or conduced to the adultery of the husband. How far it did so I shall presently consider."

Besides these facts I shall take into consideration, the following: First, the fact that the divorce decree has not been appealed against, whence we may draw, I think, the inference that while the learned judge was of opinion that the wife's conduct in leaving her husband in order after an interval to commit adultery with the co-respondent might in the sequence of events have caused or conduced to the adultery of the husband, the respondent has accepted that conclusion in fact of the learned judge by not appealing against the divorce decree. Secondly, I shall take into consideration that although the learned judge cannot have supposed that any conduct of the petitioner was proved at the trial inconsistent with the palliation of adultery by the desertion of his wife, yet that there is no evidence that the petitioner had at the time of his adulteries after the judicial separation in 1889 any knowledge of any facts likely to have led him to yield to temptation and commit adultery with a common woman, adultery continuing after the commencement of the action, while he gave no explanation leading to the conclusion that even now he has abandoned this connection. This seems to me to have been an outrage on common decency. There is, in other words, nothing which one can take into consideration in palliation of the petitioner's adultery other than the mere fact that his wife had left England and gone abroad to a remote town in a remote state of the United States. There is no evidence whatever of any personal association of the respondent and co-respondent after the judicial separation in 1899, and before the judicial separation in 1899, and before the husband's adulteries. There is also the fact that the petitioner avoided cross-examination as to the general charges of adultery, and avoided giving the sort of explanation which he would have had to give if the Queen's Proctor had intervened during the progress of the trial or after the granting of the decree *nisi* by giving no evidence in disproof of his adultery, thus bringing himself within section 3 of the Evidence Further Amendment Act, 1869, and relieving himself thereby from liability to answer questions tending to show that he had been guilty of adultery.

Having thus stated the facts, I will now deal with the principles which ought to govern this statutory power of varying marriage settlements. First of all it is to be remembered that in the exercise of the powers conferred by the Divorce Act the court must have regard not only to the rights and liabilities of the matrimonial person wronged and the wrongdoer respectively *inter se*, but also to the interests of society and public morality, which generally require that the relief and benefits which the court has the power of giving under those Acts shall hardly ever be given to those who themselves have been guilty of matrimonial infidelity. There may be such palliation of matrimonial infidelity by a petitioner that public morality will not be outraged by the exercise of judicial discretion in favour of such a petitioner. This is, I think, established by the case of *Symons* v. *Symons*, which is quoted by the learned President in his divorce judgment, but the fact that the petitioner has been so guilty must always be taken into consideration in the interests of public morality.

Dealing with these principles first, I find in *Chetwynd* v. *Chetwynd* the following passage: "In exercising the discretion accorded to the court under 22 & 23 Vict. c. 61, (1859) s. 5, I have felt bound to bear in mind the conduct of the two parties as well as their pecuniary position. In section 32 of the original Divorce Act, by which power was given to make provision for the wife in case of divorce, the court was expressly told to consider the wife's fortune, the ability of the husband, and the conduct of the parties. And although these words are not repeated in the subsequent Act, 22 & 23 Vict. c. 61, s. 5, they serve to exhibit the spirit of the Legislature in these provisions, and form a fitting guide for the court. In the endeavour to adjust the means to be accorded to the petitioner and the burden to be borne by the respondent several conditions must be borne in mind. It was well not to forget that, though the breaking up of the married life was caused immediately by the conduct of the respondent, its stability had been undermined by the withdrawal of the petitioner's affections. It was a subject of fair comment that but for the extravagance of the petitioner and the conduct which made her the object of her husband's not unreasonable suspicions the common fund would have been more ample. Nor ought the fact to have been lost sight of, sworn to by the respondent, that the sum of £1,000 had been received since the marriage by the petitioner the benefit of which is now hers if she has not already spent it. The future of the respondent had also to be considered and the available means which would be left him to sustain his position in his home. If the reasonable needs of the wife did not demand it the court could hardly feel justified in so reducing his income as to render his future residence on his property impossible." Then in the case of *March* v. *March*, Lord Penzance as the Judge Ordinary says, speaking of the same section: "The court will look at the probable pecuniary position which the parties and their children would have occupied if the marriage which the settlement contemplated had been a binding union and the parties had lived in harmony together upon their joint income. If this union has been broken and the common home has been abandoned by the criminality of one without fault in the other it

seems just that the innocent party should not in addition to the grievous wrong done by the breach of the marriage vow be wholly deprived of means, to the scale of which he may have learnt to accommodate his mode of living; nor viewing the matter on the other side does it seem either just or equitable that funds which were intended at the time of the marriage for the use of both should be borne off by the guilty party, and perhaps transferred to the hands of the adulterer as the dowry of a second marriage. The interests of society point in the same direction. It would be an evil example if this court were to decide that the entire fortune of a wealthy married woman were to be reckoned as part of the prospects of an adulterer or the resources of a second home for a guilty woman." Then later on in the same judgment Lord Penzance goes on: "This"—that is, the figure that he has just given—"will not effect an exact division of their joint incomes, nor is it so designed. The relative sums contributed by each party, the conduct of each, the total amounts of their joint income, the relation it bears to the requirements of the parties and their respective prospects of increased income are all elements to be considered. These elements are not capable of exact expression in figures and the result must be a general one varying according to the details of each case." This cause went to appeal, and Mellor, J., who was a member of that court, quotes from the judgment of Lord Penzance this passage: "If this union has been broken and the common home abandoned by the criminality of one without fault in the other it seems just that the innocent party should not in addition to the grievous wrong done by the breach of the marriage vow be wholly deprived of means to the scale of which he may have learnt to accommodate his mode of life." Then Mellor, J., says: "That I consider to be a sound exposition, and it is my view of the intention of the statute." I think the passages cited in this judgment justify the proposition that the principle is that the sum awarded to the injured husband by variation of the settlements must be measured by what is necessary to give the husband means to the scale of which he may have learnt to accommodate his own mode of life. I cannot myself find anything in the judgment that this measure may be disregarded for the purpose of preventing the co-respondent from making any pecuniary profit out of his own iniquity, and certainly not in a case where the petitioner himself has been guilty of shameless adultery. I do not say that the fact that the guilty wife and the co-respondent have married and will jointly enjoy such income as the wife retains under the marriage settlement after variation is not to be taken into consideration. But it is obvious that this consideration is not to be carried to the extent of depriving the guilty wife of everything beyond the bare necessities of life in the condition in which she had been brought up. The desire to prevent the co-respondent profiting by his iniquity may justify the turning of the scale in favour of a liberal allowance to the husband to enable him to live with the surroundings that he would have had in the joint home, or may justify the turning of the scale against the wife, but I cannot think it should do more. In the present case, in my judgment, so far as the rights of the parties *inter se* are concerned, £1,000 a year is the outside which should have been allowed as income to the husband, and I do not think that the interests of public morality would justify the giving of a larger sum to a husband himself guilty of adultery on the score that the more he gets the less benefit will the co-respondent derive from his iniquity.

Now, I have gone through so much of the judgment of the learned President as refers to what I may call the first £1,000, because I thought that whatever might be the ultimate conclusion of this court with regard to this appeal it was right and proper that I should express my opinion as to this part of the judgment; but in fact it is not necessary in the view that I take that I should consider in any way the quantum of allowance to the husband, or how it has been arrived at, because in my opinion the case must be governed by that principle to which I referred to at the commencement of my observations to-day, that the Legislature deliberately, and acting in accordance with the feelings, I would say, of the English people, has shown from first to last an intention that the court should not deal with either the question of divorce itself or any of those subsidiary questions which might arise as between the husband and wife upon the basis of the rights and wrongs of the husband and wife to the exclusion of the interests of public morality. I have already acquiesced in the correctness of the view of Sir Francis Jeune that there may be circumstances in which the relief and benefit which the court has power under these Acts of Parliament to confer may be conferred upon even a guilty party without outraging in any way public decency or public morality, and I refer to the case of *Symons* v. *Symons*, which I have already mentioned; but those cases must be very rare. I cannot myself see in the present case that the benefits intended to be conferred by the Legislature on the wife or, as in the present case, the husband who has been wronged, can, having regard to his conduct, be conferred upon him without seriously trenching upon the spirit of public morality which seems to me to run through these Acts of Parliament. It is remarkable that when Sir Francis Jeune is giving his judgment in the divorce case, although he speaks of the adulteries, the dates of which appear in the particulars, he nowhere alludes to that which I consider from the point of view of public decency and morality is of the highest importance. I mean that actually at the moment and after the moment when the husband had come into court to ask for relief on the ground of the misconduct of his wife he himself was continuing and did continue to indulge a connection which was an outrage, as I have said, on public decency, and the view that I take is that the conclusion arrived at by the learned registrar in the last paragraph of his report was right, and ought to have been acted upon and affirmed. That conclusion is: "Having regard to the verdict of the jury of adultery against the petitioner, to there being no issue of the marriage, and to no necessity being shown for providing for the petitioner out of the wife's trust funds, it is submitted that no order should be made as to variation of the respondent's settlement of the 23rd of October, 1899." I think that conclusion is right.

It will be observed that in the earlier part of the report the registrar has said: "Having heard counsel on behalf of the petitioner and respondent, it is submitted that the court should with consent order that from and after the date of such order all the interests and powers of the respondent in and upon the said indenture of settlement bearing date the 1st of February, 1890, be extinguished as if the respondent had died in the lifetime of the petitioner and that the trustees of the said settlement do reconvey the property comprised therein to the petitioner"—that is, the property which the petitioner had brought into settlement. That has been ordered by consent to be restored to the petitioner. That of course stands, but I think that the learned registrar was quite right in not only mentioning the misconduct of the husband but also in mentioning the fact that that which it was proposed by his report to refuse to give to the

petitioner was not anything which was essential to his support in the condition of life in which he is, but was something that was asked for for the purpose of restoring to this petitioner the luxuries of life which he had enjoyed during the continuance of the marriage of the respondent to the petitioner. Now, having said this, I really do not know that it is necessary for me to say much more, because if my conclusion is right up to this point no question can possibly arise as to the second £1,000, which was directed to be paid by the trustees to the petitioner after certain moneys came to the respondent by reason of the death of her mother, because it is plain, if my conclusion has been right as to the first £1,000, it must also be right as to the second. But I do wish to say that even if my conclusion as to the first £1,000 had been merely that the £1,000 was a sum which could be given to the petitioner, and I had supported the order in so far as it applied to that £1,000, I should have come to the conclusion that the second £1,000 ought not to have been allowed to the petitioner. I should have come to that conclusion by reason of the principle laid down in *Chetwynd* v. *Chetwynd* and in *March* v. *March*, because, as I have already said in my judgment, there is nothing in either of those judgments which does away with the view that the means essential to the continuation of the scale of living enjoyed by the petitioner during the continuance of the joint home are *primâ facie* a measure of the allowance of income which ought to be made—(I am leaving out, of course, the case of children)—in the interests of the husband. I do not think any useful purpose would be answered by my going through the steps by which the learned President first arrived at this figure, really treating the property the subject of the will as if it could be a subject-matter of settlement which could be dealt with under section 5 of the Act of 1859.

With regard to the last part of the order—that is, the order by which the £500 a year was to be paid for four years so that the husband might be recouped the amounts that had accumulated and had not been expended by the wife out of the husband's settlement on the wife—I expressed in the course of the argument the opinion that that order cannot be justified because in substance it would be to treat the powers under section 5 of the Matrimonial Causes Act, 1859, as justifying a retrospective order. There again I think it is not necessary for me to go into the matter, taking the view that I do. The only observation which I will make on this last point by way of precaution is that where a guilty wife has put her husband to considerable expenditure by reason of her personal conduct, in considering the amount to be allowed to the husband by variation of settlements we must take into consideration the existence of liabilities and a larger expenditure of money that may be made which will postpone the time when the injured party will get the benefit of the variation unless something is added to the income either temporarily or permanently as to enable him to meet those liabilities.

I think that this appeal should be allowed, and that an order should be made in the sense of the report of the learned registrar.

STIRLING, L.J.—In this case the court is asked to exercise a delicate jurisdiction in a novel and difficult case, and to review the decision of a learned judge who had large knowledge and experience, in the exercise of that jurisdiction. I approach the case without any such knowledge or experience, but I have endeavoured to do my best to consider what conclusion the court ought to arrive at in the present case, and I think it is right, as we are differing from the late President of the court, to state as shortly as may be the ground for the conclusions at which I arrive.

I begin by observing that under the Divorce Acts there exists no power in the court to award anything in the shape of damages as between husband and wife, although there are powers in the court to award damages against a co-respondent. Further, there is no power to inflict anything in the nature of a fine or penalty for a matrimonial offence upon a guilty person. No such jurisdiction is conferred, nor does the application which has given rise to the present judgment under appeal seek so to do. The powers which the court has are conferred by two enactments; one section 45 of the Matrimonial Causes Act, 1857, which provides that "In any case in which the court shall pronounce a sentence of divorce or judicial separation for adultery of the wife, if it shall be made to appear to the court that the wife is entitled to any property, either in possession or reversion, it shall be lawful for the court if it shall think proper to order such settlement as it shall think reasonable to be made of such property or any part therof for the benefit of the innocent party and the children of the marriage or either or any of them." The second is section 5 of the Act of 1859, which provides that "The court, after a final decree of nullity of marriage or dissolution of marriage, may inquire into the existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and may make such order with reference to the application of the whole or a portion of the property settled either for the benefit of the children of the marriage or of their respective parents as to the court shall seem fit." In the present case the petition on which the order under appeal was founded was in terms an application to the court to exercise the power conferred by the latter of these enactments, but it seems to me that in the exercise of that jurisdiction the court might also have seen fit, and at most it would only have required an amendment of the petition, if that had been the view of the court, to bring into operation the jurisdiction contained in section 45 of the Act of 1857. I say this in view of some few remarks which I shall have to make hereafter with regard to the property which belongs to the wife beyond that which is contained in the ante-nuptial and post-nuptial settlements which it is sought to vary. The jurisdiction was conferred in the year 1859, and the mode in which the very wide discretion was conferred on the court by section 5 of the Act of 1859 has been repeatedly considered. I think the best exposition is to be found in the case which has already been referred to by my lord of *March* v. *March*, which was not only a carefully considered decision of Lord Penzance, the then President of the court, but was affirmed by the Court of Appeal then in existence. I do not desire to read again the portions of the judgment then delivered which have been already referred to, but I desire to state that I wish most fully to give effect to everything which was there laid down. It appears to me that at this distance of time it would not be right to reconsider that case. Without saying that it is exhaustive, it seems to me to be a sufficient exposition of the principles in the present case from which I do not desire to depart. The late President refers in his judgment to that case and to *Noel* v. *Noel* as the authorities on which he bases his statement of the law, and I do not think that he meant in any way to depart from what is there laid down; but with the utmost respect to him, I think that, at all events in one respect, the language which he has used on this subject has gone beyond that which is warranted by the cases to which he refers, and which I think may

have given rise to misconception. I refer to that portion of the judgment in which he lays down as a broad principle that the co-respondent is not to be allowed to make any pecuniary profit out of his own iniquity. Though I entirely recognize the regard which is to be given, as is pointed out in the judgment, to public morality, I think that is an expression which might be misinterpreted as conferring a much wider jurisdiction than I conceive to be conferred by the Legislature on that footing, and I should prefer for myself to state the law in this way—that in the exercise of every discretion which is vested in the court, the court must so use that discretion as to promote the interests of virtue and morality, and to discourage vice and immorality.

Now, having made these preliminary observations, I pass on to consider more particularly the matters to which the court is to have regard according to the decisions in exercising this principle. They are shortly stated by Lord Penzance in a passage which has not been read, and which I will now read. He says: "The relative sums contributed by each party, the conduct of each, and the total amount of their joint income, the relation it bears to the requirements of the parties and their respective prospects of increased income are all elements to be considered. These elements are not capable of exact expression in figures and the result must be a general one varying according to the details of each case." That being so, let me consider shortly each of these elements which have to be considered.

Now, as regards the first, "the relative sums contributed by each party," they stand thus: By the wife there has been brought into settlement a sum of £51,000, yielding £2,200 per annum, by the husband a sum of £10,000, yielding somewhere between £300 and £400 per annum, and I may state here conveniently that the husband was entitled to the income of another sum of £10,000, which made the income arising from the funds which were either brought into the settlement by him or on his behalf of which he was possessed, £710 a year. The total amount, therefore, of the joint income approximates closely to £3,000; it falls somewhat short of it. Passing by, for the moment, the conduct of the parties, there has to be considered the relation which it bears to the requirements of the parties.

Now, in this case the one point that most requires consideration is this, that there are no children of the marriage, and, therefore, that element, which is an important one, has not to be considered. The husband, it appears, gave up business before he married, and it has been stated that he has not resumed business.

Then we come to consider the conduct of the parties. Now that is a matter which has given me the greatest anxiety. I begin with the wife, which is the simpler case of the two. The short facts are these: That the wife ever since the year 1896, the marriage having taken place, I think, in 1889, withdrew her affections from her husband and bestowed them on the co-respondent. From January, 1897, she has ceased to live with her husband, who in 1899 obtained a decree of judicial separation on the ground of desertion. From 1901 she was actually engaged in the endeavour to obtain a divorce in a distant country with the view of marrying the co-respondent, and in this she ultimately succeeded, although neither the divorce nor the marriage can be recognized by law of this country. For all this course of conduct I see no palliation or excuse whatsoever, as it seems to me it is impossible for the court to arrive at a conclusion other than this, that she has been guilty of a great matrimonial offence. As regards the husband, he, having availed himself of his legal right to a judicial separation, proceeded in 1902 to bring an action for dissolution of his marriage founded on the remarriage and cohabitation of his wife with the co-respondent. But previously to this, in August and September, 1901, and subsequently, and in September and November, 1902, during the pendency of the petition, he was guilty of what the learned President stigmatized in his judgment as shameless adultery. No explanation has been given of the circumstances in which this offence was committed. The petitioner did not go into the box to explain his conduct, or to express regret at his having been guilty of this flagrant violation of morality, and the only excuse for it which the circumstances disclose is his wife's desertion. Notwithstanding this, the learned President exercised his discretion in favour of the husband and dissolved the marriage at his instance, and from that there was an appeal, as I understand, in the first instance, but it was afterwards abandoned. I cannot think, however, that this exonerates the court on this application from taking into consideration the conduct of the husband.

Lastly, there is to be considered the respective prospects of increased income. Now, so far as appears the husband has apparently none. The wife will, if she survives her mother, under the will of her father, succeed to what is commonly termed a protected life interest in a capital sum of £150,000 or thereabouts. By a protected life interest I mean that it is made to cease in certain events, and, amongst others, if the "wife shall do or suffer any act or thing or any event shall happen whereby if the said income were made payable to her for life she would be deprived of the right personally to receive and enjoy the same or any part thereof or some other person might become entitled to receive the said income or part thereof." That fund is not the subject of an ante-nuptial or post-nuptial settlement within the meaning of section 5 of the Act. If the wife's life interest had been absolute it might have fallen under section 41 of the Act of 1857, but it is obvious from the terms of the gift that any order which the court might make directly affecting that life interest would be futile, inasmuch as it would produce a cessation of the life interest according to the terms of the will.

Now, by the order appealed from this has been done. The learned President has thought fit to order that "the said trustees do as from the date of this order during the joint lives of the petitioner, the respondent, and her mother pay the petitioner out of the income of the funds for the time being subject to the said settlement the annual sum of £1,000, and from and after the death of the mother do thenceforth, during the remainder of the life of the petitioner, pay to him out of the said income in lieu of the said annual sum of £1,000 the annual sum of £2,000, and do further pay to the petitioner out of the said income the capital sum of £2,000, the said sum to be paid by equal annual instalments of £500, if and so long as the said income after payment of the said costs and any other annual sum for the time being payable under this order." So that for the first four years he directs the payment of £1,500, and during the rest of the time till the death of the mother an annual payment of £1,000, and afterwards the sum of £2,000.

Now, the existence of the life interest, as I have said, is not one which is under the control of the court. It certainly is not one which can be dealt with under the operation of section 5 of the Act of 1859. It is only a matter which the court can take into consideration in making the order. The learned President and the learned counsel for the petitioner, the husband, in this case have, in supporting the order so far as it relates to the additional sum of

£1,000, which is to be paid after the death of the mother, relied on the case of *Noel* v. *Noel*, but in that case the marriage had been dissolved at the suit of the husband, and by the marriage settlement the wife had a certain interest in the husband's property and had settled her own property, including certain reversionary property which was stated to be of great value. In that case the question arose as to what was to be done with the income of the reversionary property which, be it observed, was the subject-matter of the settlement when it fell into possession, and the then President, Sir James Hannen, says this: "With regard to the wife's reversionary interest, I am of opinion that half of that income when it falls in must be paid to the husband on this principle: When a woman by her own fault has broken up a family of which she was a part, the court must endeavour to put the husband and the children, as far as money goes, in the same position as they would have been if she had not broken it up." With that principle and with the application of it made in that case I entirely agree, but, be it observed, it is very different from the present case. In the first place, the fund was one which was the subject of the settlement, and therefore the learned President had full power to deal with it directly. In the second place, there were children in existence there, and where there are children of a marriage who succeed to property comprised in the settlement it is of high importance that they should be brought up in accordance with the fortunes to which they succeed, and the court would exercise the right and would exercise the discretion vested in it by the statute in such a way as to secure this. Lastly, in that case the husband was entirely innocent and had been guilty of no matrimonial offence.

Now, as regards this part of the case, it is clear when one reads the judgment of the learned President that, in the first instance, he was under a misapprehension. He thought that he had power, or at all events he forgot for the moment that he had no power, to deal with this fund directly. He certainly had not power to deal with it under section 5 of the Act of 1859. Although I think he might have had power to deal with it under the Act of 1857, I am not sure that he intended to exercise the jurisdiction. When the terms of the father's will were called to his attention he saw that the order which he clearly expresses himself as about to make would be futile, and consequently he altered the order in the way in which it now stands.

I am unable to agree with the view that was taken by the learned President. I am not satisfied, the first place, that he really exercised his discretion in view of a full and careful investigation of the facts. In the second place, I think that he went beyond the law as laid down in the case to which I have referred of *March* v. *March*, and I think that he omitted to take into consideration to a sufficient extent the conduct of the petitioner; and, in the third place, I think he more than simply repaired the loss which had been occasioned to the petitioner, even if an innocent person, according to the standard which is laid down in *March* v. *March*—namely, that he is not to be wholly deprived of means to the scale of which he may have learnt to accommodate his mode of life. As regards the four sums of £500, which are payable during the first four years, these were sums directed to be paid inasmuch as the wife appeared during four years' desertion to have received an income coming from the husband's funds. The wife was quite willing as a term of settlement that the future income should be paid to the husband, but in exercising the statutory jurisdiction the learned President had no power to give it a retrospective action, and it seems to me that by the order which he made he was in effect giving it retrospective operation.

On these two points I am unable to agree with the learned President.

I have had more difficulty as regards the sum of £1,000, which the learned President directed to be paid in the first instance. I feel very strongly that the conduct of the petitioner does not entitle him to great consideration from the court, but the learned President, notwithstanding the nature of that conduct, saw fit to dissolve the marriage and to exercise the discretion which the Act gave him. I have hesitated as to whether the sum which the learned President first awarded ought to be departed from, but as my learned brothers both take a strong view, with which I sympathize, against the petitioner, and think it was not right that he should be allowed anything out of that fund, I am not prepared to differ from them, and I therefore agree with their order.

COZENS-HARDY, L.J.—It would not be right for me to occupy the court more than a few minutes inasmuch as I entirely assent to the elaborate judgments which have been delivered by my lord and Stirling, L.J., but I desire very briefly to state the reasons which have influenced me.

It is settled by authority which binds us, and I think I should have come to the same conclusion apart from authority, that in exercising the jurisdiction conferred upon the court of varying settlements the conduct, not of one party, but of both parties, must be had regard to, and that we must also not forget considerations of public morality and public decency.

Now, it was strenuously argued before us by Mr. Lawson Walton and Mr. Priestley that the judgment of the late President in the divorce case has concluded that matter; that the husband must be regarded as completely whitewashed, as in fact innocent, and that it is not open now for us in exercising the discretion conferred on us by the section to treat the husband as a man who has been guilty of any matrimonial offence or as a man whose conduct is deserving in any way of reprobation. I am entirely unable to assent to that view. I think it is within the power of the court, and if it is within the power of the court, it is part of the duty of the court to consider all the circumstances of this case affecting both the husband and the wife. Without pretending to weigh in the balance minutely the faults of the husband and the wife, I do not feel myself able to say that the conduct of the husband was not more outrageous and not more subversive of public decency than that of the wife.

I wish to refer for a moment to the report of the judgment in the divorce suit, which is to be found in [1903] P., p. 246, because there is a most unfortunate error which I think was somewhat overlooked by the learned judge himself. The statement at p. 247 of the acts of adultery by the petitioner represents them as being all before the presentation of the petition; but what are the dates? The petition is dated the 3rd of July, 1902. The acts of adultery prior to that date I say nothing about, but the acts of adultery alleged by the respondent in her answer filed on the 18th of December, 1902, alleged and admitted, were the 18th, 21st, 24th, and 29th of September, 1902, and 3rd, 14th, 15th, and 20th of November, 1902. I think it is not exaggerating to say that the acts of adultery were alleged and admitted up to or on the very eve of the answer of the respondent to the petition. It is not left there, because not only did the husband come shamelessly into court asking to be relieved in respect of his wife's adultery when he was himself continuing, after the presentation of the petition and almost up to the trial,

committing his own adultery, but he has studiously and persistently, on the hearing of the divorce proceedings and again on the hearing of this petition, evaded any liability to cross-examination as to his past relations, and it may be as to his present relations, with the person who Sir Francis Jeune has described as a "professional seductress."

All I can say is, I decline to exercise my judicial discretion in favour of a petitioner whose conduct has been such as I have described. It seems to me that the registrar's report was perfectly right, and that we should not in the exercise of our discretion be justified in giving a petitioner guilty of conduct such as I have described any part of the property brought by the wife into the settlement. In my view the order ought to be as reported by the registrar, and the order of the learned President ought to be set aside.

I only wish just to point out that there may possibly be a question hereafter under the wife's settlement, because there is a trust that "If the said Julia Ralli shall have left a husband her surviving upon trust to pay him a life interest." If the parties are content to leave that for further discussion hereafter, so be it. It may be well possibly even to get rid of that now by varying to that extent the trust of that settlement. However, that does not arise possibly upon this appeal.

Solicitors, *Lewis & Lewis; Hollams, Sons, Coward, & Hawksley; Freshfields.*

House of Lords.

From C. A. (England). July 24, 1905.

MAYOR, &c., OF WESTMINSTER v. LONDON AND NORTH-WESTERN RAILWAY CO. (a.)

Metropolis—Local government—Public health—Public convenience—Approaches—Subway—Trespass—Subsoil of roadway and footway—Injunction—Public Health (London) Act, 1891 (54 & 55 *Vict. c.* 76), *s.* 44.

By the Public Health (Metropolis) Act, 1891, *s.* 44, *power was given to the sanitary authority to construct and maintain public sanitary conveniences, and for this purpose the subsoil of the roadway, exclusive of the footway adjoining a building, was vested in the sanitary authority.*

Where the sanitary authorities had made such conveniences in the roadway beneath the soil connected by a subway from pavement to pavement, with an exit in the footway adjoining respondents' premises, and who were owners of the soil ad medium filum, *an injunction was granted directing the sanitary authorities to remove that portion of the structure only which encroached upon the footway. In other respects the matter was in the discretion of the authorities.*

Decision of Joyce, J., *to this effect* (50 *W. R.* 268, [1902] 1 *Ch.* 269) *restored, and that of the* Court of Appeal (52 *W. R.* 596, [1904] 1 *Ch.* 759) *reversed* (Lord James of Hereford *dissenting*).

This was an appeal from an order of the Court of Appeal (52 W. R. 596, [1904] 1 Ch. 759) (Vaughan Williams, Stirling, and Cozens-Hardy, L.JJ.), which reversed a decision of Joyce, J. (50 W. R. 268, [1902] 1 Ch. 269).

The facts are given in Lord Macnaghten's judgment. It will suffice to state that certain freehold premises at the corner of Parliament-street and Bridge-street, Westminster, were conveyed to the respondents in July, 1886. At this date the pavement of Parliament-street was 12 feet wide opposite these premises, and there were certain vaults belonging to the premises under the footway and projecting into the road.

In 1899 Parliament-street was widened and the footway increased to the width of 20 feet.

In 1900 the appellants constructed certain underground conveniences in the centre of Parliament-street, and provided with approaches by means of a subway with staircases at either end at or near the edge of the pavement. One of these staircases was opposite the respondents' premises and was placed to the extent of 2ft. 9in. within the kerbstones of the pavement as altered in 1899.

Joyce, J., directed the removal of that portion of the staircase which projected over the respondent's land to the extent of 2ft. 9in. on the footway aforesaid, but the Court of Appeal made a different and more extensive order.

The Corporation of Westminster appealed.

Haldane, K.C., Hughes, K.C., and *Dighton Pollock,* for the appellants.

Younger, K.C., Montague Shearman, K.C., and *Eustace Hills,* for the respondents.

Earl of HALSBURY, L.C.—It seems to me that the power of the local authority to erect certain public conveniences cannot be disputed. The shape, site, and extent of them are left to the discretion of the authority in question, and so far as the things themselves, which, under this discretion, have been erected, I do not understand that any objection can be made. The objections, so far as they assume the force of legal objections, refer to the access to them, and to the supposed motives of the local authority in the selection of the site. Assuming the thing done to be within the discretion of the local authority, no court has power to interfere with the mode in which it has exercised it. Where the Legislature has confided the power to a particular body, with a discretion how it is to be used, it is beyond the power of any court to contest that discretion. Of course, this assumes that the thing done is the thing which the Legislature has authorized: see *Truman* v. *London, Brighton, and South Coast Railway Co.*, 34 W. R. 657, 11 App. Cas. 45, 34 W. R. Dig. 131. It appears to me impossible to contend that these conveniences are not the things authorized by the Legislature. It seems to me that the provision of the statute itself contemplates that such conveniences should be made beneath public roads, and if beneath public roads, some access underneath the road level must be provided; and if some access must be provided, it must be a measure simply of greater and less convenience, when the street is a wide one, whether an access should be provided at only one or at both sides of the street. That if the access is provided at both sides of the street it is possible that people who have no desire or necessity to use the convenience will nevertheless pass through it to avoid the dangers of crossing the carriage-way, seems to me to form no objection to the provision itself; and I decline altogether to sit in judgment upon the discretion of the local authorities upon such materials as are before us. I quite agree that, if the power to make one kind of building was fraudulently used for the purpose of making another kind of building, the power given by the Legislature for one purpose could not be used for another; but I have endeavoured to show that the Legislature did contemplate making subterranean works under the roadway and also access to them. Under these circumstances, I think it is a question of degree, and if there be the express

(a.) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

provision, as I think there is, to make a tunnel under the street for the purpose of these conveniencies, then I think the question of its extent or cost is a matter with which neither a court of law or equity has any concern, since the thing contemplated by the statute has been done, and done in the way which the statute contemplated it might be done. That the public may use it for a purpose beyond what the statute contemplated is nothing to the purpose. I think the judgment of Joyce, J., should be restored. With respect to the costs of this litigation. I cannot look over the fact that the local authority made a blunder, and interfered with the footway. That has now been put right, but in the first instance led to the litigation. Then, I think, the negotiation and correspondence was not as candid as it should have been, and I think, therefore, that neither side in this controversy should have any costs.

Lord MACNAGHTEN.—At the southern or lower end of Parliament-street, just before you come to Bridge-street, where in consequence of recent improvements there is a distance of about 100ft. between the opposite buildings, the appellants, as the sanitary authority of the City of Westminster, have constructed public lavatories and other conveniences for the use of persons of both sexes. These conveniences are placed under the ground in the middle of the street, as far removed as possible from the buildings on either side. The plan of the construction is this: On each side of the roadway there is an entrance, 5ft. 9in. wide, protected by railings and leading by a staircase of the same width to a passage or subway, 10ft. wide and 8ft. high, which runs the whole way across on a level with the underground conveniences. Out of this subway there are openings—two for men and one for women—into spacious chambers, where the usual accommodation (politely described as lavatories and cloakrooms) is provided on a large and liberal scale. All the arrangements seem to have been designed and carried out with due regard to decency, and with every possible consideration for the comfort of wayfarers in need of such accommodation. The London and North-Western Railway Co. are the owners of a large and valuable block of buildings on the east side of Parliament-street, having a frontage to Parliament-street and a frontage to Bridge-street, with vaults under the pavement in Parliament-street, and a claim, for what it is worth, to the soil beneath the roadway up to the mid line of the street. They took objection to the sanitary works constructed by the corporation, and sought to have them removed. They put their case alternatively as a case of trespass or of obstruction to the highway causing special damage. The corporation relied on their statutory powers under the Public Health (London) Act, 1891, which authorizes them to construct such public sanitary conveniences, and vests in them for the purpose the subsoil of the road, exclusive of the footway. When the parties came to trial it was found that owing to some mistake or inadvertence the works of the corporation had encroached on the footway. Joyce, J., before whom the case was tried, ordered the corporation to remove the encroachment, but made no order as to costs. On appeal by the plaintiffs, the court ordered the corporation to "pull down and remove the whole of the staircase, railings, and other works placed by the defendants upon the lands of the plaintiffs other than the conveniences in the pleadings mentioned, and such further portion of the construction, as the court" might, "upon application, sanction as a proper approach to the said conveniences." The order was to be suspended pending an appeal to this House, and the corporation were to pay the costs of the action and of the appeal. The corporation have acquiesced in the order of Joyce, J. Their only contention now is that the order of the Court of Appeal is wrong.

There can be no question as to the law applicable to the case. It is well settled that a public body invested with statutory powers such as those conferred upon the corporation must take care not to exceed or abuse its powers. It must keep within the limits of the authority committed to it. It must act in good faith. And it must act reasonably. The last proposition is involved in the second, if not in the first. But in the present case I think it will be convenient to take it separately. Now, looking merely at what has been done—at the work as designed and actually constructed—it seems to me that, apart from the encroachment on the footway, it is impossible to contend that the work is in excess of what was authorized by the Act of 1891. The conveniences themselves, extensive as the accommodation is, have not been condemned by the Court of Appeal or even attacked in the evidence. Then the entrance from the roadway is only 5ft. 9in. wide; so is the staircase. It is in evidence that a width of 4ft. 6in. is "necessary" in order to enable two persons to pass on the staircase. The witness who gave that evidence was pressed to say that "under ordinary circumstances 4ft. 6in. to 5ft. would be a wide entrance for a thing of this sort." "No" he replied, "not ample. You want to give a minimum of 5ft., if you can, and more than that. You would give 6ft. if you had got plenty of space." So the entrance actually provided which has be encondemned by the Court of Appeal, and as I think without evidence, is just nine inches wider than the minimum width which the only witness examined on the point says ought to be provided, and three inches narrower than what he thinks should be allowed if space permits. It seems rather a strong measure to invoke the powers of the court in so trifling a matter, especially considering that the excess, if excess there be, cannot make the slightest practical difference to the respondents. Then I come to the subway, which has not been opened to the public as yet. Now, there is not a scrap of evidence tending to show that there is anything improper or suspicious about the subway. One witness was asked if he had "ever known an approach to a convenience which was ten feet wide except this." He said he had not, and there the matter dropped. But then no instance could be given—at any rate, no instance was given—of a convenience so large placed in the centre of a street so wide and approached from either side. If it is permissible to construct a convenience approachable from either side of a wide street, you cannot prevent the public from using the subway as a thoroughfare. I should think it most unlikely that it would be largely used, if used at all, by persons not desirous of availing themselves of the convenience. But it is possible; Vaughan Williams, L.J., thinks it more than possible. He has "no doubt, apart from the conveniences, the subway at the present moment is a considerable convenience to pedestrians." There seems to be no experience to guide one on the point. And so the corporation were, I think, not to be blamed for making provision in order to obviate crushing and jostling in a place where crowding is (to say the least) not convenient. I have not forgotten that there are two passages in the evidence which one of the learned Lords Justices quotes at length, and on which all the members of the court appear to rely. It seems that the chairman of the works committee admitted that this tunnel (as it has been called), 10ft. wide and 8ft. high, was "both an approach and a subway." That seems to have been thought a very damaging admission. Of course it was a subway. It was a subway capable of

being used as a thoroughfare. It would have been a subway if there had been no thoroughfare. For my part I do not quite understand all this play upon words. Then there was another passage in the evidence supposed to be more damaging still, in which a witness said that he did "not see any necessity for 10ft." It would, he admitted, be "a waste of space and a waste of money." But if you look at the context, it is perfectly clear that the learned Lord Justice was under a misapprehension. The witness was not referring to the subway, which was 10ft. wide. He was not thinking of the subway. The questions put to him both by the learned counsel and by the judge were addressed to the entrance and staircase, to which very different considerations apply. It was not suggested that there was any notice, or any intention of putting up a notice directing the public to this subway as a means of crossing. The entrance, which was of the usual limited dimensions, did not of itself offer any invitation to the public to enter for the purpose of crossing the roadway.

Then I come to the question of good faith. That is a very serious charge. It is not enough to show that the corporation contemplated that the public might use the subway as a means of crossing the street. That was an obvious possibility. It cannot be otherwise if you have an entrance on each side and the communication is not interrupted by a wall or barrier of some sort. In order to make out a case of bad faith it must be shown that the corporation constructed this subway as a means of crossing the street under colour and pretence of providing public conveniences which were not really wanted at that particular place. That was the view of their conduct taken by the Court of Appeal. "In my judgment," says Vaughan Williams, L.J., "it is not true to say that the corporation have taken this land which they have taken, with the object of using it for the purposes authorized by the Legislature." "You are acting *mala fide*," he added, "if you are seeking to acquire and acquiring lands for a purpose not authorized by the Act of Parliament." So you are; there can be no doubt of that The other learned Lords Justices seem to take the same view of the conduct of the corporation. Now this, as I said, is a very serious charge. A gross breach of public duty, and all for a mere fad! The learned judge who tried the case had before him the chairman of the works committee. That gentleman declared that his committee considered with very great care for a couple of years or more the question of these conveniences in Parliament-street. He asserted on oath that "the primary object of the committee was to provide these conveniences." Why is this gentleman not to be believed? The learned judge who saw and heard him believed his statement. The learned judges of the Court of Appeal discredited his testimony, mainly, if not entirely, on the ground of two letters about which he was not asked a single question—one written by the surveyor of the parishes of St. Margaret's and St. John's under the city engineer of Westminster, the other by a person acting for the acting town clerk. The letter of the surveyor was a foolish letter, which the writer seems to have thought clever. The letter of the temporary representative of the acting town clerk, if you compare the two letters, seems to have derived its inspiration from the same source. I cannot conceive why the solemn statement of the chairman of the committee should be discredited on such a ground. I do not think there is anything in the minutes tending to disprove his testimony. I agree with Joyce, J., that the primary object of the council was the construction of the conveniences with the requisite and proper means of approach thereto and exit therefrom.

I have felt more difficulty with regard to the question whether the corporation have acted altogether reasonably, "with judgment and discretion," as Turner, L.J., puts it in a well-known case. It seems to me that, when a public body is exercising statutory powers conferred upon it for the benefit of the public, it is bound to have some regard to the interest of those who may suffer for the good of the community. I do not think it is right—I am sure it is not wise—for such a body to keep its plans secret and carry them into execution without fair and frank communication with those whose interests may possibly be prejudiced or affected. I cannot help thinking that, if the engineer of the corporation and the engineer of the railway company had been put into communication, some modification of plan might have been suggested which would have obviated all this litigation and expense, and all the litigation and expense yet to come if the Court of Appeal is to take upon itself, as it proposes to do, the functions of a sanitary authority and determine the precise dimensions of approaches to such a place as this. The surveyor thought it politic and not unworthy of his position as an officer of a great public body to try and throw dust in the eyes of his correspondent. I do not suppose that the officials of the railway company were put off their guard by the answer which he sent. I have no doubt they knew perfectly well what the corporation proposed to do. But still, the mode in which they were met prevented anything like a free interchange of ideas between these two bodies for their mutual advantage. The result of these considerations to my mind is that if at the trial the respondents had suggested any practical mode of altering or amending the plans that would have obviated the inconvenience which the works as executed must cause to them, I should, speaking for myself, have been disposed to think that an injunction ought to have been granted to secure that object. Unfortunately the respondents chose to stand aloof, and have given no assistance to the court. Under these circumstances I think there is no alternative but to allow the appeal, and to restore the judgment of Joyce, J. But I think there ought to be no costs either here or in the Court of Appeal.

Lord JAMES OF HEREFORD, after stating the facts and giving a summary of the evidence, said: Now upon these facts it seems to me to be clear that the intention of the local authority was to construct two distinct objects, a convenience with an approach and a subway. It is true that a portion of the subway would be used as the approach to the convenience, but the subway would also be used by those who did not intend to visit the convenience, but only desired to cross free of danger from one side of Parliament-street to the other. It is also clear that in consequence of this double user the subway was made of four feet greater breadth than would have been necessary if only an approach to the convenience had been constructed. Such being a summary of the facts before your lordships, it is necessary to consider with what legal powers the appellants and their predecessors were invested so as to authorize the construction of the works in question. Inasmuch as the soil of the respondents has been taken without their sanction for the purposes of the works, the appellants must show legal authority for such an act. By section 44 of the Public Health Act (London), 1891, power was conferred upon sanitary authorities to provide and maintain public conveniences, and in order to carry out the exercise of the power the subsoil of any road (required for the purpose) was vested in the sanitary

authority. This is the only legislative authority under which a justification for the act done is alleged. It will be noted that there is no legislative power given to local authorities to construct subways. Now, I agree in the view that has been taken that the powers to construct a convenience under the Act of 1891 of necessity include a power to construct an approach thereto. And so the question to be solved seems to be thus formulated: Was the so-called tunnel an approach to the convenience only, or was it something more? (1) Was it a subway distinct from the approach, or (2) was it a subway in combination with the approach used for two distinct purposes? In my judgment the construction in question comes within one or other of the two latter alternatives. Possibly within the first, certainly within the second. If this finding on the facts be correct, the works, so far as they constitute the subway, are constructed without legal authority. The Legislature has not thought it right to confer on local bodies the power to compulsorily take land or impose rates for the purpose of constructing subways. In this case some land has been taken which would not have been required if the approach had not been enlarged into a subway, and an unauthorized burden has been imposed upon the ratepayers in consequence of this enlargement. Thus it is, in my opinion, that the appellants have acted beyond their powers and without justification. I have only to add that the reasons for their judgment given by the Lords Justices in the Court of Appeal appear to me to be unanswerable, and I therefore think that those judgments ought to be confirmed and this appeal dismissed.

Lord LINDLEY, whose judgment was read by Lord Macnaghten, concurred in the motion made by the Lord Chancellor.

Appeal allowed.

Solicitors, *Allen & Sons; C. de J. Andrewes.*

Court of Appeal.

From Chan. Div. (Vaughan Williams, Stirling, and Cozens-Hardy, L.JJ.) — Oct. 24, 25, 30.

PARKER *v.* TALBOT. (*a.*)

Common lodging-house—Charitable institution—Lodgers received without payment—Registration—Inspection—Common Lodging-houses Act, 1851 (14 *&* 15 *Vict. c.* 28)—*Common Lodging-houses Act.* 1853 (16 *&* 17 *Vict. c.* 41), *s.* 3—*Common Lodging-houses Act, Ireland,* 1860 (23 *&* 24 *Vict. c.* 26), *s.* 3—*London County Council* (*General Powers*) *Act,* 1902 (2 *Ed.* 7, *c. clxxiii.*), *Part IX.*

Notwithstanding the repeal of the Common Lodging-houses Act, Ireland, 1860, *the term "common lodging-house" in the Common Lodging-houses Acts,* 1851 *and* 1853, *must be interpreted according to the definition of "common lodging-house" contained in section* 3 *of the Act of* 1860. *A charitable institution, therefore, which provides free lodgings is not a "common lodging-house" within those Acts, as people are not harboured or lodged there for hire in accordance with the definition in section* 3 *of the Act of* 1860.

Logsdon *v.* Booth, 48 *W. R.* 266, *and* Logsdon *v.* Trotter, 48 *W. R.* 365, *distinguished.*

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

Gilbert *v.* Jones, ante, *p.* 94, [1905] 2 *K. B.* 691, *overruled.*

This was an appeal from the decision of Kekewich, J., and raised an important question as to what is included under the term "common lodging-house" in the Common Lodging-houses Acts, 1851 and 1853.

The case came before the learned judge upon a motion by a subscriber to the Providence (Row) Night Refuge and Home, on behalf of himself and all other subscribers to the charity, other than the defendants, to restrain the defendants from using the premises known as the Providence (Row) Night Refuge and Home, Crispin-street and Raven-row, Bishopsgate-street Without, as a common lodging-house without registering the same pursuant to the Common Lodging-houses Act, 1851, and without having obtained a licence under the London County Council (General Powers) Act, 1902, and from otherwise using the premises for any unlawful purpose, and from employing the funds of the subscribers for any such purpose.

The home was founded in 1860 under a charitable trust created by the will of the Rev. Dr. Gilbert, D.D., to provide food and shelter for the deserving destitute poor without distinction of class, nationality, or creed. The annual report stated that in the working of the home there was no distinction or creed; no charge was made; and every case was inquired into. There were separate sections for men and women. Lodgings, suppers, and breakfast, and use of lavatories were provided free. Every inmate had to make a statement as to his position; if on inquiry his statement proved satisfactory he was allowed to remain several days looking for work. There was evidence that the persons admitted to the home were destitutes of the poorest class, but they did not differ from the class who habitually frequented cheap lodging-houses. They slept in bunks placed in open dormitories, each dormitory containing about seventy persons, and their meals were taken together in common rooms. It was also proved that the house was clean, well kept, and well conducted.

In 1900 a scheme was sanctioned for the management of the charity and its endowments.

The greater part of the funds expended in support of the home was derived from voluntary subscriptions from the general public.

The house was not registered as a common lodging-house under the Common Lodging-houses Act, 1851, nor was any licence applied for under the London County Council (General Powers) Act, 1902.

In November, 1904, an officer of the county council endeavoured to inspect the home but was refused admittance. Two informations were accordingly preferred against the secretary of the institution—(*a*) under the Act of 1851 for refusing to admit the officer, and (*b*) under Part IX. of the Act of 1902 for keeping a common lodging-house without a licence.

The magistrate convicted the secretary, and fined him 1s. upon each information.

Upon an appeal to the Divisional Court (Lord Alverstone, L.C.J., and Lawrance and Ridley, JJ.) this conviction was affirmed. That case is reported *sub. nom. Gilbert* v. *Jones, ante,* p. 94, [1905] 2 K. B. 691.

As no further appeal from the decision of the Divisional Court was possible, the present proceedings—which were of a friendly character—were commenced for the purpose of obtaining the opinion of the Court of Appeal, and, if necessary, of the House of Lords, upon the question whether these premises were to be regarded as a common lodging-house within the Act of 1851.

On behalf of the plaintiff, it was suggested to the

learned judge that the injunction should be limited to restraining the defendants from employing the funds voluntarily subscribed to the charity for the purposes mentioned in the notice of motion. This would get rid of the necessity of making the Charity Commissioners parties to the proceedings (see Charitable Trusts Act, 1853, s. 62); and, as the greater part of the funds of the charity were derived from voluntary subscriptions and not from endowments, the injunction in that limited form would be sufficient for the purpose of raising the question which the subscribers wished to have determined.

For the defendants, it was admitted that the injunction could not be resisted in that court in the face of the decision of the Divisional Court, whereupon Kekewich, J., granted an injunction in the limited form proposed on behalf of the plaintiff.

The defendants appealed.

Acland, K.C., and *Ricketts*, for the appellants.—Both the learned magistrate and the Divisional Court held in *Gilbert* v. *Jones* that the Institution now in question was covered by the decisions in *Logsdon* v. *Booth*, 48 W. R. 266, [1900] 1 Q. B. 401, and *Logsdon* v. *Trotter*, 48 W. R. 365, [1900] 1 Q. B. 617. But in both those cases the question the court had to consider was whether the Salvation Army shelters, which were admittedly lodging-houses, were "common lodging-houses" within the Common Lodging-houses Act, 1851. Here the institution makes no charge at all, unlike the Salvation Army shelters, and it is submitted that an institution which provides lodgings gratis is not a "lodging-house" at all. There is no definition of "lodging-house" in the Acts, and a charitable institution not kept for purposes of gain is not a lodging-house in the ordinary acceptation of the word: *Booth* v. *Ferret*, 38 W. R. 718, 25 Q. B. D. 87.

Avory, K.C., and *Nepean*, for the plaintiff.—This appeal cannot be allowed without overruling *Logsdon* v. *Booth* and *Logsdon* v. *Trotter*. The object of this house is to provide lodgings, and therefore it is a lodging-house. It is plainly a "common lodging-house" within *Logsdon* v. *Booth* and *Logsdon* v. *Trotter*. In both these cases the payment made was small and the institutions were not carried on for gain but for charitable purposes. The fact that no payment is made here instead of a nominal payment can make no difference.

Acland, K.C., replied.

Cur. adv. vult.

Oct. 30.—The case was set down in this day's paper for hearing, but on its being called on,

VAUGHAN WILLIAMS, L.J., said that their lordships had found one statute, the Common Lodging-houses Act, Ireland, 1860, to which their attention had not been called in argument, and they thought judgment ought to be postponed a short time to give counsel an opportunity of considering it.

Judgment was postponed accordingly.

The statute in question is intituled: "An Act to remove doubts as to the application of 'The Common Lodging-houses Acts' to Ireland, and to amend the provisions of the same as far as they relate to Ireland." It recites that: "Whereas doubts have arisen as to whether the Common Lodging-houses Act, 1851, and the Common Lodging-houses Act, 1853, extend to Ireland, and difficulties have occurred in the execution of the said Acts therein; and it is expedient that such doubts and difficulties should be removed, and for that purpose that the said Acts should be explained and amended with reference to the execution thereof in Ireland. Be it therefore enacted," &c. Section 2 provides for the extension of those Acts to Ireland. Section 3 provides as follows: "For the purpose of the execution of the said recited Acts and of this Act in Ireland, certain words and expressions in the said Acts are hereby declared and explained to have been intended to bear the following meanings." Then there is this definition: "The term 'common lodging-house' shall mean a house in which persons are harboured or lodged for hire for a single night, or for less than a week at a time, or any part of which is let for any term less than a week."

Avory, K.C., and *Nepean*, for the plaintiff.—We submit that this Act carries the matter no further. It is limited to the execution of the Acts of 1851 and 1853 in Ireland. The Legislature must therefore be taken to have had no intention of extending the definition to England.

Acland, K.C., and *Ricketts*, for the defendants.—The object of the Act of 1860 is to extend the Acts of 1851 and 1853. The intention of the Legislature is plain that the term "lodging-house" shall have the same meaning in both England and Ireland. To bring a "common lodging-house" within the Acts of 1851 and 1853 there must be a monetary payment by the persons resorting to it.

VAUGHAN WILLIAMS, L.J.—Until our attention was called to the Common Lodging-houses Act, Ireland, 1860, I was disposed, and I think the other members of the court were disposed, to put the construction upon the Act of 1851 which was put upon it by Lord Alverstone and his brother judges in the King's Bench Division. In truth and in fact (I do not mean to say without hesitation, because it was with hesitation) I had written a judgment, which I hold in my hand, to that effect. I had come to the conclusion that the reasoning of the King's Bench Division ought to be accepted; but, as I have already said, not quite without hesitation, for I had expressed in my judgment the grave doubts that had arisen in my mind by reason of the exclusion, in the opinion of the law officers, given in 1854, of public-houses from the definition of "common lodging-houses." I doubted whether it was not a fair inference that the law officers of the Crown recognized the description in in the Towns Improvement Clauses Act, 1847, as applying, not only to the Public Health Act of 1848, but to other sanitary legislation. I had that doubt, and I was met by the authority of the King's Bench Division itself, and also by observations of Lord Russell in *Logsdon* v. *Booth* and Channell, J., in *Logsdon* v. *Trotter*, that it might be that that conclusion of the law officers of the Crown was arrived at because they thought that the sections of the Acts of Parliament of 1851 and 1853 only applied where the main object of keeping the lodging-house was the supply of lodgings to the poorer classes, and especially to those poorer classes who want lodgings for a very short time. I thought that the law officers of the Crown might have said to themselves, that is not the main object in the case of a public-house; the main object in the case of a public-house is probably the sale of beer, or other things, as the case may be. That was the conclusion which I, with some hesitation, had arrived at, and it was a conclusion which it was satisfactory to me to think would exclude from the operation of the Act institutions like hospitals, convalescent homes, and homes for women servants—young women seeking places in London. But now that my attention has been addressed to this Act of 1860, I think it is impossible to doubt but that the words of section 3 of that Act are intended to refer to the two Acts of Parliament—the Common Lodging-houses Act of 1851 and the Common Lodging-houses Act of 1853—and to apply to those

Acts exclusively. The suggestion of Mr. Avory really was that they were intended to effectuate the passing of an independent Act which was not either one of these Acts, but was an Act passed for application to Ireland alone. I really do not think that it is necessary to repeat the observations which were made in the course of argument. I have no doubt myself at all but that we must treat the words in the definition clause of this Act of 1860, s. 3, as applying to the two English Acts.

The result is this. It says: "The term 'common lodging-house' shall mean (it is not 'shall include,' but 'shall mean') a house in which persons are harboured or lodged for hire for a single night, or for less than a week at a time, or any part of which is let for any term less than a week." That definition applies to the two English Acts which I have mentioned; and inasmuch as this Providence (Row) Night Refuge and Home is an institution in which poor people are not "harboured or lodged for hire," it follows that this institution is outside "common lodging-houses" as defined in those Acts, and those Acts do not apply.

Of course it follows, without going in detail through it, that Part IX. of the private Act of the London County Council, called the London County Council (General Powers) Act, 1902, which only applies to the same subject-matter as that to which the Common Lodging-houses Acts, 1851 and 1853, apply, has no application at all to this institution.

I wish to say with regard to the decision of the judges of the King's Bench Division, which does not require any indorsement from me as to the logic and sufficiency of the conclusion which they arrived at, that they arrived at the conclusion which I was prepared to affirm, without having this Act of 1860 called to their attention at all; and although it is part of the duty of a judge to know the common law, there is the old authority of Lord Coke for saying that it is not part of his duty to know the statute law. Lord Coke said that statutes were very frequent in his time. What he would have said if he had seen the multiplication of statutes in modern times I really do not know.

STIRLING, L.J.—I am of the same opinion. I think that section 3 of the Act of 1860 shows what meaning the Legislature intended the term "common lodging-house" to bear in the Common Lodging-houses Acts of 1851 and 1853.

COZENS-HARDY, L.J.—I am of the same opinion, and, like my lord, I had written a judgment at the end of the arguments in this case agreeing with the view taken by the Divisional Court last August, but our attention having now been called to this Act of 1860, I am driven to the conclusion that we have here that which we could not find before—namely, a definition, in the strictest possible sense of that word, of the words "common lodging-house" applying to the Common Lodging-houses Acts, 1851 and 1853, not merely in Ireland, but in England also. It is a necessary element of a lodging-house within this definition that persons should be lodged for hire. As in this house everything is gratuitous, I am driven to the conclusion that the view taken by the police magistrate and by the Divisional Court last August, their attention not having been called to this Act, was wrong, and that this appeal must succeed.

I should be sorry that it should be thought for a moment that, in allowing this appeal, we are throwing any doubt whatever upon the view taken by the Divisional Court in 1900 that a lodging-house does not cease to be a lodging-house within the meaning of the Acts if it is carried on for charity, and not for purposes of gain. Not one word that has fallen from us—I think I may say for my colleagues, and certainly for myself—is intended to throw the smallest doubt upon that proposition; but I should just like, not at all by way of definition, but by way of illustration, to give some instances in which I think charitable institutions making a charge may or may not fall within the Act.

In the first place, I think the persons receiving the benefit of the charity must be of the very poor and humble class, whose sanitary conditions call for special attention. That was the view taken by the law officers, to which my lord has referred, and that has been throughout the view of those in charge.

In the next place, I think the sleeping of members not of the same family in cubicles or beds in a common room and having meals in a common room does not constitute a common lodging-house unless such reception and accommodation can be deemed the substantial and main purpose of the charity. For example, a hospital or convalescent home is really established for other purposes, and although the patients sleep in wards, that is a mere incident, and does not suffice to constitute a common lodging-house.

Lastly, a charitable institution will not cease to be a common lodging-house by reason only that the charity has other purposes, either benevolent or religious, which, taken by themselves, are outside the operation of the Acts of 1851 and 1853. This was the case with the Salvation Army shelters dealt with in *Logsdon* v. *Booth*.

Nov. 1.—*Avory, K.C.*, and *E. A. Nepean* called the attention of the court to the circumstance that the Common Lodging-houses Act Ireland, 1860, had been repealed by section 294 of the Public Health (Ireland) Act, 1878, and suggested a doubt whether it was permissible to look at an Act which had been repealed for the purpose of construing an earlier Act.

VAUGHAN WILLIAMS, L.J.—I do not think it makes any difference. The Act of 1860 says that certain expressions used in the Acts of 1851 and 1853 "are hereby declared and explained to have been intended to bear the following meanings." Therefore it must have been an intention at the time of the passing of the Acts of 1851 and 1853. Although they were not intended to apply to Ireland when they were passed, it would not otherwise be true to say that it was "intended to mean." It is quite true that the Act of 1860 was passed for application to Ireland, but the point is that it says what the expression "common lodging-house" in the Acts of 1851 and 1853 was "intended to mean." If it is an Act which determines the construction of another Act of Parliament for the time being, the repeal cannot make it wrong for us to look at it. The construction of an Act of Parliament must be once and for all. It cannot be altered by the repeal of a statute which has defined the construction of the Act.

STIRLING and COZENS-HARDY, L.JJ., concurred.

Appeal allowed.

By consent the hearing of the appeal was treated as the trial of the action, and the action was dismissed.

Solicitors, *Bellord & Coveney; Parker, Garrett, Holman, & Howden.*

High Court of Justice.

Chan. Div.
Buckley, J.

Nov. 11, 14.

In re DERBYSHIRE. (*a.*)

Will — Construction — "Moneys owing" — Money on deposit at bank — Payable after notice — Bearing interest.

A gift in a will of moneys owing to the testator includes money standing in the testator's name on deposit account at a bank and bearing interest, whether such money is capable of being withdrawn on demand or only after seven days' notice.

Originating summons.

By his will, made in 1883, W. S. Derbyshire gave and devised all his estate and effects, whether real or personal, "upon trust for the following purposes—namely, to collect and get in all moneys owing to me at the time of my decease," and after payment of his debts and funeral expenses to pay the proceeds to his wife, his two sons, and a daughter (naming them) in equal shares, and to pay the income, profits, interest, or rents that might accrue for the time being in similar fourth parts, and after the decease of his wife her share was to be divided among his said children, or, if any of them did not survive his wife, his or her share was to go to his or her issue. Executors were appointed, but no trustees were named.

The testator died in April, 1903, possessed of real and leasehold estates; of £3,975 standing on deposit account at the Charing Cross Bank, which could be withdrawn after seven days' notice; of £567 standing on deposit account at the Birkbeck Bank, which could be withdrawn at any time on demand, and of other moneys.

This summons was taken out by the husband of the daughter, who had died in the testator's lifetime intestate, and of whose estate the husband was administrator, against the executors and other beneficiaries of the testator, asking several questions as to the construction of the will, and among them (question 2) what was included in the gift of "all moneys owing to me at my decease"?

BUCKLEY, J., having decided that as regards the "moneys owing" to the testator (which was called estate "A") they were given to the beneficiaries absolutely; that there was no intestacy; that the gift over upon the death of the wife applied only to the rest of the estate of the testator (estate "B") and not to estate "A," and that under section 33 of the Wills Act the children of the testator were to be deemed to have become absolutely entitled to their original shares in both estate "A" and estate "B," proceeded to consider question 2.

MacSwinney, for the plaintiff, cited *Carr* v. *Carr*, 1 Mer. 541; *Vaisey* v. *Reynolds*, 5 Russ. 12; *Parker* v. *Marchant*, 1 Phil. 356; *Byrom* v. *Brandreth*, 21 W. R. 942, L. R. 16 Eq. 475; *Manning* v. *Purcell*. 3 W. R. 273, 7 D. M. & G. 55; *Mayne* v. *Mayne*, [1897] 1 Ir. 324, as shewing that the moneys at the banks passed by the gift; and *Foley* v. *Hill*, 2 H. L. C. 28, as shewing that the relation of banker and customer was one of debtor and creditor.

J. E. C. Adams, for the widow of the testator and the widow of a deceased son, cited *Petty* v. *Willson*, 17 W. R. 778, L. R. 4 Ch. 574, and *Bide* v. *Harrison*, L. R. 17 Eq. 76, 22 W. R. Dig. 273, for the same purpose.

P. M. Walters, for a child of a deceased son and a child of a deceased daughter of the testator.—Moneys on deposit at a bank bearing interest are not "moneys owing" within the meaning of the gift (*Parker* v. *Marchant*, *In re Price*, 53 W. R. 600, [1905] 2 Ch. 55; *Stein* v. *Ritterdon*, 16 W. R. 477, 37 L. J. Ch. 369); nor are moneys only payable after notice: *Mayne* v. *Mayne*, *In re Wheeler*, 52 W. R. 586, [1904] 2 Ch. 66.

W. Higgins and *Seddon* appeared for other beneficiaries.

BUCKLEY, J.—It has been argued that from the information before me I ought to draw the inference that the expression "moneys owing to me" is to be construed so as not to include moneys at a bank bearing interest, but I find nothing to show that any other construction than the simple meaning of the words themselves ought to be adopted. I find it laid down in *Foley* v. *Hill* that money handed to a banker becomes the banker's money, and that the relation between the banker and his customer is that of debtor and creditor. That state of things exists before the customer, by presenting a cheque or in any other way demanding payment, creates a debt on which he can sue. Lord Lyndhurst in *Parker* v. *Marchant*, 1 Phil., p. 361, says: "Sir W. Grant after some hesitation was of opinion that the balance at the bankers would pass under the description of a debt owing to the testator. He said, and I think he justly said, it is a debt, and may be recovered as a debt." Among other cases *Mayne* v. *Mayne*, *In re Wheeler*, and *In re Price* go to show that under the words "ready money," money in a bank on deposit withdrawable on demand will pass, but money in a bank on deposit requiring notice of withdrawal does not. It has been said that I ought to apply that distinction in this sense, that inasmuch as the money in the Birkbeck Bank being payable on demand is ready money, therefore it is not "owing at the testator's decease," for the two terms are under the circumstances mutually exclusive. I do not find myself under that necessity. I hold that the moneys in the Birkbeck Bank, although they are payable on demand, are yet moneys owing at the testator's decease, on the principle laid down in *Foley* v. *Hill*. With regard to the money on deposit in the Charing Cross Bank the revelant considerations seem to me to be these: If in the case of moneys handed to a banker the relation of debtor and creditor exists, though no demand for payment has yet been made, I do not see why moneys payable after notice should not be moneys owing equally with moneys for the payment of which no notice is required. Both are due but not yet payable, the only difference is that in the one case they become payable only after the expiration of the notice. The principle upon which *Parker* v. *Marchant* was decided is applicable to both cases. I have not to inquire whether they are ready money or not in order to ascertain whether or not they are moneys owing. I think that moneys owing, for the withdrawal of which notice is necessary, are equally owing with those for which no notice is required. Both are moneys owing at the testator's decease. In *Petty* v. *Wilson*, where it was held that moneys receivable under a policy of assurance passed as money of which the testator died possessed, Sir C. J. Selwyn said: "The case in this respect differs but little from that of money owing to the testator on a promissory note and payable on a day which did not arrive till after his decease." And Sir G. M. Giffard said: "It would be much too refined to say that this money was not due and owing to him because it was not payable to him but to his executors."

Solicitors, *Hilder, Thompson, & Dunn; E. J. Bridgman.*

(*a.*) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

Chan. Div.
Swinfen Eady, J. } Aug. 2, 1905.

In re KELSEY.
WOOLLEY *v.* KELSEY.
KELSEY *v.* KELSEY. (*a.*)

Will—Legacy—Advance to legatee to be brought into hotchpot—Erroneous statement of fact—Account.

A testator, by his will, left his residuary estate to trustees upon trust for his wife during her life or widowhood, and at her death or remarriage to divide the same amongst his children living at her death or remarriage, and the issue of deceased children in equal shares per stirpes. *The will contained a recital that the testator had advanced to three of his sons respectively certain specified amounts and a direction that parts of the amounts so specified should be brought into hotchpot, or so much thereof as remained unpaid at the death or remarriage of testator's wife. In the case of one of the sons the amount of the advance was incorrectly stated and in excess of the fact.*

Held, that the son was only bound to account for such amount as had actually been advanced to him by the testator.

Further consideration.

The testator by his will, dated the 28th of January, 1885, gave, devised, and bequeathed his residuary estate to trustees in trust to pay the income thereof to his wife during her life or widowhood, and at her death or remarriage to divide the said residuary estate equally between his children then living and the issue of deceased children, such issue taking between them equally the share which their parent would have taken if living. And the testator further directed that, "inasmuch as my son Thomas Owen Kelsey is indebted to me in the sum of £1,200, and my son Oswald Arnold [otherwise Arnold Robert] Kelsey is indebted to me in the sum of £4,000, and my son Stanley Woolley Kelsey is indebted to me in the sum of £5,000, and I am desirous of reducing the amount in which they are respectively so indebted to me as follows—that is to say, as to the said Thomas Owen Kelsey to the sum of £600, as to the said Oswald Arnold Kelsey to the sum of £2,000, and as to the said Stanley Woolley Kelsey to the sum of £3,000. Now, therefore, I hereby forgive to my said three sons the balance of the respective sums in which they are respectively indebted to me over and above the said respective sums of £600, £2,000, and £3,000, and I declare that the said respective sums of £600, £2,000, and £3,000, or as much thereof respectively as shall remain unpaid at the time of the decease or remarriage of my said wife shall be deducted and taken into account as part of their respective shares in my trust estate. And I also declare that in case any other sums shall be entered in my private ledger as owing to me by any of my children, the sum so entered in my private ledger shall be final and conclusive evidence as to the amounts owing to me or to my estate by any of my said children, but the said sums of £600, £2,000, and £3,000 to be considered as due to me at my decease unless previously paid, although not entered into such private ledger."

The testator died on the 15th of February, 1885.

On the master's certificate it was found that the recital in the will as to the amount advanced to the said Stanley Kelsey was in fact erroneous, the only advance being an apprenticeship premium of £80. None of this had been repaid.

The question now before the court was whether the said Stanley Kelsey was bound to account for the amount named in the will or only for the amount actually advanced.

Martelli, for the trustee.

A. J. Spencer, for Stanley Woolley Kelsey.

Eve, K.C., and *Laurence Rostron*, for other residuary legatees.

In re Taylor's Estate, Tomlin v. *Underhay*, 22 Ch. Div. 495, 31 W. R. Dig. 153; *In re Wood, Ward* v. *Wood*, 34 W. R. 788, 32 Ch. Div. 517; *In re Aird's Estate, Aird* v. *Quick*, 27 W. R. 882, 12 Ch. Div. 291, were referred to.

SWINFEN EADY, J., following *In re Taylor's Estate*, said that the testator, by forgiving part of the alleged debt and only directing that the alleged balance, or so much thereof as remained unpaid, should be brought into hotchpot, showed that he only meant that Stanley Kelsey should account for actual advances, to an extent not exceeding £3,000, less repayments if any. He held, therefore, that Stanley Kelsey was only chargeable with the amount actually advanced—namely, £80.

Solicitors, *Gush, Phillips, Walters & Williams; Berkeley-Calcott, Holloway, & Blount.*

(*a.*) Reported by P. JOHN BOLAND, Esq., Barrister-at-Law.

Chan. Div.
Warrington, J. } June 24, 1905.

WRAY *v.* WRAY. (*a.*)

Vendor and purchaser—Realty—Misdescription of purchaser—Partnership—Name—Legal estate—Evidence of identity.

A business was carried on by William Wray under his own name at Laurel House, North-hill, Highgate, in partnership with his two sons and another person. When he died in 1885 *his widow was admitted to the partnership, the business being carried on under the same style as before. In* 1890 *the firm purchased a house out of the partnership assets. The conveyance was made between the vendor, of the one part, and "William Wray, of Laurel House, Highgate," of the other part, and the property was conveyed to William Wray in fee simple.*

Held, that the legal estate passed by the conveyance to the four partners as joint tenants in fee simple.

Maugham *v.* Sharpe, 12 *W. R.* 1057, 17 *C. B. N. S.* 443, *followed.*

Adjourned summons.

William Wray carried on business under his own name at Laurel House, North-hill, Highgate. He took into partnership his sons Henry Wray and William James Wray and Joseph Turnbull, and the business was carried on by them under the style of "William Wray."

In 1885 William Wray died, and his widow, Eliza Wray, was admitted to the partnership in his place. The business was carried on under the same style as before.

The partners bought North Hill House, Highgate, in 1890 for £1,150, and paid for the same out of the partnership assets.

A conveyance was executed on the 22nd of September, 1890. It was made between the vendor of the one part and "William Wray, of Laurel House, North-hill, Highgate, in the county of Middlesex, optician (hereinafter called the purchaser), of the other part," and witnessed that "in consideration of the sum of £1,150 as purchase-money to the vendor paid by the purchaser on or before the execution of

(*a.*) Reported by PERCY H. WINFIELD, Esq., Barrister-at-Law.

these presents . . . the vendor as beneficial owner hereby conveys unto the purchaser" North Hill House "to hold the same unto and to the use of the purchaser in fee simple."

The conveyance was executed by the vendor and also by Henry Wray, who signed the name "William Wray" at the end of the conveyance with the concurrence of the other partners. Henry Wray retired from the partnership, receiving from his partners the full value of his share in the partnership assets, including North Hill House; and died in 1902. His widow, who was his sole executrix and representative, did not claim any beneficial interest in the property.

The heir-at-law of William Wray was William James Wray, one of the partners. Since the purchase North Hill House had always been dealt with as part of the partnership assets.

This was a summons taken out by the three continuing partners for a declaration that upon the true construction of the conveyance the legal estate in North Hill House passed to the persons then carrying on business under the style of William Wray—namely, the plaintiffs and the late Henry Wray—as part of their partnership property.

H. Greenwood, for the summons.

C. J. Mathew, for the representative of Henry Wray, offered no opposition.

WARRINGTON, J., having stated the above-mentioned facts, said: The only question I have to decide is what has become of the legal estate in North Hill House, for under the circumstances the legal interest and the beneficial interest go in the same way. The question turns upon the meaning to be given to the conveyance to William Wray. An authority has been cited which, although it does not deal with real estate, appears to be exactly in point, *Maugham* v. *Sharpe*, 12 W. R. 1057, 17 C. B. N. S. 443. In that case a certain person called William Dolby, to secure an advance made by two persons named Sharpe and Baker, who carried on business under the style of the City Investment and Advance Co., executed a deed whereby he assigned by way of mortgage certain chattels to the City Investment and Advance Co. The question arose in the case as to the effect of that deed and as to the rights of Sharpe and Baker under it, and on that part of the case Erle, C.J., and Williams, J., made the remarks which I am about to read. The Lord Chief Justice said this: "The bill of sale under which the defendants claim purports to convey the property to the City Investment and Advance Co., and not to the defendants by name; and it was contended for the plaintiff that the goods could not pass to Sharpe and Baker. No doubt Dolby considered that there was a company of which the one was manager and the other secretary. It is clear that individuals may carry on business under any name and style which they may choose to adopt, and I see no reason why the defendants may not do so under the name of the City Investment and Advance Co. If parties pretend to be a corporation, and presume to usurp the rights and powers of a corporate body as against the Crown, they may render themselves liable to be proceeded against for so doing. But, as between these parties, the City Investment and Advance Co. are Sharpe and Baker, and consequently the conveyance in question is a conveyance to those individuals." Williams, J., made the following remarks: "It has been objected on the part of the plaintiff that that conveyance is inoperative, because it is necessary in a grant that the grantees should be named, otherwise the grant can in law have no operation. I apprehend, however, it is fully settled that a grant may be good though the grantee be not named by his Christian or surname. In Shepherd's Touchstone, p. 236, the learned author, after discussing the consequences of a mistake in the Christian name or surname of the grantee, goes on to say: 'And yet, if the grant do not intend to describe the grantee by his known name, but by some other matter, there it may be good by a certain description of the person, without either surname or name of baptism'; for, he adds, '*id certum est quod certum reddi potest.*' In this case, I apprehend, the meaning of the grant is plain; the deed purports and intends to convey the goods to those persons who use the style and firm of the City Investment and Advance Co. They may or may not be a corporation, but when it is ascertained that those who carry on business under that name are the defendants, the deed operates to convey the property to them."

It seems to me that although the decision in that case only dealt with chattels, the reasoning of the judgment applies to the particular case before me. I have to ascertain who was meant by the person described as William Wray in the deed; and I find on the authority of this judgment that I may, instead of William Wray, read the deed as a conveyance to the four partners—Eliza Wray, Henry Wray, William James Wray, and Joseph Turnbull. So reading the deed and inserting the names of the partners, it becomes a conveyance to these four persons. The legal estate is not affected by the fact that the purchase-money was partnership property, and the beneficial interest was already vested in the four partners. I will therefore make a declaration that the legal estate passed to the plaintiffs and Henry Wray as joint tenants, and that on the death of Henry Wray it passed to and is now vested in the plaintiffs in fee simple.

Solicitors, *Howard & Skelton.*

House of Lords.

From C. A. (England). Aug. 3, 1905.

GUARDIANS OF WEST HAM UNION AND GUARDIANS OF HOLBEACH UNION. (*a.*)

Poor law—Settlement—Three years' residence—Illegitimate child—Residence under sixteen—Irremovability—Divided Parishes Act, 1876 (39 & 40 *Vict. c.* 61), *ss.* 34, 35.

Under the Divided Parishes Act, 1876, *ss.* 34, 35, *an illegitimate child may acquire a settlement for herself by three years' residence in a parish with her mother, although under the age of sixteen years.*

E. N. (who was illegitimate), while under sixteen, resided with her mother for three years in the parish of West Ham under circumstances which rendered her irremovable from that parish and settled therein. After attaining sixteen she had acquired no new settlement.

Held, she had acquired a settlement for herself in West Ham.

Decision of the Court of Appeal (52 *W. R.* 513, [1904] 2 *K. B.* 121) *affirmed.*

Appeal from order of Court of Appeal (52 W. R. 513, [1904] 2 K. B. 121) (Collins, M.R., and Romer and Mathew, L.JJ.), affirming the judgment of a Divisional Court (Lord Alverstone, L.C.J., and Wills and Channell, JJ.), on a special case (52 W. R. 30, [1903] 2 K. B. 627).

(*a.*) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

The case is set out at length in the court below and the necessary facts are given in Lord Macnaghten's judgment.

Emma Neep, an illegitmate child, was born in the Wisbech Union in 1879. From the 27th of June, 1890, to the 28th of July, 1893, she resided with her mother in the West Ham Union in such manner and under such circumstances in each of such years as would, in accordance with the statutes in that behalf, render her irremovable therefrom and settled therein. Afterwards she went into service, but has had no settled residence. The Court of Appeal were of opinion that she had acquired a settlement in West Ham.

Avory, K.C., and *Montague Lush, K.C.* (*Grubbe* with them), for the appellants.

Rawlinson, K.C., and *C. B. Marriott*, for the respondents.

Aug. 3.—Earl of HALSBURY, L.C.—In this case, if it were *res integra*, I might be inclined to favour the view which Mr. Lush has urged upon us with so much ability. Indeed, I am not sure that I would not go further than he does and strive to bring back the meaning of the word "settlement" to the meaning it had when Butt and Lord Kenyon were its expositors; but the statute which has turned a "status or irremovability" into a settlement has rendered such an effort impossible.

The case of *Reg.* v. *Elvet*, 7 W. R. 586, 2 E. & E. 266, expounded as it was by your lordships in this House, decides the question here in debate. Rightly or wrongly, this House has decided that unemancipated residence could found a settlement in the *Highworth case*, 38 W. R. 295, 14 App. Cas. 465. I see no answer to what the Master of the Rolls points out, that if a part of the residence while under sixteen may be available to make up the settlement, with what logic could it be suggested that the whole residence under sixteen cannot do so also.

If that decision was wrong, we must abide by it till it is altered by an Act of Parliament. I move, therefore, that this appeal be dismissed with costs.

Lord MACNAGHTEN.—The question proposed in the special case for the opinion of the court is whether Emma Neep, the mother of the pauper, acquired a settlement in West Ham under the Divided Parishes Act, 1876, ss. 34, 35.

The opinion of the Court of Appeal was in the affirmative. In the result of that opinion I agree. But I was much impressed by the argument of counsel as to the difficulties that may arise if it be held that an unemancipated child can acquire a settlement by residence, no part of which is after emancipation. And therefore, without expressing disagreement with the view of my noble and learned friend on the woolsack, I should be disposed to rest the case on section 35 rather than on section 34. Emma Neep was herself illegitimate. Her mother married after Emma was born, and derived from her husband a settlement in West Ham. Emma Neep resided with her mother and her mother's husband in West Ham, and she took and followed her mother's settlement until she attained the age of sixteen. On attaining that age she "retained" her mother's settlement. But her settlement then, in my opinion, ceased to be a derivative settlement, and became a statutory settlement—a settlement created for the first time by the second clause of section 35 of the Act of 1876. And thus Emma Neep acquired a settlement which was no longer a derivative settlement in the parish of West Ham.

By the first clause of section 35 all derivative settlements are abolished, with two exceptions—one in the case of a wife, which has no application to the present question; the other in the case of a legitimate child under the age of sixteen. In the latter case the child on attaining sixteen retains the settlement which it had taken up to that age. But it can no longer be a derivative settlement, for the enactment expressly abolishes derivative settlements, with the two exceptions I have referred to. A corresponding result must, as it seems to me, follow in the case of an illegitimate child, though the provision is rather obscure owing to its brevity. "The practical effect of the second clause of section 35 is," says Lord Watson, "to place illegitimate, as nearly as may be, on the same footing with legitimate children."

Lord ROBERTSON.—I concur.

Order of Court of Appeal affirmed and appeal dismissed with costs.

Solicitors, *F. E. Hilleary; Callard & Vulliamy*, for *Richard P. Mossop*, Holbeach.

Court of Appeal.

Appeal.
(Collins, M.R., and Romer and Mathew, L.JJ.) — Nov. 7.

SPACEY v. DOWLAIS GAS LIGHT AND COKE CO. (LIMITED). (a.)

Master and servant—Employers' liability—Accident—Compensation — Factory — Gas mains — Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 7.

A workman was employed by a gas company in opening up a road under which a gas main was laid so as to get at the main. While doing so he was injured by an accident. The gas company owned the gasworks where the gas was manufactured and the mains under the roads in the district which were connected with the gasworks and were used for distributing the gas to the consumers' houses. The place where the accident happened was about a quarter of a mile from the gasworks, and there was no steam, water, or other mechanical power used there. In proceedings to assess compensation under the Workmen's Compensation Act, 1897, *it was admitted that the gasworks themselves were a factory.*

Held, that the gas mains did not form part of the factory, and that the applicant was not employed on or about a factory when the accident happened.

Appeal from an award by Judge Gwilym Williams at the Merthyr Tydfil County Court under the Workmen's Compensation Act, 1897.

The applicant was a workman in the employment of the Dowlais Gas Light and Coke Co., who owned the gasworks and distributing mains connected therewith at Dowlais. The applicant while employed in opening up a road for the purpose of getting at a gas main was injured by an accident. The place where the accident happened was about a quarter of a mile from the gasworks, which were a factory within the meaning of section 7 of the Workmen's Compensation Act, 1897. No steam, water, or other mechanical power was used at the place in question. The applicant claimed compensation upon the ground that the gasworks and gas mains were all part of one concern, which was a factory within the Act, and that therefore the employment at the time of the accident was "on or in or about a factory."

The county court judge held that the gas mains

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

were part of the factory, and that therefore the applicant was entitled to compensation.

The employers appealed.

A. Parsons, for the employers.—The gasworks themselves are a factory within the definition in section 7, sub-section 2, of the Workmen's Compensation Act, 1897, by reason of the incorporation therein of the definition of factory in section 149, sub-section 1 (*c*), of the Factory and Workshop Act, 1901. The gasworks are a factory because gas is made there by the aid of mechanical power. The gas mains, however, are no part of the factory. They are concerned, not with the manufacture, but with the distribution of gas after it has been manufactured. The county court judge misapplied some *dicta* in *Fenn* v. *Miller*, 48 W. R. 369, [1900] 1 Q. B. 788, and therefore misdirected himself in coming to his conclusion. If his decision was right every place to which the mains extend are part of the factory. Such a conclusion cannot be supported. The decision is therefore wrong.

Bigham (*J. Sankey* with him), for the applicant.—Such undertakings as gas, electric light, and water undertakings are different from other undertakings which are carried on in factories. In ordinary factories the goods are manufactured in the factory and then delivered to purchasers either at the factory or by means of carts or by rail. Gas, electric light, and water can only be delivered by means of mains which belong to the undertakers and which are part of one entire undertaking. The gasworks are only valuable if they are connected with a system of mains so that the gas may be supplied to the houses of consumers. It is impossible to separate the manufacture from the supply of gas. Therefore the county court judge was right in holding that the applicant was at the time of the accident employed on or about a factory. Further, assuming that the mains are no part of the factory, still the applicant was employed "about" the factory. "About" denotes physical contiguity, and that physical contiguity with the factory is provided by means of a continuous line of pipes. The county court judge's finding, so far as it is a finding of fact, cannot be disturbed.

He referred to *Powell* v. *Brown*, 47 W. R. 145, [1899] 1 Q. B. 157; *Atkinson* v. *Lumb*, 51 W. R. 516, [1903] 1 K. B. 861.

COLLINS, M.R.—It seems to me to be quite clear that this case falls outside the largest meaning which can be given to the word "about" as used in section 7, sub-section 1, of the Workmen's Compensation Act, 1897, and the county court judge, in arriving at the conclusion that the applicant was employed "on or in or about a factory," mistook and consequently misapplied what this court has said as to the meaning of the word "about." He treated the applicant as having been employed at the time of the accident about the factory because he was employed on or about the main through which the gas passed. Underlying that conclusion is this—that the gas main is itself part of the factory, as that is the only way in which the applicant can be said to have been employed about the factory. The factory where the gas was manufactured was a quarter of a mile away from the place where the applicant met with the accident. The county court judge treated the main as part of the factory. When we look at the definition of the word "factory" in section 7, sub-section 2, of the Workmen's Compensation Act, 1897, which refers to the Factory and Workshop Acts, now the Factory and Workshop Act, 1901, it is obvious that the conditions therein specified which make any particular premises a factory come to an end and are entirely spent when the gas is made and ready for delivery to consumers, and that the mains, which form the channel or road through which the gas when made travels without assistance and is delivered to consumers, are no part of the factory. That method of delivering the gas is something different from its manufacture, which is completed and over before the delivery through the mains begins. It would be unduly extending the decisions of this court if we were to make the area of the factory extend to the mains, especially considering that the area of the factory would thereby be made to extend to every place in which the mains were laid. The county court judge only arrived at the conclusion he did by a misdirection, and as the whole of the materials are before the court, there is no reason for sending the case back to him, and the appeal must be allowed and his decision reversed.

ROMER, L.J.—I am of the same opinion. The applicant cannot be brought within the Act of 1897 by reason of the physical proximity of the main where the accident happened to the factory where the gas was manufactured. Therefore the only way in which he can be brought within the Act is by saying that the mains are all part of the factory. In my opinion that contention cannot be maintained. The mains do not form part of the gas factory. They are not used for or in connection with the manufacture, but only with the supply of the gas. They are practically necessary for the purpose of the gas company's business, but the business of the supply of gas is distinct from the business of its manufacture. No doubt it is convenient that the gas company should undertake the supply of gas as well as its manufacture. The gasworks are a factory within the meaning of the definition in section 7, sub-section 2, of the Act of 1897 by reason of the premises being used for the manufacture of gas by mechanical power, which has nothing to do with the pipes by means of which the gas is delivered to consumers.

MATHEW, L.J.—I am of the same opinion. In the ordinary use of language a gas factory is a place where gas is manufactured. There are two businesses carried on by the gas company—one the making of gas, and the other the distribution of gas when made. Those two businesses might conceivably be carried on by different persons. We ought not to extend the word factory so as to make it include the physical thing by means of which the gas is distributed. There is danger connected with the manufacture of gas, and the Legislature has accordingly extended the protection of the Act to employment in that work. The applicant's employment had no connection with the manufacture of gas, but was connected with the method adopted of delivering the gas to consumers. In my opinion the Act does not apply.

Appeal allowed.

Solicitor for the applicant, *F. Sydney Simons*, Merthyr Tydfil.

Solicitors for the employers, *William Hurd & Son*, for *Gwilym James, Charles, & Davies*, Merthyr Tydfil.

Appeal.
(Collins, M.R., and Romer and Mathew, L.JJ.) — Nov. 3.

COULTHARD v. CONSETT IRON CO. (*a*.)

Master and servant—Employers' liability—Dependant—Desertion by husband of wife—Workmen's Compensa-

(*a*.) Reported by MAURICE N. DRUCQUER, Esq., Barrister-at-Law.

tion Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 7, *sub-section* 2; *First Schedule*, *s.* 1, *sub-section* 2.

A. was married to B. in 1882, *and lived with her till June*, 1905. *He then left her owing to a quarrel, being at the time out of work. He took with him one child, whom he subsequently sent back to B. After A. left her B. supported herself, partially by occasional work and partially by charity of relatives. Within three months from the time A. left B., A. met with an accident, resulting in his death, he having been at the time in employment for three weeks, during which he did not contribute to his wife's support.*

Held, B. was wholly dependent upon her deceased husband within section 7, *sub-section* 2, *of the Workmen's Compensation Act*, 1897.

Appeal from the award of the judge of the Newcastle-upon-Tyne County Court.

The respondent, Elizabeth Ann Coulthard, was married to her husband in 1882, and lived with him to June, 1905, there being three children of the marriage. He had been for some weeks out of work and the furniture had to be sold to support the family. A quarrel arose between the respondent and her husband, resulting in the husband leaving her. He took one child with him, but subsequently sent him back to the respondent. He left the town where the respondent was living, and she never saw him again, although she stated in her evidence that she "expected him back every day to provide a home."

About three months after he left the respondent he met with a fatal accident in the course of his employment at the appellants' works. He had been so employed for three weeks previous to the accident, but had never sent any part of his earnings to the respondent, who had just managed to support herself by occasional work and assistance from her relatives; she was for one week obliged to go to the workhouse.

Upon these facts the county court judge found that the respondent and her children were dependent upon the deceased and made an award.

Ruegg, K.C. (*Meynell* with him), for the appellants.—The applicant to come within the Act must be dependent upon the deceased at the time of his death. It is immaterial whether there was a legal obligation upon the deceased to support the applicant, if as a matter of fact he was not supporting her: *Rees* v. *The Penrikyber Navigation Colliery Co.*, 51 W. R. 247, [1903] 1 K. B. 259. [ROMER, L.J.—In that case the deceased was the son of the applicant. There was no legal obligation upon him to support his mother, only indirectly under the poor law. The mother would have had no claim against the son.] The same question has arisen in Scotland. The decision of *Sneddon* v. *Addie & Sons' Colliery* (*Limited*), 6 F. 992, is against me admittedly, but I submit the earlier case of *Turners* (*Limited*) v. *Whitefield*, 6 F. 882—a case of husband and wife—was correct. If the husband deserts his wife, and contributes nothing to her support, how can she be said to be dependent upon him, especially if she does not look to him but manages to support herself. The facts of the present case clearly show desertion, and the respondent was able for two months to support herself.

Syme, for the respondent, was not called upon.

COLLINS, M.R.—This was an appeal from the decision of a county court judge, who has held that the wife was dependent, under the Workmen's Compensation Act, on the earnings of her husband at the time of his death by an accident. The contention is that on the facts no dependency existed at the time of the death. The facts upon which that contention is sought to be supported are these: The husband some months before his death had left the wife. In point of fact he was in work, and had been in work some three weeks before the date of the accident. There had been some quarrel between the husband and the wife; he had fallen out of work, sold the furniture, and finally withdrew from the same house and town where his wife lived. Under these circumstances they were separated at the time of the accident. The wife had no other source of livelihood than her husband's earnings. From time to time she was able to earn a little herself, and she received doles from some of her relatives—given only out of charity. They just sufficed to keep her alive up to the time of her husband's accident. Under these circumstances the learned county court judge came to the conclusion that in fact she was dependent on her husband at the time of his death. Mr. Ruegg says that that cannot be a proper finding on the facts. The finding could only be appealed from on the ground that the learned judge has misdirected himself. This man was undoubtedly earning wages at the time of his death. We must look to the statute to see whether the wife was a dependent within its meaning. [The learned judge read section 7, sub-section 2, and first schedule, section 1, sub-sections 1 and 2, of the 1897 Act.] Why was this woman not a dependant? I think it is an important fact as distinguishing it from the decision so much relied on by Mr. Ruegg that the relation actually subsisting was that of man and wife, and that therefore there was a direct obligation upon the husband to support his wife. True, if the wife has means of subsistence irrespective of her husband's earnings which she can and does rely upon and treats as a source of income, then she may be said in fact not to be dependent upon her husband. The House of Lords have decided that it is a question of fact whether she is dependent. She is dependent if there is a primary obligation upon the husband to support her by his earnings and she has in fact no other source of income to rely on other than that. It has been contended, on the authority of some Scotch decisions, that if from any source the wife has managed to subsist, has been able to live, then inasmuch as she has not been drawing money from her husband's earnings she cannot be said to be dependent at the time of his death. That was the main argument. In support of it he relied upon *Turners* (*Limited*) v. *Whitefield*, where it was held "that a woman who had been for fourteen years living apart from her husband, and was supported by an illegitimate son, was not wholly or in part dependent on the earnings of her husband, and was not entitled to compensation under the Act." Mr. Ruegg argued from this case that no inference as to dependency could be drawn from the primary legal obligation to support the wife. When that case is examined it does not go to any degree in the direction which Mr. Ruegg seeks to assert. The inference of fact drawn was that the wife had another source of subsistence upon which she was dependent. There were three special reasons which made it conclusive in fact that she was not dependent upon her husband. The facts are the other way in this case. There was no certain source of income. She only had those precarious doles and precarious opportunities of earning something herself other than the wages of her husband. The distinction is brought out in the next case reported in 6 F., at p. 992, *Sneddon* v. *Robert Addie & Sons' Collieries* (*Limited*). There, in July, 1901, a husband deserted his wife and thereafter did not contribute anything to her support. She suffered from chronic bronchitis and varicose veins to an extent which incapacitated her from work requiring ordinary exertion, and she became unable to do anything for her own support. Her husband

having in 1904, in the course of his employment, sustained injuries from which he died, she claimed compensation under the Workmen's Compensation Act, 1897, from his employers. It was held that the claimant was dependent on the earnings of her husband at the time of his death. Lord Moncrieff, in the course of his judgment, said: "If in order to constitute total dependency in the sense of the statute it is essential that the deceased workman was at the date of his death supporting the respondent, the judgment is wrong, because the dead workman did not contribute a farthing to her support from the time that he deserted her in 1901. But I do not think we are tied up to such a construction of the statute. A husband is primarily bound to aliment his wife. Exceptional cases, no doubt, may be figured in which, notwithstanding that primary obligation, the wife could not be said in any reasonable sense to be wholly dependent on his earnings. She might have means of her own, or she might be earning her own livelihood, or she might be living apart from her husband under an express or implied agreement with him that she would make no claim upon him, but look for support either to her own exertions or her relatives. That was the case recently decided by the first division of the court in *Turners (Limited)* v. *Whitefield*. That case in no way conflicts with the sheriff's judgment . . . Indeed, speaking for myself I think that this point has already been decided by an unanimous decision of this division in the case of *Cunningham* v. *M'Gregor & Co.*, 3 F. 775. In that case it is true that the husband, who lived apart from his wife and family, contributed on an average about £5 a year towards their support. But the question raised was not whether the wife was partially dependent upon him—that was admitted—but whether she was wholly dependent upon him. The court held unanimously that she was wholly dependent upon her husband." The case of *Cunningham* v. *M'Gregor & Co.*, referred to by Lord Moncreiff in his judgment, seems, also directly in point in this case. The Scotch authorities, which though not binding on this court are always treated by it with the greatest respect, are conclusive that in such a case dependency exists. For such reasons, not only on the authority of the Scotch cases, but for the reasons I have stated, it is perfectly clear that the decision of the learned county court judge was right and will not be impeached by us.

ROMER, L.J.—I am of the same opinion. The question is purely one of fact. Was the wife at the time of the husband's death dependent on his earnings? I think that it cannot be said that on the evidence before him the learned county court judge could not reasonably come to the conclusion that the wife was dependent on the husband's earnings at the time of his death. He was admittedly earning wages at the time of the accident. He had left her to get work. [The judge stated the facts as set out above.] The wife tried to support herself. It was clear that she was not able to support herself by her own labours, and she had no means of her own to maintain herself. She was clearly dependent on somebody. She had a husband living whose duty it was and who was liable to support her. Can it therefore be said that it was unreasonable to infer that she was dependent on him at the time of his death. I think it ought to be inferred, unless there are other circumstances to justify the conclusion that at the time of the death in fact she did not and could not look to the husband and his wages for her support. The evidence before the learned county court judge did not compel him to come to any such conclusion. I think on the evidence that the county court judge could reasonably hold that the wife did look to the husband and depended on him for support. They had lived together for a considerable time until he left her, owing to some quarrel, to get work. He was away for three months. He did get work for a short time before his death. Is it a fact that the wife treated him as having nothing to do with her, and was she in no practical sense looking to him as her husband who was liable to support her? There was one piece of evidence which alone shows that the county court judge might come to the conclusion he did. The wife says "I expected him back every day to provide a home." I see no reason to doubt that statement. She looked to him to maintain and support her. I think she was at the time of the death dependent on her husband, and in fact I think that dependency was not valueless but substantial. I consider there was evidence for the conclusion to which the county court judge came.

MATHEW, L.J.—The case was argued on the assumption that the husband left his wife with the intention of never returning to support her. Even if that were made out it seems to me that the position of the wife was unaffected. She would not cease to be dependent on her husband, although the husband's intention was not to return. But I think on the evidence the county court judge could be asked to say that there was permanently a dependency on the obligation of the husband to the wife and children. The wife was clearly dependent on the husband. The man went away to look for work and took one child with him. The inference from that is that sooner or later he would revert to the old position. After a time the child was sent back. It is said that that was discreditable to the father. Why should that be said. Probably at the time he was unable to provide for it. Subsequently he got work for about three weeks before his death. He did not send his wife any money, but possibly he was in debt. Under these circumstances it cannot be said that she was not dependent on him. Can it be said that she ceased to be dependent because of the assistance of others. She had no right to that That could not take it out of the Act. She was clearly dependent, and the appeal must be dismissed.

Appeal dismissed.

Solicitors for appellant, *Rawle & Co.*, for *Cooper & Goodger*, Newcastle

Solicitors for respondent, *Belfrage & Co.*, for *J. Murray Aynsley*, Consett.

High Court of Justice.

Chan. Div. } Buckley, J. } July 19, 20, 21, 22; Aug. 1, 1905.

BEHRENS v. RICHARDS AND OTHERS. (a.)

Trespass—Alleged highway—Existing user—Coast—Foreshore—Injunction—Practice.

Although there may be failure to prove any pubbic right of way recognized by law over the foreshore or the rough cliff paths leading to the sea, it does not follow that in an action for trespass by the owner of the locus in quo, *even where the defendants trespassed and broke down obstructions in assertion of their supposed rights, the court is bound or will, in the absence of good reason, grant an injunction.*

(a.) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

The plaintiff owned part of the coast where there were paths leading to the sea, which had been for many years used by fishermen and others. Such user did no damage to the plaintiff, or interfere with any plans for building or development of the property. The plaintiff put obstructions upon these paths, which the defendants, in assertion of their supposed rights of highway, broke down. The plaintiff brought an action claiming an injunction. The Attorney-General was not a party. The defendants failed to prove any public rights of way.

Held, that the plaintiff was not entitled to have an injunction, and that it was sufficient to give him nominal damages.

Llandudno Urban Council *v.* Wood, 48 *W. R.* 43, [1899] 2 *Ch.* 705, *followed.*

Action.

This was an action for trespass brought to negative an alleged public right of way over paths and roads leading to the shore of the sea on a part of the Cornish coast belonging to the plaintiff, and situated in the parish of St. Hilary, near Marazion. These paths and ways led to certain coves called Channell Rush, King's Cove, Pixie's Cove, and Bessie's Cove, and were called respectively during the trial the "green way," the "purple way," and the "red path," from the colouring on the map used. The green way was hardly more than a footway. The purple way which joined the green way at a point on the cliff was widened and developed into a road about 1870.

As far back as the evidence went there was always a means of carrying fish up this cliff in baskets by this way.

Fishermen had landed their fish in King's Cove for a long time, but for some years—say, ten to twenty years—the fishing had been indifferent and much less had been done. At Bessie's Cove there was a slipway, and in recent years it had been more used than King's Cove by the fishermen. In Pixie's Cove there were some beautiful natural caverns, and the path there had been chiefly used by persons going to explore these caverns. To the north of Bessie's Cove, at a spot where the road was some seven feet wide, there was a small recess or bay which the defendants said had been used as a passing-place for carts. The plaintiff had acquired the property in which this part of the coast and these paths were situated about eighteen months before the action. Being of opinion that he was within his rights, he took physical means to prevent the country people from using the disputed ways. He dug a trench across the road to the north of the purple and green ways so that no cart could go that way, and he also built a wall. These obstructions of the existing way were not made in the course of the erection of new buildings or of any development of this part of the property for new purposes. He also put a fence at the junction of the green and purple ways. He filled up the turf bank at a gap leading to Pixie's Cove so that access could not be obtained to that cove by the old path, and he planted the place alleged to be a passing-place with hyacinths. The defendants, who were eleven in number and were fishermen and others of a like station in life, took forcible means to assert what they conceived were their rights. They filled up the trench, reopened the gap through Pixie's Cove, and demolished the fence, and they, or others, trampled on the hyacinths. Under these circumstances the plaintiff brought the action asking for an injunction to restrain the defendants from trespassing upon the disputed ways and for damages. The defendants pleaded that all the ways were common and public highways, and that what they had done was for the purpose of enabling them to use these highways.

Astbury, K.C., G. A. S. Garland, and the *Hon. T. H. Watson,* for the plaintiff.—We do not press for an injunction, if we can have a declaration made that there is no public right of highway over the paths in question. Still we say that we are entitled to it as the defendants are asserting against us what they say is a right, and they evidently intend to repeat their conduct: *Bourke* v. *Davis*, 38 W. R. 167, 44 Ch. D. 110; *Stocker* v. *Planet Building Society*, 27 W. R. 793, 877; *Goodson* v. *Richardson*, 22 W. R. 337, 9 Ch. D. 221; *Colls* v. *Home and Colonial Stores*, 53 W. R. 30 [1904] A. C. 199; *Brinckman* v. *Matley*, 52 W. R. 363, [1904] 2 Ch. 313; *Llandudno Urban Council* v. *Wood*, 48 W. R. 43, [1899] 2 Ch. 705; *Imperial Gas Light and Coke Co.* v. *Broadbent*, 7 H. L. C. 600, 8 W. R. H. L. Dig. 4; *Cooper* v. *Laidler*, 51 W. R. 539, [1903] 2 Ch. 337.

J. G. Wood and *J. R. Randolph*, for the defendants.—It is unnecessary for the plaintiff to ask for an injunction. He does not want the roads, and no damage was being done to him by their use. The court will not under the circumstances grant an injunction against the defendants in any case.

Cur. adv. vult.

Aug. 1.—BUCKLEY, J.—The plaintiff asks an injunction to restrain the defendants from trespassing on the disputed ways. The defendants plead that all the ways in question are common public highways. First, as regards the passing-place, the matter is to my mind too insignificant to require any intervention by this court. That a passing-place was a convenience at the spot in question I have no doubt, and it was no inconvenience or injury to the plaintiff. There was no reason why he should plant it with hyacinths. I pass by this petty contest without further mention. It is matter for the application of reason, common sense, and ordinary forbearance, not for an injunction. As regards the three ways—the green way, the purple way, and the red path, the action is not so constituted as that I can in this proceeding determine so as to bind the public whether there be public rights over those ways or not. The Attorney-General is not a party. I have only to decide whether the defendants have as matter of defence made out that they have such a public right of way as they allege so that the plaintiff was not entitled to exclude them. In my opinion the evidence falls short of establishing the defence that these ways are common and public highways. To those who are conversant with the Cornish coast or with many other parts of the coast in this country it will be familiar that there are frequently to be found rough tracks or paths which have in fact been used without objection made by the landowner for very many years. From this fact alone it is difficult in surroundings such as there are in this case to infer an intention to dedicate. In permitting persons to stray along the cliff edge or wander down the cliff face or stroll along the foreshore the owner of the land was permitting that which was no injury to him, and whose refusal would have been a churlish and unreasonable act on his part. From such a user nothing, I think, is to be inferred. If it were otherwise, a landowner would be compelled to prohibit such user as this lest at some future time, when perhaps the cliffs now practically deserted may become the site of a place like Bude, Cromer, or Bournemouth, he should be told that he could not lay out his estate as he was minded because rights of highway existed which precluded him from so doing. No part of the disputed ways has ever become repairable by the parish. The parish roads (as is common in many parts of Cornwall) are in this neighbourhood joined by rough tracks coming up from the irregular contour of the broken coast line, which serve to give access to the foreshore on the

lands adjoining the foreshore; and these rough cart tracks in turn degenerate into mere rough foot tracks crossing the moorland and ending sometimes in the roughest of paths by which the adventurous may scramble down the face of the cliff to the sea. From the mere fact that the landowner has never raised objection to any one who was so minded making use of tracks such as these no inference of dedication can, I think, be drawn. There may no doubt exist, and there does in my opinion in this case exist, another question—that is, whether a public right may in some such case have been acquired for the purpose of access to the foreshore as the means of reaching the highway of the sea and there exercising the public right of fishing. That arises in the present case as regards King's Cove. In *Blundell* v. *Catterall*, 5 B. & Ald. 302, Holroyd, J., speaks of public common law rights with respect to the sea of obtaining access thereto by and from such places as necessity or usage have appropriated to those purposes. I am pronouncing no final opinion, but only an opinion as between the parties to these proceedings, when I say that I think these defendants have failed in making out a public right over the green and purple ways for the purpose of access to King's Cove for fishing. As regards dedication, the purple way, as I have said, as such, has existed, I think, only from 1870, and substantially the user of the purple and green ways has been by tenants of the estate. Moreover, as regards about the last fifty years, the circumstances have been such as regards settlements and tenancies as that dedication binding the owner of the inheritance is not to be presumed. On the whole, therefore, I have arrived at the conclusion that the defendants have not established the public rights of way which they assert. The order will, therefore, contain an expression of the opinion of the court to that effect. From the fact, however, that I arrive at the conclusion that the defendants have not established the common public rights which they claim, it does not, in my opinion, follow that the plaintiff is entitled to the formidable weapon of an injunction of this court. He asks the court by injunction to forbid the continued user of ways which have in fact for many years past been enjoyed, and whose enjoyment is no injury to the owner of the land, unless and until, under altered circumstances, the reasonable enjoyment of his property is affected by its continuance. No doubt it is the law that upon the foreshore of this country and the rough cliff paths which exist in many places along the coast the public have not a right of way recognized by the law, and no doubt it is true that rights of property are as a general proposition entitled to protection by, if necessary, an injunction of this court. But it does not follow that if the owner of the foreshore—say, at some well-known seaside resort—came to this court for an injunction to restrain the nurserymaids from wheeling their perambulators on the sand or the children from playing on the rocks, this court is bound to make, or in the absence of good reason, would make, such an order. In *Llandudno Urban Council* v. *Woods*, [1899] 2 Ch. 705, Cozens-Hardy, L.J., then a judge of first instance, refused it. The existing security of the tenure of land in this country is largely maintained by the fact that the owners of the land behave reasonably in the matter of its enjoyment. It would, in my judgment, be a disastrous thing, not for the public only, but for the landowners also, if this court, at the caprice of the landowner, not because circumstances have altered, but merely because he was minded that it should be so, entertained every trivial application to restrain persons by injunction from using paths which, though not public highways, have in fact been used by permission of the owners for many generations, and whose user is no injury to the owner of the land. The landowner, if he be wise, will rather erect upon the road or path a notice expressive of permission, or even of invitation, to persons who make use of the way in an orderly and reasonable manner. I am glad to say that the plaintiff in this case, by his answers to myself in the box, disclaimed any intention of acting thus capriciously, and that he has by his counsel offered to make a disclaimer in terms which I will read presently in the exact words in which Mr. Astbury offered it, and which will form part of the order of the court. The people must understand that in availing themselves under this disclaimer, of the user which the plaintiff concedes they must conduct themselves in an orderly and reasonable manner. If effect be really given by the plaintiff to that disclaimer and the people act temperately and with good feeling in availing themselves of it, and if, by mutual concession as regards the purple and green ways, the plaintiff's intended building at King's Cove is rendered harmless by such a substitution or preservation of a way to the foreshore at that place as I have suggested, no further difficulty ought, I think, to arise in this case. The plaintiff must bear in mind that in proceedings properly instituted he might have great difficulty in maintaining that there is not at some one of the places here in dispute a public right of access to the foreshore for fishing, and that, as between Bessie's Cove and King's Cove, there is no obvious reason why the access should be by the former and not by the latter. As to this, however, I need say no more. I have only to consider whether, the defendants having failed, as I think, to make out that the ways are public, the plaintiff is entitled to an injunction. For the reasons which I have given, I think not. It is enough, in my judgment, that I should mark the opinion of the court that the acts of the defendants were wrongful by giving nominal damages. As regards the costs of the action, I think that both parties are to blame, and that neither the plaintiff, who fails to obtain an injunction, nor the defendants, who fail to establish the public rights which they claim, ought to receive costs. In dealing with the costs I have also borne in mind that the plaintiff makes a disclaimer which I am about to read. I wish to add, as matter to the plaintiff's credit, that he offered an undertaking not to enforce an order for costs if he obtained one. The judgment which I pronounce is this: The court being of opinion that the defendants have failed to establish any right of public cartway or public footway over the purple way, the green way, and the red path, or any of them, as public highways, and the plaintiff voluntarily disclaiming any intention of preventing the fishermen in the district from reasonably exercising their calling, or of refusing to permit the defendants or any member of the public to exercise reasonable passage to or from such portions of the foreshore abutting on the plaintiff's property for the purpose of fishing or enjoying the beauties of the locality as may not from time to time interfere with his own or his tenants' user and enjoyment of his property, the court doth not think fit to make any order except that the defendants do pay to the plaintiff 40s. damages.

Solicitors for plaintiff, *Collyer-Bristowe, Hill, Curtis, Booth, & Co.*, for *J. Jewell Hill*, Penzance.

Solicitors for defendants, *Coode, Kingdon, & Cotton*, for *Edward Boase*, Penzance.

K. B. Div. (Channell, J.) July 5, 6, 1905.

GOLDSMITHS' COMPANY v. WYATT. (a.)

Inland Revenue—Imported watches—Customs Act, 1842 (5 & 6 *Vict. c.* 47), *s.* 59—12 *Geo.* 2, *c.* 26.

Imported gold and silver watches are not "plate" within the meaning of section 59 *of the Customs Act,* 1842, *and a seller of such watches which have not been assayed, stamped, and marked as required by the Customs Act,* 1842, *is not, therefore, liable to the penalties imposed by* 12 *Geo.* 2, *c.* 26.

Case stated.

The special case was in the following terms:

"This is an action brought by the plaintiffs for (1) £40 for penalties under the statutes 5 & 6 Vict. c. 47, s. 59 (the Customs Act, 1842), and 12 Geo. 2, c. 26, in respect of the sale of certain gold and silver watch-cases—to wit, two gold watch-cases and two silver watch-cases of foreign manufacture imported into the United Kingdom of Great Britain and Ireland from foreign parts since the commencement of the said Customs Act, 1842, which said gold and silver watch-cases were sold and exposed for sale in England before the same had been assayed, stamped, and marked as alleged to be required by the said Customs Act, 1842, and the Hall Marking of Foreign Plate Act, 1904; (2) a declaration that the said gold and silver watch-cases were respectively gold and silver plate within the meaning of sections 59 and 60 of the Customs Act, 1842, section 10 of the Revenue Act, 1883 and the Hall Marking of Foreign Plate Act, 1904."

"1. The plaintiffs are the Wardens and Commonalty of the Mystery of Goldsmiths of the City of London, who are and have been a guild and corporation time out of mind, with divers privileges confirmed and enlarged from time to time by divers statutes and by several charters from his Majesty's royal predecessors, Kings and Queens of this realm, amongst other things, for the searching, assaying, marking, and regulating wrought plate in order to ascertain the standard thereof for the good and safety of the public.

"2. The defendant is William Wyatt, carrying on business as a watchmaker, jeweller, and dealer in plate at No. 198, Ebury-street, Eaton-square, in the county of London.

"3. On the 14th day of March, 1905, four watches, of which two were in silver watch-cases, and two in gold watch-cases, were exposed for sale by the defendant at his said shop, and were then and there sold by him (the defendant) to one Sir Walter Sherburne Prideaux, an agent of the plaintiffs, for the sum of £7 7s. The said watches have been marked and numbered respectively 1, 2, 3, and 4.

"4. None of the said watch-cases are battered within the meaning of section 59 of the Customs Act, 1842, nor are they richly engraved, carved, chased, or set with jewels or other stones, and they are each and all of them of foreign manufacture, and have been imported into the United Kingdom of Great Britain and Ireland since the commencement of the Customs Act, 1842 (5 & 6 Vict. c. 47).

"5. None of the said four watch-cases were wrought or made prior to the year 1800.

"6. In the opinion of the Commissioners of Customs none of the said four watch-cases may be properly described as hand-chased, inlaid, bronzed, or filigree work of an Oriental pattern. The watch-case forming part of the said watch No. 3 is not incapable of receiving the marks referred to in the statute 12 Geo. 2, c. 26, or any of such marks by reason of the smallness or thinness thereof.

"7. None of the said four watch-cases so exposed for sale and sold on the 14th day of March, 1905, as aforesaid, at the time of the said exposure for sale and sale had been assayed or stamped and marked with the marks of the said plaintiffs or with the marks of any other duly authorized assay office in the United Kingdom of Great Britain and Ireland.

"8 The said four watch-cases have been weighed and assayed. No. 1 weighs 11dwt. 7gns., and is of a standard less in fineness than 11oz. 2dwt. of fine silver in every pound weight troy. No. 2 weighs 10dwt., and is of a standard greater in fineness than 11oz 2dwt. of fine silver in the pound weight troy. No. 3 weighs 2dwt. 3gns., and is approximately of a standard in fineness of 14 carats of fine gold in every pound weight troy, but has a dome and bow of base metal, and No. 4 weighs 11dwt. 10gns., and is of a standard of fineness of 18 carats of fine gold in every pound weight troy. All the said watch-cases bear Swiss Government hall-marks indicating the true standard of gold or silver employed in their manufacture and agreeing with the above-mentioned assays, and the dome of the watch-case No. 3 bears the mark 'cuivre,' denoting that the same is of base metal. . . .

"10. No legal proceedings have been instituted by the plaintiffs since the year 1842 in respect of the sale and exposing for sale of foreign watch-cases forming part of watches imported into the United Kingdom of Great Britain and Ireland and sold or exposed for sale before the same have been assayed, stamped, and marked. . . .

"12. Gold and silver watch-cases forming part of gold and silver watches imported into the United Kingdom of Great Britain and Ireland since the passing of the Revenue Act, 1883, have not been entered to be warehoused nor deposited in a bonded warehouse, but have been delivered for home use before they have been assayed, stamped, and marked.

"13. All highly finished articles of foreign plate, after being assayed, stamped, and marked by an assay office, have to go back to the shop for the marks to be 'set' and 'finished' before such articles can be placed on the market. The assaying, stamping, and marking of British-made watch-cases is invariably performed while the cases are in the rough and before they are polished, and before the movements are inserted therein. Foreign-made watch-cases are now never imported into the United Kingdom without being made up into finished watches, but formerly such cases when intended to be assayed and marked were, like British watch-cases, sent to the assay offices in an unfinished state, and were subsequently 'finished.'

"The points of law raised by the special case for the opinion of the court are: (1) Whether the said gold and silver watch-cases forming part of the said watches are respectively gold and silver plate within the meaning of sections 59 and 60 of the Customs Act, 1842, section 10 of the Revenue Act, 1883, and the Hall Marking of Foreign Plate Act, 1904; (2) whether upon the facts set out in the special case and agreed between the parties the defendant is liable to penalties under the statute 5 & 6 Vict. c. 47 (the Customs Act, 1842), which penalties are defined by the statute 12 Geo. 2, c. 26, in respect of the sale and exposing for sale of any one or more of the said gold and silver watch-cases. If the court shall decide the first question in the affirmative, a declaration shall be made accordingly. If the court shall decide the second question in the affirmative in respect of any one or more of the said watches, a declaration shall be made and judgment given accordingly. If the

(a.) Reported by ALAN HOGG, Esq., Barrister-at-Law.

court shall be of opinion that the defendant has not incurred any penalty in respect of any of the said watches, judgment shall be entered for the defendant."

Eldon Bankes, K.C. (*Graham Campbell* with him), for the plaintiffs.—These watches are plate within the meaning of section 59 of the Customs Act, 1842 and are therefore liable to the penalties imposed by 12 Geo. 2, c. 26. Watch-cases are recognized as "plate" in various Acts of Parliament as in 25 Geo. 3, c. 64, and 38 Geo. 3, c. 24. If watch-cases are to be regarded as "plate" for the purposes of the Customs Act, 1842, they must equally be so whether they are imported separately or with the works. It is not necessary for an article to be wholly made of gold or silver in order to be "plate": *Scott* v. *Solomon*, [1905] 1 K. B. 577.

Asquith, K.C. (*Newbolt* and *Sebastian* with him), for the defendants.—No one has ever suggested before that finished gold and silver watches are "plate," though this Act has been in force over sixty years. "Plate" means something substantially composed of gold and silver. That finished watches are not included in section 59 is shown not only by the context but by previous legislation, 38 Geo. 3, c. 24, and 43 Geo. 3, c. 68.

Eldon Bankes, K.C., replied.

CHANNELL, J.—This case raises the question whether gold and silver watches are gold and silver plate within the meaning of section 59 of the Customs Act, 1842, for if they are they are also within the other two Acts mentioned in the case. The word "plate" is one which is capable of a considerable diversity of meaning, and the difficulty is to determine what is the precise meaning that it ought to be held to bear in this particular section. But I cannot help saying at the outset that according to the ordinary use of language such an expression as gold and silver plate would not be understood to include a gold or silver watch. It is not an ordinary expression to use for such a thing. For instance, it is fairly clear that under a bequest of "all my plate" (without other words to assist the construction) a gold or silver watch would not pass. I have been referred to a number of statutes dealing with other matters of various kinds, some of which include watches within the category of plate, and others of which exclude them. But I do not think that a consideration of those statutes helps us much. Thus, in the Acts imposing a custom's duty on imported articles, gold and silver watches are not included under the head of plate, but are placed in a separate class by themselves. But there are obvious reasons for that. A comprehensive class like "plate" is useful to embrace a variety of articles which are respectively imported in but small quantities, but when you are dealing for purposes of custom's duty with specific articles which are imported in large quantities like watches, it would presumably be more convenient to place them in a class by themselves especially when the amount of the duty payable is made to depend upon the value of the article, which value in the case of watches would lie as much, if not more, in the works than in the precious metal of the case. Therefore those Acts do not afford us much guide to the meaning of the term "plate" in the Act before us. Nor do the Acts relating to excise duty on plate made or wrought in Great Britain. The duty thereby imposed did for a time attach to watch-cases, though afterwards watch-cases were exempted from the duty, probably with the object of encouraging the manufacture and export trade in them. Nor is any assistance to be got from the Acts requiring a licence for the sale of plate. Leaving those statutes one comes to the comparison of the two —12 Geo. 2, c. 26 and 5 & 6 Vict. c. 47—upon which the contention here mainly turned. The former of those two Acts provides, by section 5, that "no goldsmith, silversmith, or other person whatsoever making or selling, trading or dealing in gold or silver wares shall sell, exchange, or expose to sale within that part of Great Britain called England any gold or silver vessel, plate, or manufacture of gold or silver whatsoever . . . or export the same out of this kingdom" before it has been duly assayed and marked. The subject-matter of that section, then, includes anything that could be described as gold or silver ware, vessel, plate, or manufacture. And section 6 provides that certain wares of gold or silver, not including watches or watch-cases, shall be excepted from the requirements of the former section as to marking. I do not think that that statute was intended to deal in any way with imported articles; its operation has always been treated as confined to articles of gold or silver manufactured in this country. Then the Act of 1842 provides by section 59 that "All gold or silver plate not being battered which shall be imported from foreign parts after the commencement of this Act and sold, exchanged, or exposed to sale within the United Kingdom of Great Britain and Ireland shall be of the respective standards now required for any ware, vessel, plate, or manufacture of gold or silver"—referring back to the language of the Act of George II.—"wrought or made in England; and that no gold or silver plate so to be imported as aforesaid not being battered shall be sold, exchanged, or exposed to sale within the United Kingdom until the same shall have been assayed, stamped, and marked either in England, Scotland, or Ireland in the same manner as any ware, vessel, plate, or manufacture of gold or silver wrought or made in England, Scotland, or Ireland respectively is or are now by law required to be assayed, stamped, and marked." Now the subject-matter of that section is "gold and silver plate," and the question is whether that expression was intended to cover everything that was included in the expression "ware, vessel, plate, or manufacture" in the earlier Act. According to ordinary rules of interpretation I think one ought to say that if the Legislature had intended to cover precisely the same ground it would have used the same language. And having regard to the difference of the language in the two Acts I think I am justified in assuming that a different subject-matter was to some extent intended to be dealt with. But Mr. Bankes has relied on the proviso at the end of section 59: "Provided always that no article or ware of gold or silver so to be imported as aforesaid shall be liable to be assayed, stamped, or marked as aforesaid which would not be liable to be assayed, stamped, or marked if it had been wrought or made in England." He contends that the use of the word "ware" as applied to the imported articles with which the section deals shews that the draughtsman was using the terms "ware" and "plate" as interchangeable terms and as covering the same ground. But that, to my mind, is not a necessary inference. It may well be that the expression "ware of gold and silver" would include "gold and silver plate," but the converse is not true, not all wares of gold and silver come under the head of gold and silver plate. The two expressions are not co-extensive. Under these circumstances I must consider the meaning of the term "plate" in the later Act by itself without any regard to the classes of articles that were included in the term "ware" in the earlier. One of the tests, no doubt, to be applied for the purpose of determining the meaning of an Act is to consider what was the mischief intended to be provided against. Now here

the mischief aimed at was the same as that which was aimed at by the earlier Act—namely, the defrauding of purchasers by selling as gold and silver, articles made partly of those metals, but below the recognized standards of fineness. The provision was intended for the benefit of purchasers to insure them an opportunity of knowing what they were buying. Then does that apply to the watch-cases to which the questions in this case relate. Mr. Asquith does not dispute that if the cases were imported separately from the works they would be plate within the meaning of the section. But here the case finds that they were not so imported. Does a watch-case forming part of a finished watch come within the object of the section? Does the section apply to a composite article such as a watch, the value of which no doubt partly depends upon the quality of the gold or silver of which the case is made, but mainly upon the quality of manufacture of the internal parts of the watch? I think it does not. It may be that if very cheap works were put into a gold or silver case the case might be the more valuable part of the two. But that would be of but rare occurrence, and in general the value of a watch lies mainly in the works, the quality of the metal of the case being of a secondary consideration. I do not think the protection afforded by the section was intended to extend to the purchaser of a finished watch, inasmuch as he does not in general buy it for the sake of the value of the case. Nor would a finished watch come within what persons would ordinarily understand by the use of the word "plate." No one using the word in its ordinary sense would say that the mere fact that an article was partly made of silver and gold would bring it within the category of gold or silver plate. There is one argument which was addressed to me in support of the defendant's contention, and which I ought not to leave unnoticed—namely, that though the Act has been in force for more than sixty years no attempt has ever been made to treat finished watches as coming within its operation. Where, indeed, the court is called upon to construe an Act of Parliament expressed in unambiguous language it ought to put its own construction upon it regardless of the construction that has been commonly put upon it by other persons less skilled in the law. The fact that a mistaken interpretation has been generally put upon it cannot alter the law. But where the question is as to the meaning of an ambiguous term of common use the fact that it has for a long period of years been understood in a particular sense by persons who have an interest or duty in enforcing the Act becomes very material. And I think I am entitled to take into consideration the fact that the ambiguous term plate, which may mean very different things in different contexts, has not been hitherto understood as covering a completed watch of which a part only is gold or silver. I do not think that in order to make a thing come within the term "gold or silver plate" it would be necessary that it should be made entirely of gold or silver, but it must be a thing of which the precious metal is the main constituent of value, the part consisting of other material being merely accessory to the part which is made of gold or silver. But when the gold or silver which forms part of the article is accessory to the principal part which is not made of those metals I think that it could not be treated as coming within the word "plate." I must answer both the questions raised in the special case in the negative.

Judgment for defendant.

Solicitors for plaintiff, *Prideaux & Sons.*

Solicitors for defendant, *James & James.*

K. B. Div. (Jelf, J.) — May 15, 22, 1905

LEWIS v. BAKER. (a.)

Landlord—Tenant—Yearly tenancy—Construction of agreement.

By an agreement of tenancy certain licensed premises were let from a certain date "until such tenancy should be determined as hereinafter mentioned," at an annual rent of £70 clear of all deductions except landlord's property tax, payable quarterly. The tenant agreed further to keep the premises in repair, not to assign or underlet without notice, to keep up the licences wherever necessary, and the landlord had the right to eject the tenant for misconduct. The tenancy was terminable by three months' notice in writing.

Held, that, having regard to the above terms, the agreement was one for a yearly tenancy, terminable only by a three months' notice expiring at the end of any full year.

Action tried by Jelf, J., without a jury.

This was an action brought by Daniel Lewis to recover possession of certain licensed premises known as the Carpenters' Arms, Mountain Ash, in the county of Glamorgan, and the question raised was whether the notice to quit was a valid one.

By an agreement of tenancy dated the 1st of June, 1901, made between Thomas Morris and the defendant, Morris let the premises in question to the defendant for a term thus expressed in the memorandum: "To hold the same under and by the said John Baker until such tenancy shall be determined as hereinafter mentioned at the yearly rent of seventy pounds clear of all deductions except landlord's property tax by quarterly payments on the 13th day of August, the 13th day of November, the 13th day of February, and the 13th day of May in each year, the first payment to be made on the ensuing 13th of August." Baker further agreed to keep the premises in repair, not to assign or underlet the premises without written consent, to keep the Carpenters' Arms during all lawful hours as a licensed house, and to deliver up at the termination of the tenancy all fixtures, &c., at a valuation to the landlord. It was further agreed that if John Baker should be convicted of any offence through which the licence is indorsed Morris should be at liberty to enter and eject Baker and his family, and that it should be lawful for either of the parties to determine the tenancy thereby created by giving to the other of them three calendar months notice in writing.

On the 11th of May Morris gave notice in writing to determine the tenancy as and from the 13th of August, 1903.

On the 12th of February, 1904, Morris assigned his interest in the premises to the plaintiff, who now sought to recover possession of them.

J. R. Atkin (*Danckwerts, K.C.*, with him).—This tenancy is one determinable at three months' notice. The words in the habendum, "until such tenancy shall be determined as hereinafter mentioned," fix the date of the determination of the tenancy at the expiration of the three months' notice: *Doe d. King* v. *Grafton*, 18 Q. B. 496; *Dixon* v. *Bradford Coal Supply Society*, [1904] 1 K. B. 444, 52 W. R. Dig. 83, is distinguishable.

Bankes, K.C. (*Kimber* with him), for the defendant.—This is a yearly tenancy determinable at three months' notice. This case is covered by *Dixon* v. *Bradford Coal Supply Co.* The provisions of the

(a.) Reported by ALAN HOGG, Esq., Barrister-at-Law.

agreement as to the tenant paying rates, keeping the premises in repair, and keeping up the licences are inconsistent with the tenancy being less than a yearly one.

He also referred to *Doe d. Pitcher* v. *Donovan*, 1 Taunt. 555; and *Soames* v. *Nicholson*, 50 W. R. 169, [1902] 1 K. B. 157.

Cur. adv. vult.

May 23.—JELF, J., read the following judgment: This is an action by the assignee of the reversion to recover possession of a licensed public-house, let by one Thomas Morris to the defendant by an agreement in writing dated the 1st of June, 1901. The case turns entirely on the question whether a notice dated the 11th of May, 1903, given by Thomas Morris to the defendant to quit the premises on the 13th of August, 1903, was or was not a good notice to terminate the agreement. In order to answer this question I have to determine whether the agreement of the 1st of June, 1901, created, as the plaintiff contends, a tenancy terminable by a three months' notice on either of the four quarterly days mentioned in the agreement, or, as the defendants contend, a yearly tenancy terminable by a three months' notice only at the end of any full year. Every case of an express agreement must be decided on its terms according to the view taken by the court of the intention of the parties, regard being had to any rules of construction to be gathered from the decided cases. The principal case relied on for the plaintiff was *Doe d. King* v. *Grafton*, while for the defendant it was contended that the case was covered by *Devon* v. *Bradford Coal Supply Co.* In order to decide which of these contentions is correct it is necessary to scrutinize carefully the provisions of the agreement of tenancy. It then becomes apparent that the whole difficulty in the present case is caused by the insertion in the habendum of the words "until such tenancy shall be determined as hereinafter mentioned." If these words had been left out, all the other terms of the agreement, the yearly rent payable quarterly in every year, the obligation to repair, and to keep the licences wherever necessary, the right of the landlord to eject the tenant for misconduct, and lastly the clause for determining the "tenancy hereby created" by three months' notice would point to a yearly tenancy with the one special term of three months instead of the ordinary six months' notice to quit: see *Doe. d Pitcher* v. *Donovan*. It is unlikely that such a tenancy should be only intended to last for six months certain and that it might be put an end to on the 13th of November, 1901, before it had lasted a year. But it was contended for the plaintiff that the words "until such tenancy shall be determined as hereinafter mentioned" incorporate by reference the clause as to the three months' notice and form the terminus *ad quem*, so to speak, of the tenancy and so bring the case within *Doe d. King* v. *Grafton*, and no doubt there is much force in this argument though not so much as if the words "at any time," or similar words had been added to the notice clause, as was the case in *Soames* v. *Nicholson*. In *Doe d. King* v. *Grafton*, however, there was no relegation to a later part of the agreement of the clause as to notice, but the terminus was stated definitely in the habendum itself, and several indications of a yearly tenancy present in this case were there absent. *Dixon* v. *Bradford Coal Supply Society*, on the other hand, shows the importance of looking to all the terms of the agreement in order to find out (when there is an ambiguity) the intention of the parties, and lays stress on the parts of the agreement which point to a yearly tenancy. On the whole I think that the words "until such tenancy shall be determined as hereinafter mentioned" may fairly be treated as parenthetical, and as having the same kind of effect as the words "terminable however as hereinafter mentioned" which are often to be found in the habendum. The case is not free from doubt, but for the reasons which I have given I am of opinion that the agreement creates a yearly tenancy, and that the notice to quit is bad, and that the defendant is entitled to succeed on that ground.

Judgment for defendant.

Solicitors for plaintiff, *Simmons & Simmons*, for *W. J. Shipton*, Mountain Ash.

Solicitors for defendant, *Kimber & Edwards*, for *J. W. Evans*, Aberdare.

C. C. R.
(Lord Alverstone, L.C.J., and Wills, Darling, Walton, and Jelf, JJ.) — Nov. 9.

REX v. WILLIAM BARRACLOUGH. (a.)

Criminal law—Obscene libel—"Obscene"—Sufficiency of indictment—"To the manifest corruption of the morals of his Majesty's subjects"—Law of Libel Amendment Act, 1888 (51 & 52 *Vict. c.* 64), *s.* 7.

In an indictment charging the publication of an obscene libel it is sufficient to aver that the publication is obscene, and that it has been unlawfully published. It is unnecessary to aver the "intent" by the use of a common form expression as "to the manifest corruption of the morals of his Majesty's subjects," although, in the opinion of the court, as a matter of practice it were more desirable to do so.

The object of the Law of Libel Amendment Act, 1888, *s.* 7, *which provides that "It shall not be necessary to set out in any indictment . . . instituted against the publisher of any obscene libel the obscene passages, but it shall be sufficient to deposit the book . . . containing the alleged libel with the indictment or other judicial proceeding, together with particulars showing precisely by reference to pages, columns, and lines in what part of the book . . . the alleged libel is to be found, and such particulars shall be deemed to form part of the record . . ," was to obviate the setting out of the matter by a clear reference to the document deposited.*

Case stated by Jelf, J., on the trial at the Leeds Assizes in August, 1905, of William Barraclough upon an indictment charging him with the publication of a defamatory and obscene libel.

The indictment charged that the defendant, intending to injure a certain person, unlawfully and maliciously did publish a false, scandalous, malicious, and defamatory libel in the form of a type-written document which contained lewd, wicked, scandalous, obscene, false, malicious, and defamatory matters to the damage of that person and "to the evil example of all others in the like case offending and against the peace of our Lord the King."

There was no averment in the indictment that the publication was to the "manifest corruption of the morals of his Majesty's subjects."

It was objected on behalf of the defendant that the indictment was bad on the ground that so far as it purported to charge the publication of a defamatory libel it did not set out the words of the alleged libel, *Reg.* v. *Bradlaugh*, 3 Q. B. D. 607.

The judge upheld the objection and held that in so

(a.) Reported by MAURICE N. DRUCQUER, Esq., Barrister-at-Law.

far as the indictment purported to charge a defamatory libel it failed.

It was then objected that the indictment so far as it alleged the publication of an obscene libel was bad by reason of the omission of the words "to the manifest corruption of the morals of his Majesty's subjects," although for this purpose the Law of Libel Amendment Act, 1888, s. 7, made it unnecessary to set out in the indictment the obscene passages.

The learned judge overruled these objections, holding that the term "obscene" connoted that the libel tended to the corruption of morals.

The jury found the defendant guilty and he was sentenced to one year's imprisonment, the sentence to be respited until after the decision of this case.

The question arising under the Law of Libel Amendment Act, 1888, is sufficiently stated by the Lord Chief Justice.

Atkinson, K.C. (*Palmer* with him), for the defendant. — The indictment should aver the intent to corrupt public morals. It is an essential part of the offence. [Lord ALVERSTONE, L.C.J.—You must answer Jelf, J.'s ruling that obscene connotes corruption of morals.] [JELF, J.—It seems to me tautology to say an obscene libel is published to the manifest corruption of the morals of the public.] A document may be obscene and yet not corrupt public morals. [WALTON, J.—The mere publication of an obscene book is not a crime.] I agree fully. In fact this indictment was not framed as an obscene libel, but a defamatory libel. And it was at the last moment, when *Reg.* v. *Bradlaugh* was called to the attention of the prosecution that the charge for an obscene libel was set up. On such an indictment it would be impossible to know whether the grand jury found a true bill for a defamatory or obscene libel, whereas the averment of the intent would leave no doubt. [JELF, J.—The framer of the indictment did not intend a defamatory libel because in the "particluars" required by the statute he set out the whole of the document, which would have been meaningless in the case of a defamatory libel.] The particulars were not exhibits and were not before the grand jury, neither was the book itself. They should have been deposited with the indictment according to the statute. [DARLING, J.—There is no indictment till the grand jury find a true bill.] The grand jury cannot possibly find a true bill unless all the proper material is supplied to them. [Lord ALVERSTONE, L.C.J.—We cannot look into the grounds upon which the grand jury find a true bill. They may even rely upon secondary evidence. The prosecution could not possibly have done more than they did do.]

Waugh, K.C. (*Compston* with him), for the prosecution.—It may be that there may be publication of obscene matter which is yet not unlawful, such as the handing of the document to a judge for the purposes of justice. But here we aver that the publication is "unlawful and malicious," and the defendant must prove the contrary. It is a presumption of law that an obscene libel tends to the manifest corruption of morals, and being a presumption need not be set out.

Lord ALVERSTONE, L.C.J.—I have no doubt in this case, although I think that my brother Jelf was put in a difficult position by the form of the indictment. In order to avoid any difficulty of this kind it would be better that the indictment should contain the common averment that its publication was to the manifest corruption of the morals of his Majesty's subjects. The question we have to consider is whether there was sufficient material alleged in the count to justify the case being tried as to the publication of an obscene libel. I need not refer to the objections to the counts for a defamatory libel, because Jelf, J., withdrew those. After a full argument he held there was sufficient left in the allegations to justify him in leaving to the jury the charge of a publication of an obscene libel. He did not quash any part of the indictment. The two counts he withdrew on the ground that they were mere surplusage, while the two remaining were counts for obscene libel. Mr. Waugh pointed out that the indictment contained the words "unlawful and malicious." There is also the extract, "which contained lewd, wicked, scandalous, obscene, false, malicious, and defamatory matters . . . to the evil example of all others in the like case offending and against the peace of our Lord the King." In order to prevent arguments of this kind arising it is better that the old practice be followed. But, granting there is before the jury the indictment and the book containing the obscene libel, it is impossible to say that the learned judge ought to have withdrawn the case from the jury, upon the ground that it could only be treated as a defamatory libel and not as an obscene libel. There is a distinct allegation of the publication of scandalous, obscene, and false matter. I agree with Mr. Atkinson if the indictment had contained the averment the defendant would be able to show by way of defence that the publication was not unlawful and was not obscene. But, the book being deposited, it seems to me the learned judge would have been wrong in withdrawing the case from the jury. It may be tested in this way. Assuming it to be an indictment of obscene libel, and the words to be set out in the indictment, so that the judge and jury could see for themselves whether the obscene publication was to the manifest corruption of the morals of his Majesty's subjects, could the judge have withdrawn the case from the jury because there was no averment to that effect in the indictment? I think that reasoning has the clear support of Cockburn, L.C.J., in *Q.* v. *Hicklin*, at p. 370: "The recorder thought an indictment could not have been sustained inasmuch as to the maintenance of the indictment it would have been necessary that the intention should be alleged and proved—namely, that of corrupting the public mind by the obscene matter in question. In that respect I differ from the recorder. I think that if there be an infraction of the law, the intention to break the law must be inferred and the criminal character of the publication is not affected or qualified by there being some ulterior object in view of a different and of an honest character." I am therefore of opinion that, embarrassing as the count was in one sense, it was impossible for the learned judge to stop the case. If Mr. Atkinson could have alleged that there was a statement of two separate offences in this indictment an objection might have been raised on another ground. But there is only one offence alleged here. I think it would have been wrong to quash the whole indictment on the ground that two offences were alleged.

On the second point I think there is no argument. [The judge read section 7 of the 1888 Act set out above.] The object is to substitute the deposit for the setting out of the words. The document appears for the first time upon the application to the magistrate for committal; is proved by a witness, is annexed, and forms part of the depositions; it is first in the legal custody of the clerk to the justices, then the clerk of assize and finally it serves the judge and jury. What else could be done in this case in effect? The document must have remained with the clerk of the assize. The indictment is deposited and is called a bill of indictment at that stage. It is deposited, and annexed to it are the particulars which refer to the document which is in the custody of the clerk of assize. The statute says nothing as to how it is to

be deposited. It uses the word deposited because the framers of the statute knew the document would be in the custody of the officials. It could not otherwise be done than by a reference to the document which was in the custody of one or other of the officials. The object being to obviate the setting out of the matter by a clear reference to the document. In this case every line of the particulars was relied upon. I am of opinion there was a fulfilment of section 7, and the objection cannot be allowed to prevail.

WILLS, J., concurred.

DARLING, J.—I am of the same opinion. It seems to me that if the thing is called obscene and is published, that it follows that all those allegations which are usually put into an indictment are included in the same statement that the defendant published it and that it was obscene. The intent, as it appears to me, in such a case being part of the indictment, it is not absolutely necessary to set out allegations with that iteration to which we are accustomed in indictments, most of which is useless. I think it better to allege the intent, partly because it gives notice to the defendant of that which he is charged with, and partly because of the case of *Q.* v. *Thomson*, (1900) 64 J. P. 456, where the Common Serjeant—and there is no one for whose opinion I have more respect—in trying a person for the publication of an obscene libel, had it objected that other books could not be put in evidence to show the intent. He says: "Whilst the question of the intention with which the book was sold is part of the indictment, it is impossible to say that the holding out and offering other books may not bear on the intent. If the defendant sold other books whose titles go to suggest that they are indecent, it is some evidence to show that she sold this book with the intention alleged in the indictment. I cannot exclude the evidence." I think the intent is part of the indictment; but it would certainly be alleged as a grievance if evidence of that kind were tendered, and because the indictment did not state the intent the judge should think it better not to admit such evidence. It would be regrettable. Therefore, if for no other reason, it would be better to draw up the indictment in the old form.

WALTON, J.—I had some doubt upon the question whether the indictment was sufficient during the argument. The crime of obscene publication involves two things—the matter must be obscene and the publication must be unlawful. In the ordinary form of indictment it is alleged that the publication is unlawful and malicious, and also tending to "corrupt the morals of his Majesty's subjects." These particular words did not occur in the indictment, and the question was whether there was sufficient in the indictment as framed to allege the offence; the words which were relied upon are these: "that the defendant did unlawfully and maliciously publish, &c." That sufficiently alleges the matter as obscene, and it also alleges that the publication was unlawful. It seems to me that, though it is better to follow the old form, the offence is sufficiently described by using the words "lewd, wicked, scandalous, obscene . . ." and the expression "malicious and unlawful." The defendant could establish the negative of either of these things, and either publication was not unlawful or not obscene. It seems to me, therefore, that the allegation as to the offence is sufficient.

Conviction confirmed.

Solicitor for the defendant, *Arthur Willey*, Leeds.

Solicitors for the prosecution, *Peckover & Scriven*, Leeds.

Court of Appeal.

Appeal.
(Collins, M.R., and Romer and Mathew, L.JJ.) Nov. 3.

MURPHY v. O'DONNELL. (*a.*)

Master and servant—Employer's liability—Engineering work—Construction—Mechanical power—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 7, *sub-section* 2.

A. contracted with B. to erect a machine on the third floor of B.'s building. C., who was in the employment of A., had to superintend the carrying out of the work. The machine was delivered in parts at B.'s building, and the heavy parts of the machine were raised to the third floor by pulleys, whilst the lighter parts were carried up by the lift, to work which mechanical power was required. When all the parts were on the third floor, and whilst C. was engaged in erecting the machine, for which no mechanical power was required, a piece slipped and injured C.

Held, the erecting of the machinery was a distinct and separate part of the contract from the delivery of the parts on to the third floor. The erection alone constituted the "construction" within the meaning of the statute, and as no mechanical power was required for that purpose, the injured workman was not entitled to compensation under the Act.

Appeal from the decision of the judge of the Leeds County Court.

The respondent George Murphy was a machinist in the employ of the appellant John William O'Donnell.

The appellant had contracted to supply to Messrs. Stocks' tannery a machine, which would be driven by steam power, and which was to be erected *in situ* upon the third floor of the building. The machine was delivered at the tannery in packing cases, and the heavier parts of it were raised to the third floor by pulleys, but the lighter parts were taken up by the lift, which was worked by mechanical power.

The respondent was in charge of the work. Whilst he was putting into position some of the smaller parts by means of chains and pulleys, a part slipped and caught his foot, necessitating amputation.

No mechanical power was used or required for the purposes of erecting the machine.

The county court judge found that the respondent was engaged in engineering work and entitled to compensation under the Workmen's Compensation Act, 1897.

By section 7, sub-section 2: "'Engineering work' means any other work for the construction, alteration, or repair of which machinery driven by steam, water, or other mechanical power is used."

R. A. Shepherd, for the appellant.—The respondent was not engaged upon engineering work within the meaning of the statute. The engineering work was the construction of the engine, if the erection of the engine could be called construction at all. But for the erection of the machine no mechanical power, steam or otherwise, was required. The only mechanical power used at all was in getting the parts of the machine to the third floor, but that was not part of the erection. It was part of the delivery; the contract being to deliver on the third floor.

Ruegg, K.C. (*Bridgwater* with him), for the respondent.—The whole work was one entire work and cannot be separated. In ordinary parlance he was

(*a.*) Reported by MAURICE N. DRUCQUER, Esq., Barrister-at-Law.

doing engineering work throughout the job. In *Cosgrove* v. *Partington*, 17 T. L. R. 39, the work included the hoisting of iron girders by means of a steam winch for the purposes of putting on new top story on a mill. The workman was injured while so employed, and it was held that he was entitled to compensation.

He also referred to *Rae* v. *Fraser*, 36 Sc. L. R. 782.

COLLINS, M.R.—The question here is whether a man, who was employed as a workman by a contractor who had undertaken to deliver a machine to a particular place which happened to be on the third floor of a building, comes within the definition under the Workmen's Compensation Act as a person engaged in engineering work which by section 7, sub-section 2 is defined as "any work for the construction, or alteration, or repair of which machinery driven by steam, water, or other mechanical power is used." The employer of the workman, the undertaker, had to deliver the machine upon the third floor of the proprietors' premises, and he had to employ a skilled workman to erect it *in situ*. The machine was delivered at the bottom floor of this building, and the parts had to be brought up to the upper floor. The heavier parts of the machine, being too big to be taken up in the lift, were got up by pulleys without the use of any mechanical power, but the smaller parts were taken up in the lift, which was worked by mechanical power. After they were got on to the floor, the workman was engaged in putting the parts together, and whilst so engaged, using no mechanical power, one of the things he was moving slipped and he met with an accident. The county court judge says that under these circumstances he came within the meaning of the Act. It seems to me there was no evidence that he was engaged in any work "for the construction, alteration, or repair of which machinery driven by steam, water, or other mechanical power is used." The evidence was the other way. The delivery of the parts on to the upper floor was not engineering more than the sending of goods by train from Manchester to London, the delivery to London being by steam transit. The actual engineering work began when the parts were on the upper floor, and it is found that there no steam or other mechanical power was used at all. It seems to me the two things were separable. The obligation to deliver the separate parts was separable from the construction, and the case does not fall within the statute unless the mechanical power is used in the construction. There is no evidence upon which the judge could find that the man was engaged in engineering work. The appeal must be allowed.

ROMER, L.J.—I agree. There is no evidence, in my judgment, upon which the county court judge could find that the workman was engaged, at the time of the accident, on engineering work within the definition of the Act. The only part of the definition upon which it is contended the workman was engaged upon engineering work is the following: "Any other work for the construction of which machinery driven by steam, water, or other mechanical power is used." The only work of construction in any sense upon which the workman was employed was the work of putting up the pieces of the machine so as to make the engine a complete working engine. That is the only work which could be regarded as construction work. The workman had to do other work. He had to superintend the carrying of the parts up to the third floor. For the purpose of carrying up certain parts mechanical power was used, but that was used for the carrying and not for any constructive purposes whatever. When you came to the constructive part, the putting of the pieces together, no mechanical power was used at all. That being so, it seems to me clear that the case does not fall within the definition. Whenever machinery was used it was used for the purposes of carrying and not for the purpose of construction.

MATHEW, L.J.—I am of the same opinion. There were two parts of the contract. One involved the use of mechanical power, the other did not. The parts of the contract were separable and distinguishable, one was the carrying, the other the construction. The man was injured in the construction of the engine for the purpose of which no mechanical power was used.

Appeal allowed.

Solicitors for the appellant, *William Hurd & Son.*

Solicitors for the respondent, *Walter & H. E. Foster*, Leeds.

From K. B. Div. (Collins, M.R., and Mathew, L.J.) } Aug. 7, 1905.

TEMPERLEY STEAM SHIPPING CO. v. SMYTH & CO. (*a*.)

Ship—Charter-party—Bill of lading—Incorporation of terms of charter-party—Arbitration clause—Cesser clause—Dispute "in the loading"—Demurrage.

By a charter-party the plaintiffs' steamer was to load a cargo at Bahia Blanca for a port in the United Kingdom at a certain rate per day, and all time on demurrage over and above the lay days to be paid for according to a certain rate; the charterers' liability to cease upon shipment of the cargo, and the vessel to have a lien on the cargo for the recovery of all bill of lading freight, dead freight, demurrage, and all other charges whatsoever. By clause 39, if the cargo could not be loaded from certain specified causes, the time lost was not to be counted as part of the lay days, and "should any dispute arise under this clause in the loading of the steamer, same to be settled in the Argentine Republic by" arbitration. The cargo was shipped under a bill of lading which made it deliverable to the charterers, they paying freight against delivery at the charter-party rate of freight "all the terms and exceptions in which charter-party . . . are herewith incorporated and form part hereof," the shipowners to have an absolute lien upon the cargo for the freight, demurrage, and all other charges whatsoever. A delay occurred in the loading, and on the completion of the loading the master of the ship claimed demurrage, but the charterers denied liability upon the ground that the delay was due to one of the causes specified in clause 39 of the charter-party. The charterers requested that the dispute should be referred to arbitration under that clause. The master refused, and the vessel sailed. On arrival at the port of discharge the shipowners claimed a lien for demurrage due at the port of loading, and brought an action to recover the amount. The charterers applied, under section 4 of the Arbitration Act, 1889, to stay the proceedings in the action with a view to having the dispute settled by arbitration in accordance with clause 39.

Held, that, notwithstanding the cesser clause in the charter-party, inasmuch as the charterers were also the holders of the bill of lading the arbitration clause was incorporated in the bill of lading, and the court had jurisdiction to stay the proceedings in the action; and that in the circumstances, in the exercise of its discretion, it would do so.

Held, also, that a dispute arises "in the loading" within the meaning of clause 39 if the loading is claimed

(*a*.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

by one party and denied by the other to have been delayed by one of the causes named in the clause, and none the less because the extent of the delay cannot be ascertained until the loading has been completed.

Runciman & Co. *v.* Smyth & Co., 20 *Times L. R.* 625, *overruled.*

Appeal by the defendants from the refusal of Channell, J., to stay the action and refer the dispute between the parties to arbitration in pursuance of an arbitration clause contained in a charter-party.

The action was brought by shipowners for a declaration that the plaintiffs were entitled to a lien on certain goods discharged from the steamship *Woodbridge* for the sum of £681 for demurrage at the port of loading, and for payment of that sum which had been deposited in a bank in joint names. On the 7th of January, 1905, a charter-party was entered into at Buenos Ayres between the plaintiffs and one F M. Nicholson, who was the agent there of the defendants, whereby *The Woodbridge* was chartered to Nicholson to carry a cargo of wheat from Bahia Blanca to a port in the United Kingdom. By clause 23: "Cargo to be loaded at the rate of 200 tons per running day, Sundays and holidays excepted (if the ship be not sooner despatched), and the time for loading shall commence to count twelve hours after written notice has been given by the master, brokers, or agents, on working days between 9 a.m. and 6 p.m., to the charterers or their agents that the vessel is in readiness to receive cargo, said notice to be given at the first port of loading only, and all time on demurrage over and above said laying days shall be paid for by charterers or their agents to the ship at the rate of 4d. sterling per gross register ton per day." By clause 31 the master was to sign bills of lading as presented at any rate of freight that the charterers or their agents might require, but any difference in amount between the bill of lading freight and the total gross chartered freight, as above, should be settled at the port of loading before the steamer sailed, "charterers' liability to cease upon shipment of cargo (provided such cargo be worth the bill of lading freight, dead freight, and demurrage at port of shipment). Vessel to have a lien on cargo for recovery of all such bill of lading freight, dead freight, demurrage, and all other charges whatsoever." By clause 39, "if the cargo cannot be loaded by reason of riots or any dispute between masters and men occasioning a strike or lock-out of stevedores, lightermen, tugboat men, cart men, railway employés, or other labour connected with the working, loading, or delivery of the cargo proved to be intended for the steamer, or through obstructions on the railways or in the docks or other loading places beyond the control of charterers, the time lost not to be counted as part of the lay days (unless any cargo be actually loaded by the steamer during such time), but lay days to be extended equivalent to the time lost owing to such cause or causes, and if the cargo cannot be discharged by reason of a strike or lock-out of any class of workmen essential to the discharge of the cargo, the days for discharging shall not count during the continuance of such strike or lock-out. A strike of the charterers' or receivers' men only shall not exonerate charterers or receivers from any demurrage for which they may be liable under this charter, if by the use of reasonable diligence they could have obtained other suitable labour, at rates current before the strike, and in case of any delay by reason of the fore-mentioned causes, no claims for damages shall be made by charterers or receivers of the cargo, or by the owners of the ship, or by any other party under this charter. Any time lost by the steamer through any of the above causes to be reckoned as days for loading solely for the purpose of settling the despatch money account. Should any dispute arise under this clause in the loading of the steamer, same to be settled in the Argentine Republic by a committee consisting of two arbitrators, one to be nominated by each party to this contract, and should they be unable to agree the decision of an umpire mutally approved by the two arbitrators shall be final."

The cargo was shipped at Bahia Blanca under a bill of lading, which stated that the cargo was shipped by F. M. Nicholson on board the steamship *Woodbridge* to be delivered, subject to the terms of charter-party or freight contract, unto the defendants or their assigns, "they paying freight for the said goods, against delivery, in cash, without deduction, the rate of freight to be in accordance with charter-party or freight contract effected at Buenos Ayres, dated the 7th of January, 1905, all the terms and exceptions contained in which charter-party or freight contract are herewith incorporated and form part hereof." By a subsequent clause, "the owner or master of the vessel shall have an absolute lien and charge upon the cargo and goods laden on board for the recovery and payment of freight and demurrage and all other charges whatsoever." The loading of the vessel at Bahia Blanca occupied a longer time than the lay days allowed by the charter-party. The defendants asserted and the plaintiffs denied that the delay was due to labour disturbances within the exception contained in clause 39 of the charter-party. On the completion of the loading the captain, on behalf of the plaintiffs, made a claim for £660 18s. 4d. demurrage, but the charterers repudiated their liability for such demurrage and requested arbitration upon the dispute in accordance with clause 39 of the charter-party. The master refused to go to arbitration, and the vessel sailed for Manchester, where she arrived in due course, and in order to prevent any delay in the discharge and to release the cargo the defendants paid the sum of £661 into a bank to a joint account. The plaintiffs having brought this action, the defendants took out a summons under section 4 of the Arbitration Act, 1889, for a stay in order that the matter might be referred in accordance with the arbitration clause in the charter-party. The plaintiffs opposed the summons on three grounds—namely, that upon the facts the court in its discretion would refuse to stay the action; secondly, that they were suing the defendants as consignees of cargo under the bills of lading, and not as charterers, and therefore the arbitration clause was not incorporated in the bills of lading, and might be disregarded; and thirdly, that, if the arbitration clause was to be treated as part of the contract between them, it only applied to disputes "in the loading," and did not apply to such a dispute as the present, which had arisen after the loading was completed. It was admitted that there was no dead freight and that the goods shipped were worth the freight and demurrage. The defendants made an affidavit in the action stating that F. M. Nicholson was their representative at Buenos Ayres, and that the charter-party was entered into by him as their agent. The plaintiffs stated that this was the first time that they heard that the defendants were the undisclosed principals of Nicholson, and not merely consignees, and that Nicholson was not himself the real charterer. Channell, J., was of opinion that the plaintiffs were right in their contention that "in the loading" meant during the loading, and on that ground he refused a stay. He also decided that the case was not one in which, in the exercise of his discretion, he would grant a stay.

The defendants appealed.

Pickford, K.C., and *Leslie Scott*, for the defendants. —Where the charterers are also the consignees of the

goods, the contract is contained in the charter-party, and the bill of lading is only a receipt for the goods and does not affect the contract: *Rodocanachi* v. *Milburn*, 35 W. R. 241, 18 Q. B. D. 67; Carver on Carriage by Sea (4th ed.), s. 151. *Gullichsen* v. *Stewart*, 32 W. R. 763, 13 Q. B. D. 317, does not seem quite consistent with *Rodocanachi* v. *Milburn*, which, being a later case, must be taken as the last statement of the law. The decision of the Divisional Court to the contrary effect in *Runciman & Co.* v. *Smyth & Co.*, 20 Times L. R. 625, was wrong. It purported to follow the decision of this court in *Hamilton* v. *Mackie*, 5 Times L. R. 677, but this latter case was between shipowners and indorsees of the bill of lading, and not between shipowners and charterers, and the action was to recover bill of lading freight. That was a very different case. If, however, the defendants had to rely upon the bill of lading by reason of the cesser clause, the arbitration provision in clause 39 of the charter-party is incorporated in the bill of lading. Further, clause 39 speaks of any dispute "under this clause," not "under this charter-party," and that is clearly incorporated in the bill of lading. Secondly, the bill of lading in anyone's hands incorporates clause 39 of the charter which is not inconsistent with the bill of lading. The cesser clause did not apply to relieve the charterers from liability. That clause only comes into operation when the shipowner obtains a lien on the cargo, and does not apply if the shipowner is left unprotected for the particular breach complained of: *Hansen* v. *Harrold*, [1894] 1 Q. B. 612. It only applies to discharge the charterers when a new contract between the shipowner and the bill of lading holder is brought into existence. [They also referred to *Restitution Steamship Co.* v. *Pirie*, 6 Asp. Mar. L. C. 428, 7 Asp. Mar. L. C. 11*n*.] Again, Channell, J., was wrong in confining the arbitration clause to disputes arising during the loading, in holding that it did not apply to a dispute as to demurrage arising after the loading was completed. Lastly, the learned judge was wrong in the exercise of his discretion in refusing a stay. It was more convenient that this dispute of fact as to the cause of the loading should be settled at a place where the facts were known. No question of law was in dispute.

J. A. Hamilton, K.C., and *Adair Roche*, for the plaintiffs.—The defendants have to prove two things: First, that there is an existing contract to refer the dispute to arbitration; and secondly, if there is, that it is a proper case in which to stay the action and refer the dispute. The charterer's liability ceased under the charter-party when the goods were loaded as they were worth the bill of lading freight, dead freight and demurrage. The bill of lading only incorporated the conditions of the charter-party applicable to the reception of the goods at the port of discharge (*Gullichsen* v. *Stewart*), and therefore did not incorporate the arbitration clause as to disputes in the loading: see Scrutton on Charter-parties (5th ed.), p. 41-43. In *Rodocanachi* v. *Milburn* the jury found as a fact that the bill of lading was signed upon the understanding that it was to be treated only as a receipt for the cargo and in no way to affect the clauses in the charter-party; and the argument and judgment proceeded upon that footing. *Gullischen* v. *Stewart* was not cited there, and it cannot be said that in those circumstances the court in *Rodocanachi* v. *Milburn* intended in any way to modify their earlier decision in *Gullichsen* v. *Stewart*. [They also referred upon this point to *Serraino* v. *Campbell*, 39 W. R. 356, [1891] 1 Q. B. 283, and *Turner* v. *Haji Mahomed Azam*, [1904] A. C. 826.] Further, the dispute did not arise "in the loading," but after the loading was completed. Secondly, the learned judge had properly exercised his discretion in refusing to stay the action. Questions of commercial law might arise, and it would be very undesirable to refer any such questions to lay arbitrators in the Argentine Republic. It would be very inconvenient for the plaintiffs to have the arbitration there, as their ship and all their witnesses had left. Upon all grounds the decision of the learned judge was right.

Pickford, K.C., in reply.—He was willing to undertake that no question of law would be raised by the defendants before the arbitrators.

Cur. adv. vult.

Aug. 11.—COLLINS, M.R., read the following judgment: This is an appeal from Channell, J., who refused to stay proceedings with a view to a reference under section 4 of the Arbitration Act, 1889. The plaintiffs are the owners of the steamship *Woodbridge*, and have brought this action for a declaration that they are entitled to a lien to the amount of £661 on a cargo carried in the said steamship from Bahia Blanca to Manchester under a charter-party. The defendants, who are the charterers and also holders of the bill of lading, dispute the plaintiffs' right to the amount claimed, but have paid it into a bank in the joint names of the parties so as to release the cargo. The lien claimed is for demurrage at the port of loading. The defendants contend that the question whether any such demurrage is payable or not depends on clause 39 of the charter-party, which provides that should any dispute arise under that clause in the loading of the steamship it shall be settled by arbitration, and they accordingly apply under section 4 of the Arbitration Act to have the dispute settled by arbitration as provided by the clause. The plaintiffs contend that, as a matter of construction, the clause does not cover the dispute in this case, and Channell, J., has accepted that view. They also contend that, having regard to the cesser clause in the charter-party and to the fact that the defendants, although charterers, are holders of the bill of lading, the arbitration clause, even if applicable to the facts cannot be invoked. The main argument before us has been on the latter point.

The charter-party purports to be made between the plaintiffs and F. M. Nicholson as charterer. Nicholson was, in fact, the agent for the defendants. The cesser clause (clause 31) is as follows. [His lordship read the clause.] Clause 23 provides for the rate of loading. [His lordship read that clause and also clause 39 and continued:] First, with regard to the construction of clause 39 itself. I cannot agree with Channell, J., that it relates only to a dispute that must arise for settlement before the loading is complete. It seems to me that the dispute arises "in the loading" within the meaning of the clause if the loading is claimed by one party and denied by the other to have been delayed by one of the causes named in the clause, and none the less because the extent of the delay cannot be ascertained until the loading has been completed. With regard to the point that clause 39 cannot apply by reason of the cesser clause and (or) the fact that the charterers are also the holders of the bill of lading, if the case were free from authority I cannot think that there would be any difficulty. A dispute has arisen between two parties to a contract by which they have agreed that in an event which has happened there shall be an arbitration. Why is the arbitration not to take place? The fact that the liability of the charterers is to cease on shipment of the cargo cannot affect the matter, because the clause is quite independent of whether personal liability subsists or not. It is common ground that a lien subsists if anything is due and the only question is

for what amount. Why is the amount not to be ascertained in the manner provided by the contract? The cesser clause itself cannot bring about this result, and if it can be reached at all it must be because of the bill of lading. But the bill of lading in terms provides that "all the terms and exceptions contained in the charter-party or freight contract are herewith incorporated and form part hereof," and further, "the owner or master of the vessel shall have an absolute lien and charge upon the cargo . . . for the recovery and payment of freight and demurrage and all other charges whatsoever." I can see nothing at all inconsistent in the provision of the charter-party that the amount of demurrage at the port of loading is to be ascertained by arbitration at the port of loading, and the provision in the bill of lading that there is to be a lien for the amount, so as to prevent former provision operating between the parties to the charter-party who are also the parties to the bill of lading. Apart from authority I think this would be clear. It is, however, necessary to examine the authorities, and the respondents can certainly vouch one in their favour, which does not seem to be distinguishable—viz., *Runciman & Co.* v. *Smyth & Co.* That case, however, purported to be decided on the authority of *Hamilton* v. *Mackie*. This latter case was an action by the shipowners against the indorsees of the bill of lading who were not the charterers and was for bill of lading freight. The case is very shortly reported, and I will read the judgment of Lord Esher: "The law on the subject had been laid down several times. Where there was in a bill of lading such a condition as this, 'all other conditions as per charter-party,' it had been decided that the conditions of the charter-party must be read *verbatim* into the bill of lading as they were there printed *in extenso*. Then if it was found that any of the conditions of the charter-party on being so read were inconsistent with the bill of lading, they were insensible and must be disregarded. The bill of lading referred to the charter-party, and therefore when the condition was read in, 'all disputes under this charter shall be referred to arbitration,' it was clear that that condition did not refer to disputes under the bill of lading, but to disputes arising under the charter-party. The condition, therefore, was insensible, and had no application to the present dispute which arose under the bill of lading." He treats the dispute in that case as arising exclusively under the bill of lading, and not under the charter-party, and therefore as not covered by the clause which related to disputes under the charter only. Here the dispute arises under the charter-party and is between the parties to it, and, unless as between these parties the bill of lading has annulled this part of the contract of the charter-party, it still subsists and binds the parties. There is no doubt that, where the charterer takes the bill of lading in his own name, the rights and obligations as between him and the shipowner are different from those of a person other than the charterer who has become the holder of a bill of lading purporting to incorporate the charter-party, though the precise extent of the difference is not quite clear. In *Rodocanachi* v. *Milburn*, decided in 1886, Lord Esher, M.R., says: "In my opinion, even so, unless there be an express provision in the documents to the contrary, the proper construction of the two documents taken together is that as between the shipowner and the charterer of the bill of lading, although inconsistent with certain parts of the charter, is to be taken only as an acknowledgment of the receipt of the goods"; and he adopts fully what was said by Lord Bramwell in *Sewell* v. *Burdick*, 33 W. R., at p. 469, 10 App. Cas. at p. 105. On the other hand, in *Gullichsen* v. *Stewart* decided in 1884 in the Court of Appeal consisting of Lord Coleridge, C.J., Brett, M.R., and Bowen, L.J., it was held that a charterer who was also the bill of lading holder could not set up the cesser clause in the charter as an answer to a claim for demurrage at the port of discharge. The broad distinction between the position of a charterer, who ships and takes a bill of lading, and an ordinary holder of a bill of lading is, I think, that in the former case there is the underlying contract of the charter-party, which remains until it is cancelled, and taking a bill of lading does not cancel it in whole or in part unless it can be inferred from the inconsistency of the terms of the two documents that it was intended to do so. On the other hand, in the case of the holder of the bill of lading who is not the charterer there is no presumption that he contracts in any terms but those of the bill of lading, and if the bill of lading purports to import the charter-party the presumption is that it incorporates only those clauses which relate to the conditions to be performed by the receiver of the goods: *Russell* v. *Niemann*, 13 W. R. 93, 17 C. B. N. S. 163. With all deference to the learned judges who decided it, I think *Runciman & Co.* v. *Smyth & Co.* is not supported by the authority relied upon, and is not in accordance with principle. If the clause is operative, as I think it is, between the parties, I think the fact that the ship sailed away from Bahia Blanca without performing its conditions, though pressed to do so, debars the owner from relying upon the inconvenience of conducting the reference in the Argentine now. I am of opinion, therefore, that the appeal should be allowed.

MATHEW, L.J.—I am of the same opinion, and will only add a few words upon the question of discretion. I think that the matter should be disposed of by arbitration in accordance with clause 39 of the charter-party. If the question raised were one of English law it would be better to try it in the Commercial Court here, but it is clear upon the facts that there is no such question for the decision of the arbitrators, and, moreover, an undertaking has been given by the defendants' counsel that no such question of law will be raised on the arbitration. It would be very undesirable to submit to those commercial men who will act as arbitrators any question of commercial law. The charter-party contains the ordinary cesser clause, substituting a lien for demurrage for the personal liability of the charterers. Clause 39 seems to be contained in a slip annexed to the charter-party, and no doubt it was put there on account of the state of affairs at the port of loading. Almost immediately after the ship arrived at the port of loading it was seen that the loading was not progressing properly and that the ship would be detained beyond the time allowed for loading, and the dispute at once arose as to whether the detention of the ship was due to any of the causes specified in clause 39. That dispute ought to and could have been disposed of at the time on the spot. The charterers requested arbitration upon it. The master, however, absolutely refused to go to arbitration, and sailed home. When the ship arrived the shipowners at once claimed a lien on the cargo for demurrage, and the very sensible course was adopted of placing the amount claimed in a bank in joint names so as to release the cargo pending the settlement of the dispute. The shipowners thereupon issued a writ against the charterers and the action was transferred to the Commercial Court, and an application was immediately made for a stay of proceedings in the action upon the ground that the contract between the parties contained a submission of the dispute to arbitration. The question is whether that application ought to be granted. I have come to the conclusion

that it ought. It was said that it would be inconvenient to the shipowners to send the case back to the Argentine Republic because their ship is here and their crew has dispersed. I am not at all clear that it is necessary that the captain or crew should give evidence. I do not know that they can be of any assistance to the arbitrators. However, if there is any such inconvenience the shipowners cannot complain of it, because it was entirely their fault that the ship left the port of loading without the dispute having been settled by arbitration. Looked at from the point of view of the charterers, the balance of convenience is decidedly upon the side of those who seek to have the matter referred. If this action proceeded in the Commercial Court it would be necessary for them to bring their witnesses over here, or else a commission would have to issue to examine them in the Argentine Republic. Either of those two courses would involve serious delay and expense, and I decline to impose such a burden on the charterers. I therefore agree that the action should be stayed, and that this question of fact—for it is a question of fact and nothing else—should be settled by arbitration.

The court made the following order: "Appeal allowed; defendants to have costs of this appeal and of the application to the judge in any event. Proceedings in this action stayed. Arbitrators to deal with questions of fact only, and make award thereon. The award when made to be brought before the Commercial Court, and stay of proceedings to continue until the award is so brought before the court or further order. Costs of action and reference to be reserved to Commercial Court."

Appeal allowed.

Solicitors for the plaintiffs, *Botterell & Roche.*

Solicitors for the defendants, *Field, Roscoe, & Co.*, for *Batesons, Warr, & Wimshurst*, Liverpool.

High Court of Justice.

Chan. Div.
Farwell, J. } Nov. 16.

In re BOURNE.
BOURNE *v.* BOURNE. (*a.*)

Partnership—Lien of partner's executors on the assets of the partnership—Deposit of deeds by surviving partner—Priorities—Partnership Act, 1890 (53 & 54 *Vict. c.* 39), *s.* 39.

G., partner in a firm, died in 1901. *B., the surviving partner, in* 1902, *finding debts still due, borrowed money from the bankers of the firm, and as security deposited deeds which related to real estate, part of the assets of the partnership. In* 1903 *an order was made that the executors of the will of G. were entitled to prove for* £3,000 *against the estate of B., and were to have a lien for the amount on the assets of the partnership.*

Held, that the bankers had a first charge upon what was comprised in the security.

In re Langmead's Trusts, 20 *Beav.* 20, *followed.*

Further consideration.

On the 1st of July, 1873, articles of partnership were entered into between W. T. Bourne and George Grove.

G. Grove died on the 9th of May, 1901.

A deposit of deeds was made on the 7th of February, 1902, in favour of Messrs. Berwick & Co., bankers, accompanied by a memorandum of deposit signed by the testator, W. T. Bourne, in the name of "Bourne & Grove." The memorandum related to certain hereditaments which formed part of the assets of the partnership of "Bourne & Grove."

W. T. Bourne died on the 3rd of September, 1902. His estate was insolvent. The overdraft at the bank was then about £4,500.

An action was commenced against Bourne's executors to administer his estate.

By an order dated December, 1903, in the claim of the executors of the will of G. Grove to rank as creditors against the capital which G. Grove had in the business of Bourne & Grove, it was ordered that the executors of G. Grove be at liberty to prove for £3,000 against the estate of W. T. Bourne, and are to have a lien for the amount of such debt and costs on the assets of the said partnership.

The partnership real estate, the subject of the deposit of the 7th of February, 1902, had been sold and realized about £5,000. It being insufficient to pay both the bank and Grove's executors in full, the question had to be determined which of them was entitled to priority.

Upjohn, K.C., and *Stamp*, for the parties having the conduct of the action.

Jenkins, K.C., and *P. Wheeler*, for Grove's executors.

Butcher, K.C., and *Martelli*, for the bank.

Bramwell Davis, K.C., and *Owen Thompson*, for Bourne's executors.

FARWELL, J., in giving judgment, said: In my opinion this case is covered by the authority that has been cited. Grove died on the 9th of May, 1901. At that time the firm was in debt to his bankers, Messrs. Berwick & Co. Mr. Bourne, the surviving partner, carried on the business and got an overdraft from the bank on the security of the deposit of partnership deeds.

The circumstances are set out in the master's certificate, and these are the facts with which I have to deal. Messrs. Berwick were the bankers of the firm of Bourne & Grove during the late partnership down to the death of the partner George Grove.

Between the death of George Grove and the date of the memorandum of deposit the testator "drew out sums amounting to £8,685 9s. 1d. The overdraft on the 7th of February, 1902, was £5,088 9s. At this time the said Messrs. Berwick & Co. required security to be given for the said overdraft, in consequence whereof the testator, William Temple Bourne, deposited the title deeds of the said hereditaments with Messrs. Berwick & Co., and signed the said memorandum of deposit by way of security for such overdraft. Between the date of the said memorandum of deposit and his death, the testator, William Temple Bourne, paid to the credit of the said account sums amounting in all to £6,825 9s. 8d. and drew out sums amounting in all to £6,200 13s. All cheques upon the said account were drawn in the names of Bourne & Grove, and appeared to have been drawn for the purposes of the said business." Now, the rule in *Clayton's case*, 1 Mer. 572, would make the actual indebtedness of the firm at the death of Grove disappear before the date at which the security was given, but on the authority of *In re Langmead's Trusts*, 3 W. R. 602, (1855) 20 Beav. 20, it appears to me that the lien which Grove had for the amount due to him would not interfere with the raising of money for the purpose of the business carried on by the surviving partner by giving security for an overdraft. The bankers, it is admitted, knew of the

(*a.*) Reported by PAUL STRICKLAND, Esq., Barrister-at-Law.

death of Grove. They also knew that the account was not altered in any way. They knew that they were only paid off, if they ever thought about it, by the application of the rule in *Clayton's case*. The account was not altered in any way. It certainly would be rather strong to say that because the bankers were paid off, because of the rule in *Clayton's case*, they could not possibly take a security afterwards without being fixed with some impropriety of conduct. In my view *Langmead's case* shows that that is not the law. The 39th section of the Partnership Act declares what is now the nature of a partnership lien. "On the dissolution of a partnership every partner is entitled, as against the other partners in the firm, and all the persons claiming through them in respect of their interests as partners, to have the property of the partnership applied in payment of the debts and liabilities of the firm, and to have the surplus assets after such a payment applied in payment of what may be due to the partners respectively after deducting what may be due from them as partners to the firm; and for that purpose any partner or his representative may, on the termination of the partnership, apply to the court to wind up the business and affairs of the firm." Lord Lindley, in his note to that section, refers to *In re Langmead*, which I observe he there also treats as though it related only to specific chattels, which I venture to think is an oversight, because *In re Langmead* did not deal with a chattel at all, but with a *chose in action*—namely, a policy of assurance. *In re Langmead* was a case where the partners were brewers, and part of the partnership property was a policy of assurance. It does not appear how they bought it, probably they had taken it as security for some loan. This was sold by the surviving partner, and the deceased partner's executors claimed a paramount title.

Lord Romilly puts the case in this way in 20 Beav., p. 25: "I think that the case of the petitioner cannot be put higher than one of an express trust vested in William Langmead to sell the property and apply the proceeds in payment of the debts of the partnership. If that had been the case, a purchaser from William Langmead, even with express notice of that trust, would not have been bound to see to the application of the purchase-money." That is confirmed by the Court of Appeal, by Knight-Bruce, L.J., on the same ground, and by the other Lord Justice on a different ground. I observe that Lord Lindley in his treatise speaks of this right as this *quasi lien*, or whatever else it may be called, and I think that the argument really is founded on a certain misapprehension as to the nature of the right by treating it as though it were in fact an equitable mortgage security. The right is as stated in the Partnership Act, and it cannot be put higher, as Lord Romilly says, than a trust to realize and pay the debts, with, of course, a receipt clause. That being so, what has happened is that the surviving partner, finding debts still due, borrows money, and goes on carrying on what had been the partnership business, and which had become his. So far as I can see there is nothing whatever to put the bank upon any inquiry or to fix them with notice that he was intending to use the money otherwise than in accordance with the trust to which Lord Romilly refers in *In re Langmead*. If that was so, the case is indistinguishable from *In re Langmead*.

The Irish case *In re Thomas Ryan*, L. R. Ir. 3 Eq. 222, I think can be explicable, although it is very difficult to follow the very lengthy judgments, reading all the evidence in full, and must have been put, I think, on the ground that, applying *In re Langmead*, the purchaser or mortgagee had notice that the purpose for which the sale or mortgage was being made was improper. I do not see how otherwise he can possibly, consistently with the authorities, have been held liable. Of course if a man knows as a fact, and it is brought home to him, that the surviving partner is going to pay a gambling debt or something of that sort, I do not say for a moment that he would be assisted by *In re Langmead*, which puts it, to my mind, on a very intelligible ground—namely, that a trustee has power to sell and power to give receipts. The purchaser is entitled to rely on the power to give receipts, except so far as he is fixed with the express knowledge that there is an improper application intended. Further than that Mr. Jenkins has not relied upon it. So far as I can see, there is no answer to the second point, that the executors of the partner might have got the deeds; they did not, and the bankers have got them, and therefore, on the authority of the cases cited, they appear on that ground to have a better equity. Messrs. Berwick have a first charge upon what was comprised in the security.

Solicitors, *P. W. Chandler; Badham & Comins; Maples, Teesdale, & Co.*

Chan. Div. }
Farwell, J. } Nov. 10.

DAVY v. SCARTH. (a.)

Partnership—Receiver—Remuneration of receiver—Debt of receiver to partnership—Set-off.

In an action for dissolution of partnership, one of the partners, who was indebted to the partnership, had been appointed receiver.

Held, that his remuneration as receiver could not be deducted from the debt due by him to the partnership.

Further consideration.

An action had been brought for dissolution of a partnership that had existed between Davy and the defendant. The defendant had been appointed receiver in the action. It appeared from the master's certificate, filed in July, 1905, that the defendant as receiver had passed his accounts showing that he had in hand a sum of £1,892 12s. 8d., and that there was also due to the partnership from the defendant as partner a sum of £1,457; the master further certified that he allowed the defendant as receiver the sum of £280 for remuneration and £48 1s. 6d. for costs—making together the sum of £328 1s. 6d.

The defendant was unable to pay any part of the debt of £1,457 due by him to the partnership.

The question on further consideration was, whether the defendant was entitled to deduct from the partnership assets in his hands the sum (£328 1s. 6d.) allowed for his remuneration and costs as receiver, or whether that sum ought to be set-off against the debt owing by him as partner.

Elgood, for the plaintiff (the executrix of Davy), admitted that there was no express authority on the point raised.

Luxmoore, for the defendant.

FARWELL, J., said that the defendant, as receiver, was an officer of the court, and was entitled to be paid for the work that he was employed to do. He was therefore entitled to retain out of the partnership moneys in his hands the sum of £328 1s. 6d. which had been allowed him by the master for remuneration and costs, notwithstanding the fact that he was himself indebted to the partnership estate and was unable to pay what he owed.

Solicitors, *Emmet & Co.; Oscar Edmunds.*

(a.) Reported by C. B. MORGAN, Esq., Barrister-at-Law.

Chan. Div.
Swinfen Eady, J. } July 14, 1905.

BISHOP OF CREDITON v. BISHOP OF EXETER. (a.)

Deed—Execution—Alterations after execution—Blanks filled up—Date altered—Alteration immaterial.

A deed was executed by all necessary parties other than B., whose signature was necessary for its validity. At the date of execution the date of the day and month were in blank, but the year 1899 *was written in full. B. executed the deed some months later in* 1900; *the blanks were filled up and the year altered from* 1899 *to* 1900.

Held, that the validity of the deed was unaffected by these alterations.

Pigot's case, 11 *Rep.* 26*b*, *since* Aldous *v.* Cornwell, 16 *W. R.* 1045, *L. R.* 3 *Q. B.* 513, *applies only to material alterations.*

Action.

This was an action brought for the purpose of determining whether certain alterations made in the date of a deed after some of the parties had executed it thereby rendered it invalid.

It had been intended to build a new church in St. Jude, a newly-formed parish made out of an old one in Plymouth, and it was necessary, in order to vest the patronage of the new church in the vicar and certain trustees therein named of the old parish, to execute a deed, in pursuance of the Church Building Acts (8 & 9 Vict. c. 70 and 11 & 12 Vict. c. 37).

Under these Acts it was necessary for this object to have an agreement in writing between the bishop of the diocese and the patrons and incumbent of the parish in which the new church was to be erected.

The agreement in question was made by a deed between the defendant of the first part, the vicar and churchwardens of the old parish, who were patrons of the parish of St. Jude, of the second part, the vicar of St. Jude of the third part, and the plaintiffs of the fourth part. After reciting that it had been proposed to build in St. Jude a new church, to be named St. Simon's, it was declared that the advowson and patronage of the new church should be vested in the plaintiffs and the vicar for the time being of the old parish. The deed was executed by all parties, with the exception of one of the plaintiffs and the Bishop of Exeter, on the 21st of October, 1899, and the remaining plaintiff on the 23rd of October, 1899.

At these dates the testimonium clause ran as follows: "In witness hereto the said parties to these presents hereunto set their hands and seals this day of , one thousand eight hundred and ninety-nine." It was forwarded to the bishop on the 4th of November, 1899, and was executed by him on the 26th of January, 1900. The testimonium was then filled up with the "twenty-sixth" and "January," the word "nine" was substituted for "eight," and the words "and ninety-nine" erased.

It had been the intention of the parties executing it that it should be dated as of the day of execution by the Bishop of Exeter, and a question was accordingly raised whether the alteration in the testimonium rendered the deed invalid. The plaintiffs claimed that the deed was valid. The other parties to the deed were made defendants.

Austen-Cartmell, for the plaintiffs, relied on *Doe* v. *Bingham*, 4 B. & Ald. 672; *Adsetts* v. *Hives*, 33 Beav. 52; *Pigot's case*, 11 Rep. 26*b*, 27*a*; a case in Dyer 261*b*; *Aldous* v. *Cornwell*, 16 W. R. 1045, L. R. 3 Q. B. 573; *Hudson* v. *Revett*, 5 Bing. 368; *In re Howgate and Osborn's Contract*, [1902] 1 Ch. 451, 50 W. R. Dig. 48.

He referred to Sheppard's Touchstone (7th ed.), on p. 554 (Preston's). SWINFEN EADY, J. mentioned *Paget* v. *Paget*, 2 Rep. Ch. 187; Sheppard's Touchstone (8th ed.) (Atherley's), on p. 53.]

The defendants did not appear.

SWINFEN EADY, J.—In my judgment there is no doubt that the instrument in question was effective, and that the advowson, patronage, and perpetual right of presentation and nomination to the new church therein mentioned became thereby effectually vested in the plaintiffs and the vicar of Charles (the old parish). The facts are these: [His lordship stated the facts set out above, and continued:] It was perhaps contemplated the bishop would execute in 1899. The instrument was sent to him on the 4th of November, 1899, but he did not execute it until the 26th of January, 1900, and it was then made a deed of that date. If the year had been left blank as well as the month and day, it would only have been necessary to fill in the date, but as the year had been written in it was necessary to alter it. But it was only technically an alteration, for the deed was not dated. In the first place the alteration was only made to carry out the intention of all parties that the deed should be dated and take effect on the day it was executed by the bishop. Substantially, therefore it was not an alteration, only a filling in the date which all parties intended to be the date; and, secondly, it was not a material alteration. The rule laid down in *Pigot's case*, in 11 Rep. 27*a*, must in the present day be taken to apply only where the alteration is in a material point. In that case it was found as a fact that the alteration was not material and was made by a stranger, and judgment was given for the plaintiff. In the case of Dyer, quoted in *Pigot's case*, the alteration was material. *Pigot's case* was considered in *Aldous* v. *Cornwell*, where the judgment of the court, consisting of Cockburn, C.J., and Blackburn and Lush, JJ., was delivered by Lush, J., and after going through the authorities he says: [His lordship read his remarks on p. 579, and continued:] In other words, *Pigot's case* is not now any authority that where the alteration is not material the deed is made void. The passage in Sheppard's Touchstone and other authorities which have been cited are to the same effect. The case of *Hudson* v. *Revett* is, I think, not immaterial upon this point. That was a case of a creditor's deed in which the amount of one of the principal debts was left blank when the deed was executed. [His lordship referred to Gaselee, J.'s, remarks on p. 390 in 5 Bing., and continued:] In substance that is this case. In this case the date was left blank with the intention that the deed should be dated on, and take effect from, the day on which the Bishop of Exeter executed it. It was in effect an imperfect execution. Under these circumstances I am of opinion that the alteration in the deed did not make the deed invalid, and that the plaintiffs are entitled to a declaration in the words of the statement of claim.

Solicitors, *Ravenscroft, Woodward, & Co.*, for *Woollcombe & Sons*, Plymouth.

(a.) Reported by A. R. TAYLOUR, Esq., Barrister-at-Law.

K. B. Div. (Bigham, J.) July 17; Aug. 10, 1905.

In re WILKINSON.
Ex parte FOWLER. (a.)

Bankruptcy—Contract for works—Power to engineer to order direct payment to those supplying contractor with machinery—Exercise of such power after receiving order against the contractor.

The bankrupt had entered into a contract to do certain work for a public authority. The contract contained a clause empowering the engineer to order direct payment by the public authority to those supplying machinery to the contractor in case he should have reasonable cause to believe that the contractor was unduly delaying payment to them. At the date of the receiving order some of the firms who had supplied machinery were unpaid, and the engineer subsequently ordered direct payment to be made to them out of the money which remained due from the public authority to the bankrupt at the date of the receiving order.

Held, that the engineer was entitled to make such order, and that the trustee could not recover such money from the public authority, as the effect of the filing by the bankrupt of his petition was that payment to the machinery firms was unduly delayed.

Held, also, that the authority given by the contractor to the engineer under the clause in question was irrevocable by the contractor and consequently irrevocable by the trustee in his bankruptcy.

Motion by the trustee in bankruptcy to recover from the Aylesbury Urban District Council certain money alleged to be due from the council to the bankrupt under a contract.

The bankrupt had on the 9th of September, 1903, entered into a contract with the Aylesbury Urban District Council for the carrying out of certain drainage works.

The price agreed was £11,546, payable by monthly instalments on the certificate of the council's engineer, less 10 per cent. retention money. The contractor was to maintain the works for six months after the engineer should have certified their completion, and the retention money was then to become payable. The contract also provided that certain machinery should be supplied by certain specified firms; and also that "at each and every certificate in which the engineer shall deem proper to include a sum or sums for machinery, the contractor shall, upon measurement being made, produce to the authorized officer a receipt showing that he has paid to the machinery makers the net sum to be included notwithstanding that he has not at the time of paying such machinery makers received the said sums from the council. If the engineer shall have reasonable cause to believe that the contractor is unduly delaying proper payment to the firms supplying the machinery, he shall have power, if he thinks fit, to order direct payment to them, and shall deduct from the next certificate issued to the contractor the money so paid. (Clause 54 of the contract.)

On the 3rd of October, 1904, when the contract was very nearly completed, a receiving order was made against the contractor. He was adjudged bankrupt upon the 12th or October, and a Mr. Fowler was appointed trustee.

Notice of the adjudication was at once given to the council.

At the date of the receiving order there was due to the bankrupt firm from the council a total sum of £1,574 15s. 10d., of which £1,349 17s. 8d. was retention money, and £224 18s. 2d. was to become payable under the next certificate from the engineer.

The trustee continued the work, which was completed on the 24th of October, and maintained it for six months after completion, as required by the contract.

The bankrupt, however, had not paid the machinery makers regularly, and at the date of the receiving order was indebted to various firms in a total sum of £836 8s. 9d.

On the 7th of February, 1905, the council's engineer made an order under clause 54 of the contract, reciting that he had reasonable cause to believe that the contractor was unduly delaying payment to the firms who had supplied him with machinery, and ordering direct payment of the sum of £224 18s. 2d. to the various firms on account of the money owing to them from the bankrupt.

On the 8th of February the engineer certified that the works had been completed to his satisfaction upon the 24th of October, 1904, but that nothing was due to the contractor, as he had already ordered direct payment to the machinery firms of all that was owing to the contractor.

On the 5th of April the engineer made an order, similar to that of the 7th of February, for the direct payment of £611 10s. 7d. to the various firms of machinery makers.

On the 24th of April, the works having by then been maintained for six months, the engineer issued his final certificate for the payment of the retention money, but deducted therefrom £611 10s. 7d., which he had ordered to be paid directly to the machinery makers, and certified only £738 7s. 1d. as due to the contractor.

The trustee claimed from the council the sum of £224 18s. 2d., due on the completion of the works, and for £1 349 17s. 8d., the whole of the retention money, subject to a charge thereon to the debtor's bankers of £1,220. The council refused to pay the money because of the orders made by their engineer, and the trustee took proceedings against them by way of motion for a declaration that the money in question formed part of the property of the bankrupt divisible among his creditors, and for an order that the council should pay it to the trustee.

The motion came on for hearing on the 17th of July, when counsel for the Aylesbury Urban District Council objected that the court had no jurisdiction to try the question by way of motion, as a decision in favour of the trustee would not be binding upon the engineering firms, who were no parties to the motion, and would still be in a position to enforce their claims against the council.

The respondents were prepared to pay the money to whoever should be found entitled to it, but they contended that the trustee should have proceeded by an action, in which they could have interpleaded.

Counsel for the trustee then suggested that each of the engineering firms should be served with a copy of the notice of motion, and asked if they would consent to the question being tried on motion.

Bigham, J., consented to this course being adopted, and gave directions accordingly.

The engineering firms having been duly served and consented to the jurisdiction, the motion came on again for hearing on the 10th of August.

S. G. Lushington, for the trustee.—Clause 54 was intended to protect the council against delay in the works arising from non-supply of machinery, not to protect the manufacturers. At the date when the engineer issued his orders for direct payment the machinery had all been supplied, and the council was in no need of protection. Further, upon the adjudica-

(a.) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

tion of the contractor the contract vested in the trustee, who did not disclaim it, but, on the contrary, continued and completed the work and became "the contractor" under the contract. The engineer's certificate that "the contractor" was unduly delaying payment was not really a true statement of fact. The trustee could only pay the creditors of the bankrupt by way of dividend, and there could be no suggestion that the trustee was unduly delaying a distribution of dividends on the estate. The machinery makers were unsecured creditors at the date of the receiving order, and the subsequent orders made by the engineers could not make them secured creditors.

A. A. Hudson, for three of the firms of machinery makers.—Clause 54 was intended to protect the machinery makers as well as the council. They would not have supplied the machinery without some such guarantee that they would be paid for it. Further, the bankrupt by clause 54 gave an authority to the engineer to order direct payment to the machinery makers in certain events. This was an authority which he could not revoke, and the trustee standing in the bankrupt's position as "the contractor" has no more power to revoke the authority than the bankrupt had. The bankruptcy put it out of "the contractor's" power to pay the firms, consequently payment thereby became unduly delayed. Finally, the engineer's certificate of undue delay is conclusive and cannot be questioned, unless it is suggested that he acted *mala fide*.

G. D. Pepys, *W. Glynn*, and *W. E. Ball*, for the other machinery makers, argued to the same effect.

Clayton, for the council, stated that they would pay the money as the court might direct.

S. G. Lushington replied.

Mr. A. N. Stephens, solicitor to the bankers, who had a charge on the retention money, conceded that if the court decided in favour of the machinery makers they would be entitled to payment in priority to his clients.

BIGHAM, J.—I doubt whether without the consent of all parties I should have had jurisdiction to deal with this question upon a motion; but as all parties have consented I will decide the points that have been raised. The trustee claims as part of the property divisible among his creditors two sums of money payable by the Aylesbury Urban District Council to the bankrupt under a contract stated the 9th of September, 1903, and amounting in all to £1,574 15s. 10d. On the other hand, certain firms who have supplied machinery to the contractor claim that they are entitled to part of this money in priority to the trustee. Now the contract contains a provision on which, in my judgment, the whole question turns. [His lordship here read clause 54.] That clause, in my opinion, is inserted in the contract not only for the protection of those who supply the machinery but also for the benefit of the council. It is much to the interest of the council to see that contracts of this kind for public works are carried out in a manner satisfactory to all persons who are concerned in the performance of them. The council certainly may, and no doubt frequently do, make contracts of this kind, and they make them much more advantageously when the people who supply the machinery or other goods which are to be used by the contracter in the performance of the contract know that there is a reasonable probability that they will be paid. The council are enabled by inserting a clause of this kind in their contract to give a certain amount of confidence to people who supply goods to the contractor, and in that way they are placed in a better position when they come to make contracts again, than they otherwise would be, and therefore I say that the clause is inserted, not only in the interests of the persons who supply the contractor, but also in the interests of the council themselves. Now, what is the meaning of this clause? I think it means that if the persons supplying machinery to the contractor for the purpose of the contract are not promptly and properly paid by him, they can apply to the engineer, and then it shall be competent for the engineer to intervene and, by a proper certificate given in that behalf, to require the council to pay to the machinery firms the amount of their accounts directly—that is to say, not through the hands of the contractor at all, but the money is to be paid directly by the council to the machinery firms. That is the meaning of the clause. It amounts to an authority given by the contractor—that is to say, by the bankrupt in this case—to the engineer representing the council to dispose of money which would otherwise come to the bankrupt, in a certain way under certain circumstances. It is an authority which, in my opinion, it is not competent for the bankrupt to withdraw, and it was never contemplated that he should withdraw it; and, indeed, it is not contended on behalf of the trustee that the authority was one which could be lawfully withdrawn. It is an authority, therefore, which the bankruptcy of the contractor did not annul. I have, then, to see whether that authority has been properly exercised. On the 3rd of October, 1904, after the machinery had been supplied, the contractor filed his own petition and was adjudicated bankrupt—that is to say, by his own act he put it out of his power to pay for the machinery which had been supplied to him. In my opinion that very act amounted to "unduly delaying proper payment" of the machinery firms within the meaning of clause 54. He prevented himself, no doubt by his own misfortune, from making proper and due payment. I think it would have been competent at that very moment for the engineer to have given the certificate which, as I shall mention in a moment, he subsequently did give, directing that the moneys should be paid direct by the council to the firms supplying the machinery. He, however, did not give the certificate then, but on the 7th of February, 1905, long after the bankruptcy, he gave a certificate by which he certified that certain sums of money were due to various firms who had supplied machinery to the bankrupt. The certificate begins: "Having reasonable cause to believe that the contractors, Messrs. Cooke & Son" (the bankrupt's trading name), "are unduly delaying proper payment to the firms supplying machinery, I hereby under the terms of the contract direct payment to those firms who are hereunder named of the sums respectively payable." In my opinion the circumstances were such as to give the engineer power to execute the provisions of clause 54 by giving that certificate. The power or authority given by that clause was never revoked, and in my opinion it binds the trustee just as much as it would have bound the contractor if he had never become bankrupt. The day after the engineer gave that certificate, he gave another certificate to the effect that the bankrupt or the bankrupt's estate was entitled to receive the the balance of the contract money less the retention money of 10 per cent. which the council were entitled to retain under the terms of the contract during the maintenance of the works, and less the amount of the order or certificate of the 7th of February. Later on, on the 5th of April, 1905, the period during which the maintenance clauses under the contract were in operation came to an end,

and the contractor, if he had not been a bankrupt, would have been entitled to the retention money. Then what the engineer did, and I think he had power to do it, was to certify that the machinery firms, having been delayed in the manner before described, were entitled to be paid direct out of the retention money the balance of their accounts, and he gave a certificate accordingly on the same 5th of April. In my opinion he gave that certificate with authority and under circumstances that justified him in directing that these firms were to receive out of the retention money the balance of their accounts. I will make an order for payment by the council direct, in accordance with the certificates of the 7th of February and of the 5th of April of the sum of £836 8s. 9d. to the machinery firms, and the balance will go to the bank.

Solicitors for trustee, *Parker, Garrett, & Co.*

Solicitors for council, *Nicholson & Crouch*, for *P. A. Wright*, Aylesbury.

Solicitors for other respondents, *Hind & Robinson; G. D. Perks; Nash, Field, & Co.; G. Reader & Co.; Stephens & Sons.*

K. B. Div.
(Lord Alverstone, L.C.J., and Lawrance and Ridley, JJ.) — Aug. 8, 1905.

SYMONS *v.* BAKER. (*a.*)

Ship—Liability of King's ship to pay pilotage dues—Liability of master—Merchant Shipping Act, 1894 (57 & 58 *Vict. c.* 66), *ss.* 591, 741—*Bristol Channel Pilotage Act*, 1861 (24 & 25 *Vict. c. clxxxxvi.*), *s.* 35.

A collier owned by his Majesty's Government was exclusively engaged in going backwards and forwards carrying coal for the Navy. She appeared in the Navy List under the heading "List of small steam vessels, tugs, &c., employed on harbour service." Her master was not an officer of the Royal Navy. On divers occasions the master of the collier employed a licensed pilot for the port of Cardiff, and the pilot took proceedings under section 591 *of the Merchant Shipping Act against the master to recover pilotage dues according to the scale imposed by bye-laws made in pursuance of the Merchant Shipping Act*, 1894, *and a local Act* (*in which the Crown were not mentioned*) *under which the pilots were licensed.*

Held, that the collier was a King's ship, and therefore came within the exemption conferred by section 741 *of the Merchant Shipping Act, and that the master of the King's ship was not liable to pay pilotage dues on the scale contemplated by the bye-laws.*

Case stated.

At the Cardiff Petty Sessions a complaint was preferred by the respondent against the appellant under section 591 of the Merchant Shipping Act, 1894, and the bye-laws made and confirmed by Order in Council pursuant to sections 582 and 583 of the Act called Pilotage Rates, Bye-laws, and Regulations for the Government of Pilots acting under the Bristol Channel Pilotage Act, 1861, for the recovery of the sum of £44 in respect of a claim for dues for the pilotage of the steamship *Kharki* from Penarth Roads to Roath Basin, Cardiff, on two occasions, and from Roath Basin to Penarth Roads on two occasions.

Upon the hearing of the complaint the following facts were proved or admitted:

The Kharki (net register nottage 338·24 tons) was a coal vessel owned by his Majesty's Government. She was a collier exclusively engaged in going backwards and forwards to various ports carrying coal for the Navy. She flew the Devonport dockyard flag, but not the Navy flag, and she did not carry guns. She was not registered under the Merchant Shipping Act, but had been surveyed by the Board of Trade in accordance with rule 1 of that Act. She appeared in the Navy List under the heading "List of small steam vessels, tugs, &c., employed on harbour service."

The appellant held a Board of Trade certificate as master mariner, and was employed as master of *The Kharki* by the dockyard authorities at Devonport, under the Admiralty, and acted on the instructions received from the coaling officer at Devonport Dockyard. He was not an officer of the Royal Navy.

The crew of the vessel were engaged at the dockyard under articles of agreement.

The respondent was a licensed pilot for the port of Cardiff, and at the request of the appellant he piloted *The Kharki* on the 5th of May from Penarth Roads to the Roath Basin, Cardiff; on the 6th of May from the Roath Basin to Penarth Roads; on the 12th of May from Penarth Roads to the Roath Basin; and on the 13th of May from the Roath Basin to Penarth Roads. Pilotage is not compulsory in the port of Cardiff. On the completion of each pilotage service rendered by the respondent the appellant handed him a certificate.

On the 20th of May, 1904, the respondent sent to the appellant a demand in writing for payment of the said dues.

Bye-law of the Pilotages Rates, Bye-laws and Regulations for the Government of Pilots acting under the Bristol Channel Pilotage Act, 1861, made pursuant to section 582 of the Merchant Shipping Act, 1894, and approved and confirmed by Order in Council dated the 20th of May, 1903, provides that every licensed pilot who may be employed to pilot any ship to any dock, harbour, or basin in the port of Cardiff, from any point in Penarth Roads, or *vice versâ*, shall be paid according to the registered tonnage of such vessel as follows: If 300 tons and under 400 tons, £1 1s.

On the part of the appellant it was contended, first, that *The Kharki* was a ship belonging to his Majesty within the meaning of section 741 of the Merchant Shipping Act, 1894, and that inasmuch as the Act neither made a provision for the application of section 591 to the King's ships nor conferred power on the pilotage authority to fix dues for the pilotage of such ships, the appellant, as master of *The Kharki*, was not liable to pay the pilotage dues claimed, and that the magistrate had no jurisdiction to adjudicate upon the claim; secondly, that by the common law the Crown was not liable for statutory dues or bound by any statute, except when expressly bound therein; thirdly, that the appellant was not legally responsible for the payment of the dues, because the services were ordered by him in his capacity as a public officer and as agent for the Crown, and the public revenue could not be reached by means of an action against him.

On the part of the respondent it was contended, firstly, that section 741 merely placed King's ships on a different footing from other ships in that they were not liable to be proceeded against *in rem*, and that the section did not preclude an action from being successfully maintained against the master of a ship belonging to his Majesty in respect of tort or breach of contract; secondly, that *The Kharki* was not a ship belonging to his Majesty within the meaning of section 741, and that the appellant as master was therefore

(*a.*) Reported by ALAN HOGG, Esq., Barrister-at-Law.

personally liable under section 591 to pay the dues claimed by the respondent.

The magistrate was of opinion that *The Kharki* did not perform the services of a King's ship, but was a dockyard vessel or yard craft used exclusively for commercial purposes by the dockyard authorities at Devonport, and he therefore held that she was not a ship belonging to his Majesty within the meaning of section 741 of the Merchant Shipping Act, 1894, and that the appellant as her master was therefore liable under section 591 of the Act to pay the dues claimed, and the magistrate accordingly gave judgment for the amount claimed.

The question for the opinion of the court was whether the magistrate came to a correct determination in point of law.

By section 591 of the Merchant Shipping Act, 1894: "(1) The following persons shall be liable to pay pilotage dues for any ship for which the services of a qualified pilot are obtained—viz., (*a*) the owner or master; (*b*) as to pilotage inwards such consignees or agents as have paid or made themselves liable to pay any other charge on account of the ship in the port of her arrival or discharge; (*c*) as to pilotage outwards such consignees or agents as have paid or made themselves liable to pay any other charge on account of the ship in the port from which she clears out; and these dues may be recovered in the same manner as fines of like amount under this Act, but that recovery shall not take place until a previous demand has been made in writing."

By section 681, sub-section 2: "Where under this Act any sum may be recovered under this Act, that sum, if recoverable before a court of summary jurisdiction, shall in England be recovered as a civil debt in manner provided by the Summary Jurisdiction Act."

Section 741: "This Act shall not, except where specially provided, apply to ships belonging to his Majesty."

By the Bristol Channel Pilotage Act, 1861 (24 & 25 Vict. c. clxxxvi), s. 35, it shall be lawful for the board to levy, demand, and receive from the master or owner or consignee of every vessel coming into or going out of the port for which such board may have been appointed, and who shall have required and obtained the assistance of a pilot, such reasonable rates for pilotage as may from time to time be provided by the bye-laws to be made by such board for such purpose; and such board shall at all times maihtain an efficient staff of pilots.

Sir R. B. Finlay, A.G., and *W. Wills*, for the appellant.

Pickford, K.C., and *John Sankey* (*Herman Cohen* with them), for the respondent.

The arguments sufficiently appear from the judgment.

The following cases were referred to in argument: *Cargo ex Woosang*, 1 P. D. 260; *The Cybele*, 26 W. R. 345, 3 P. D. 8; *Palmer* v. *Hutchinson*, 6 App. Cas. 619, 30 W. R. Dig. 138.

Lord ALVERSTONE, L.C.J.—I think that this appeal must be allowed, though I feel there are strong arguments in favour of both sides. I am unable to agree with the view of the magistrate that a different rule has to be applied because the vessel was employed for what the magistrate terms commercial purposes, by which he means, I suppose, that she carried coal for the supply of his Majesty's ships. I do not think that there was anything commercial in that employment. The vessel was what may be called a coal tender, and was used solely as a tender taking coal to ships of the Navy. I do not understand why any distinction is to be drawn between the service of an ordinary ship of the Navy and the most useful, but less dignified, work which this vessel was performing. In my opinion, the vessel in question was clearly a King's ship, and therefore came within the exceptions defined by section 741 of the Merchant Shipping Act, 1894. I think, therefore, that we have to consider whether the decision of the magistrate can be supported on one of two grounds, either that a King's ship is liable under the Bristol Channel Pilotage Act to pay the pilotage dues imposed by the bye-laws, or that the master of a King's ship, if he chooses to employ a pilot, is personally liable. I have come to the conclusion that the Bristol Pilotage Act is not sufficient to make the King's ship liable to pay pilotage dues on the scale contemplated by those bye-laws. It seems to me that, whatever may be the rights, duties, and obligations of pilots who are summoned to pilot the King's ships, it cannot be said, in the absence of express language, that there is a necessary implication that the public revenue, by petition of right, can be called upon to pay the scale of pilotage dues which have been imposed by the bye-laws. In my opinion the Bristol Pilotage Act and the Merchant Shipping Act combined are not sufficient to create a debt against the Crown in respect of pilotage services rendered. I have not overlooked the argument of Mr. Pickford, that this conclusion has the effect of depriving the Crown of certain rights under the Bristol Pilotage Act, but I agree with the view presented by the Attorney-General that the two questions are not necessarily dependent upon the same considerations. I think it is possible that the Crown may get the benefit of certain enactments by way of privilege, although it does not incur the obligations which would arise if the Crown were liable to other provisions.

Then as to the other point, that the master is liable because he, as master, has ordered the pilotage, I do not think that can be maintained. The master of a King's ship acts as master on behalf of the Crown; he is an agent in the ordinary sense of the word; and unless it can be clearly implied that the obligation to pay pilotage dues was to be a personal obligation on the master the argument goes too far. If the King's ships are not liable to pay dues under these bye laws, then one cannot find a contract based upon the statute to make the master personally liable; to do so would be an express contradiction of the provision of the Merchant Shipping Act which expressly exempts the Crown. The only way in which it could be suggested that any contract or obligation was created on the part of the master would be, as was indicated in *Palmer* v. *Hutchinson*, by showing grounds for alleging a contract on the part of the Crown which could be enforced by petition of right.

LAWRANCE and RIDLEY, JJ., concurred.

Appeal allowed.

Solicitor for the appellant, *Treasury Solicitor.*

Solicitors for the respondent, *Stephens, David, & Co.*, Cardiff.

Court of Appeal.

From Chan. Div. (Vaughan Williams, Stirling, and Cozens-Hardy, L.JJ.) } Nov. 28, 29, 30; Dec. 14.

RUSHMER v. POLSUE & ALFIERI (LIMITED). (a.)

Nuisance—Noise—Crowded neighbourhood occupied by printing trade—Private resident—Injunction.

A trade not carried on in the particular and established manner of a district devoted to that trade principally, and causing serious disturbance to a resident in that district by making noises in excess of those made by carrying on the trade in the particular and established manner of the trade of the district constitutes a private and actionable wrong which may be restrained by injunction. There can be no prescriptive right to commit a nuisance constituting a private and actionable wrong.

In this case the defendants appealed from a judgment of Warrington, J.

The plaintiff carried on the business of a dairyman, and had for nearly twenty years occupied a house in the City of London in the midst of a district which was largely used by persons carrying on the business of printing. His business was carried on in the lower part of the house he occupied, and in the upper part of it he lived with his family.

The defendants some short time before this action was commenced set up a machine for printing in a house adjoining the plaintiff's premises, and up to that time the plaintiff had suffered no inconvenience or discomfort from noise, though the house was not as quiet as one which might be situated in a district more used for residential purposes.

After the defendants' coming the plaintiff was caused much annoyance from the machinery that had been set up, and thereafter sought relief by claiming an injunction restraining the defendant from working their machinery in such a manner as to cause annoyance to the plaintiff from noise.

Warrington, J., found as a fact that the defendants had so carried on their work during the night time as to amount to a legal nuisance entitling the plaintiff to an injunction, which he granted.

The defendants appealed.

Duke, K.C., F. Hinde, and *G. H. Couch,* for the appellants.—Warrington, J., stated the law correctly, but did not apply those principles properly, this appears from his findings of fact. He treated as serious an amount of noise which was not such according to the standard of a printing neighbourhood. A person living in a district specially devoted to a particular trade cannot complain of a noisy nuisance caused by the carrying on of a branch of that trade without carelessness and in a reasonable manner.

H. Terrell, K.C., and *Coote,* for the respondent.—Respondent is entitled to an injunction if the result of the appellants' printing operations at night in a house adjoining that of respondent, is to cause serious inconvenience to respondent and his family even though the locality is devoted to the printing trade, carried on by printers in a particular and established manner not constituting a public nuisance. Printing carried on in such a manner is an actionable wrong if it causes serious inconvenience to respondent and his family. Prescriptive rights alone could prevent such conduct of the appellants being actionable.

They cited *Crump* v. *Lambert,* 15 W. R. 417, L. R. 3 Eq. 409.

Cur. adv. vult.

(a.) Reported by HENRY STEPHEN, Esq., Barrister-at-Law.

Dec. 14.—VAUGHAN WILLIAMS, L.J.—The principles applicable to the case were thus laid down by Warrington, J., in the earlier part of his judgment. "The question I have to answer is whether the defendants, by working the machine in question, seriously interfere with the comfort physically of the plaintiff and his family in the occupation of his house according to ordinary notions prevalent among reasonable English men and women: *Walter* v. *Selfe,* 4 De G. & S. 315, 322. And for the purpose of answering this question I am not to look at the defendants' operations in the abstract by themselves, but in connection with the circumstances of the locality and in particular to the nature of the trades usually carried on there, and the noises and disturbances existing prior to the commencement of the defendants' operations: *Sturges* v. *Bridgman,* 11 Ch. D. 852, 865; *St. Helens Smelting Co.* v. *Tipping,* 13 W. R. 1,083, 11 H. L. C. 642. But if after taking these circumstances into consideration I find a serious and not a slight additional interference with the plaintiff's comfort as above defined, I think it is the duty of the court to interfere: *Crump* v. *Lambert,* 15 W. R. 417, L. R. 3 Eq. 409." It seems to me that these principles as expressed by Warrington, J., contain nothing which is not supported by the authorities cited by him. And I find nothing in these authorities which makes them inconsistent with one another, although Mr. Terrell, arguing on behalf of the plaintiff respondent, urged—and urged very strongly in argument, and told the court that he had urged the same argument before Warrington, J., that the case of *Crump* v. *Lambert,* would entitle the plaintiff to an injunction if the result of the defendants' printing operations at night in a house adjoining the plaintiff's residence was to cause serious inconvenience to the plaintiff and his family, even though the locality was devoted to the printing trade carried on by printers in a particular and established manner not constituting a public nuisance; and he argued that the printing so carried on in such a district, in such a locality, was an actionable wrong if it caused serious disturbance to the plaintiff and his family by reason of the printing machines being used on premises immediately adjoining the plaintiff's residence; and that prescriptive rights alone could prevent such conduct of the defendants' business constituting an actionable wrong. I do not think the case of *Crump* v. *Lambert* justified either part of this argument; and I further think that, if it did, it would be inconsistent with the judgmens of Lord Westbury and Lord Cranworth in *St. Helens Smelting Co.* v. *Tipping* and the judgment of Thesiger, L.J., in *Sturges* v. *Bridgman.* Now, this appeal is based partly upon the judgment being against the weight of evidence, and partly on the ground that Warrington, J., having regard to the evidence, could not have properly applied the principles laid down in those cases. The learned judge, however, in the statement of facts at the beginning of his judgment, spoke of Gough-square as a small oblong space situate in the City of London, in the district bounded on the east by Shoe-lane, on the south by Fleet-street, on the west by Fetter-lane, and on the north by Holborn, and that it was a district specially devoted to printing and allied trades, and that there was no thoroughfare for wheeled traffic in Gough-square. The learned judge concluded this statement of facts by saying, "For a house in the heart of the City of London the plaintiff's is in a quiet situation, but for such noises as arise from neighbouring business establishments. Prior to the starting, in September, 1904, of the defendants' machinery there was no noise proceeding from the house which is No. 10, Wine Office-court. The house on the other (the west) side of the plaintiff's—viz., No. 7, Gough-square—had for

some time been occupied by persons maintaining and working machinery; and I come to the conclusion on the evidence that in the day time the plaintiff must have been subjected to a noise from that source, but no noisy machinery had been worked at night in this house. Nearly opposite to the plaintiff's house was a large printing establishment, Messrs. Pardons, in which work on certain days of the week proceeded at night, and some distance further away were the printing works of the *Daily Telegraph*, which were run regularly at night. I find on the evidence, and particularly that of the plaintiff's two daughters, that no disturbance at night was caused by noise arising from these sources." It was urged upon us by Mr. Duke and Mr. Hinde, the counsel for the defendants, that, if one takes these findings of the judge in conjunction with the finding at the end of his judgment —that, as a fact, the night-work caused serious disturbance to the plaintiff and his family, and that such disturbance had not been previously experienced by them—it becomes apparent that, although the learned judge referred to the principles laid down in *Walter* v. *Selfe*, 4 De G. & S. 315, p. 322; *Sturges* v. *Bridgman*, 11 Ch. D. 852, 865; *St. Helens Smelting Co.* v. *Tipping*, 13 W. R. 1,083, 11 H. L. C. 642; and *Crump* v. *Lambert*, 15 W. R. 417, L. R. 3 Eq. 409, as the principles governing his judgment, and that although the passages referred to, taken by themselves, may not be inconsistent with the judgment in this, yet, if those cases are examined, it would seem that the learned judge has not applied the principles established by these cases, and that this especially appears to be so if the findings at the end of the judgment in this case are read in connection with the evidence, and that if they are not so read those findings are contrary to the evidence. There are, in my opinion, considerable grounds for this conclusion. The findings of the learned judge are quite consistent with the view that the cases above referred to establish such principles that in an action for nuisance not alleged as a public nuisance the standard of comfort to be applied—when the tribunal dealing with the facts asks itself the question whether the acts done by the defendants constitute a material interference with the ordinary comfort, physically, of human existence—is the same in a district devoted to a trade carried on by traders in a particular and established manner as it would be outside such a district so devoted to a particular trade. To put it in another way, the findings of the learned judge and his judgment are consistent with his having taken the view that if a man lives in a district or street where there are numerous printing establishments, and a printing office is opened next door to him which is carried on in a district devoted to the printing trade in the particular and established manner of the printing trade of that district, he has ground for complaint and a cause of action for nuisance, because to him individually there may arise serious discomfort from the printing operations carried on next door in a house not previously used as a printing office, or in a house not previously used for night printing. This was the argument, in fact, presented to us by Mr. Terrell as counsel for the plaintiff, who contended that on this view the findings of the learned judge were amply established by the evidence, which clearly showed, in the language of Lord Romilly, in *Crump* v. *Lambert*, which he cited, that there was a material interference with the ordinary comfort of human existence. I may observe that I do not myself think that Lord Romilly meant by his decision to exclude the proposition of law that in a district or street devoted to trade a different standard of comfort should be applied when answering the question whether there had been a material interference with ordinary comfort in such a district from that which would otherwise be applied, for he says, at page 414, "the smoke at defendant's factory has produced a completely new state of things as regards the plaintiff's house and grounds"; but I cannot but see that these words are not inconsistent with the contention that, even in a district or street devoted to trade, if a new factory or printing-house is opened, subjecting the occupiers of some house in the district to discomfort interfering materially with human comfort, this is sufficient to constitute an actionable wrong, and that the words are consistent with the law, being that the defendant in such a case could not ask to have Lord Romilly's words, "ordinary comfort of human existence," qualified by the addition, "as enjoyed in this district devoted to a particular trade." But if Lord Romilly did mean this, it seems to me that his words are plainly inconsistent with these words of Lord Westbury in the *St. Helens case* (at p. 650): "If a man lives in a street where there are numerous shops and a shop is opened next door to him which is carried on in a fair and reasonable way, he has no ground for complaint because to himself individually there may arise much discomfort from the trade carried on in that shop. But when an occupation is carried on by one person in the neighbourhood of another, and the result of that trade, or occupation, or business is a material injury to property then there unquestionably arises a very different consideration. I think that in a case of that description the submission which is required from persons living in society to that amount of discomfort which may be necessary for the legitimate and free exercise of the trade of their neighbours would not apply to circumstances the immediate result of which is sensible injury to the value of the property"; and, further, that Lord Romilly's words are also inconsistent with the words of Lord Cranworth in the same case, at p. 653, when speaking of a case tried by him in the county of Durham as a Baron of the Exchequer. He says: "It was proved incontestably that smoke did come and in some degree interfere with a certain person; but I said, 'You must look at it not with a view to the question whether, abstractedly, that quantity of smoke was a nuisance, but whether it was a nuisance to a person residing in the town of Shields." The view that the standard of what freedom from smoke, smell, and noise a man may reasonably expect will vary with the locality in which he dwells seems to me confirmed by the following passage in Lord Halsbury's judgment in *Colls* v. *Home and Colonial Stores*, 53 W. R. 30, [1904] App. Cas. 179, 185: "A dweller in towns cannot expect to have as pure air, as free from smoke, smell, and noise as if he lived in the country and distant from other dwellings, and yet an excess of smoke, smell, and noise may give a cause of action; but in each of such cases it becomes a question of degree, and the question is in each case whether it amounts to a nuisance which will give a right of action." The view is confirmed also by the jugment of Lord Hardwicke in *The Fishmongers' Company* v. *East India Company*, 1 Dick. 163, cited by Lord Macnaghten and also by Lord Davey. It should also be observed that the present action is an action brought for a nuisance on the ground that the thing alleged to be a nuisance is productive of sensible personal discomfort, and not upon the ground that the alleged nuisance produces material injury to the plaintiff's property. And Lord Westbury in *St. Helens Smelting Co.* v. *Tipping*, 13 W. R. 1083, 11 H. L. C. 650, draws a distinction between these cases, saying of the case where the thing alleged to be a nuisance is productive merely of personal inconvenience and interference with one's enjoyment, one's quiet, one's personal freedom, anything that discom-

poses or injuriously affects the senses or nerves, whether that may or may not be denominated a nuisance, must undoubtedly depend greatly upon the circumstances of the place where the thing complained of actually occurs. If a man lives in a town, it is necessary that he should subject himself to the consequences of those operations of trade which may be carried on in his immediate locality, and which are actually necessary for trade and commerce and also for the enjoyment of property and for the benefit of the inhabitants of the town and of the public at large. These observations seem peculiarly applicable to the case of a plaintiff who carries on, in fact, the business of supplying milk to the persons employed in the very trade to which the district is devoted, and who gets compensation for the personal annoyance to which he is subjected when residing, for the convenience of his milk trade, in a district in which there are very few other residents. My brethren are, I believe, of opinion that the evidence in this case, and in particular the evidence of the expert called by the plaintiff and the evidence with reference to the noise made at night by the printing machines of the *Daily Telegraph* and of Messrs. Pardon, is not of such a character as to justify the conclusion that the learned judge, in his ultimate finding, in fact failed properly to apply the law as laid down in the House of Lords in *St. Helens Smelting Co.* v. *Tipping*, and in the Court of Appeal in *Sturges* v. *Bridgman*, and acted on a view of Lord Romilly's decision in *Crump* v. *Lambert*, inconsistent with those decisions. I do not think I ought to differ from this conclusion or inference of fact; and, accepting this conclusion, it would not be right to review the decision in fact of the judge who tried the case and saw and heard the witnesses. I think, however, that I ought to point out that, in my view, it would be inconsistent with the view expressed by Lord Westbury in *St. Helens Smelting Co.* v. *Tipping*, in the passages I have already read, and also inconsistent with the view expressed by Thesiger, L.J., in *Sturges* v. *Bridgman*, where he says: "Whether anything is a nuisance or not is a question to be determined, not merely by abstract consideration of the thing itself, but in reference to its circumstances; what would be a nuisance in Belgrave-square would not necessarily be so in Bermondsey, and where a locality is devoted to a particular trade or manufacture carried on by the traders or manufacturers in a particular and established manner not constituting a public nuisance, judges and juries would be justified in finding, and may be trusted to find, that the trade or manufacture so carried on is not a private or actionable wrong." It would be inconsistent, in my opinion, with the above-cited passages to hold that the fact that night work caused a serious disturbance to the plaintiff and his family, in a locality devoted to a particular trade carried on by the traders in a particular and established manner, constituted private and actionable wrong. Nor do I think that the fact that the noise of the defendant's printing machine was a substantial addition to pre-existing noises would amount to a legal nuisance, if such noise was only the result of carrying on the trade in the district devoted to that trade according to the particular and established manner. So to hold would, in my judgment, be to disregard the standard of comfort which a person living in such a district would have a right to expect; and, in effect, to hold, as Mr. Terrell argued, that the plaintiff in such circumstances would have suffered a private actionable wrong, unless the defendant could establish a prescriptive right, which I much doubt whether he could ever do in respect of a nuisance which he could not prevent, and therefore could not acquiesce in. I do not think, to use the words of Lord Westbury, that the plaintiff would have, in such a district, a good cause of action merely "because to himself individually there may arise much discomfort from the trade carried on" in the newly opened printing office. It may be, however, that Warrington, J., did not intend by his judgment anything to the contrary of this, and intended to find that the defendants' trade was not carried on in the particular and established manner of the printing district, but caused serious disturbances to the plaintiff and his family by making noises in excess of those made by carrying on the trade in the particular and established manner of the trade of the district. I should not myself have arrived at this conclusion on the evidence as it appears from reading the notes, but I agree that this is not a sufficient ground for reviewing the decision of the learned judge if he, in fact, applied the principles established by *St. Helens Smelting Co.* v. *Tipping* and *Sturges* v. *Bridgman*. In my opinion this appeal should be dismissed.

STIRLING, L.J.—The plaintiff in this action complains of a nuisance by noise, causing serious interference with the physical comfort of himself and his family. The plaintiff has been for the last seventeen or eighteen years, and still is, the occupier of a house, No. 8, Gough-square, situate in the City of London, in the heart of a district the buildings in which are, to a large extent, used for carrying on printing businesses. He himself carries on the business of a dairyman on the ground-floor of his house; the rest is occupied as a residence by himself and his family. Down to a time shortly before the commencement of this action no printing business was carried on in either of the houses which adjoin the plaintiff's, but recently the defendants have established printing works in No. 10, Wine Office-court, which is one of those adjoining houses, and Warrington, J., has held that these works are so carried on during the night (not by day) as to amount to a legal nuisance entitling the plaintiff to an injunction, which the learned judge has granted. From this decision the present appeal has been brought. The learned judge, at the commencement of his judgment, has stated the legal principles on which he proposed to act, and the learned counsel who appeared for the appellants admitted, and in my opinion rightly admitted, that no fault could be found with the law as laid down by his lordship. What they alleged was that the learned judge had failed to give due effect to the principles which he himself laid down. Warrington, J., said (among other things not necessary to be stated) that, for the purposes of his decision, he was not to look at the defendants' operations in the abstract and by themselves, but in connection with all the circumstances of the locality, and in particular with regard to the trades usually carried on there and the noises and disturbance existing prior to the commencement of the defendants' operations; but that if, after taking these circumstances into consideration, he found a serious and not merely a slight interference with the plaintiff's comfort, he thought it his duty to interfere. It is contended that the learned judge, in coming to the conclusion that a serious and not merely a slight interference had been caused by the defendants' operations, applied a wrong standard, and treated as serious an amount of noise which was not such according to the standard of a printing neighbourhood, though it might be serious according to the standard of a London West End square, or, still more so, of a quiet country neighbourhood. I am unable to see that this contention is well founded. What I understand the learned judge to have done is to consider, first, the

noise and disturbance which existed at the commencement of the defendants' operations; and, secondly, the noise and disturbance caused by the defendants' operations themselves; and to have come to the conclusion that those noises and disturbances taken together create an amount of discomfort by night in excess of that which an ordinary person could reasonably be expected to put up with in a printing neighbourhood. Although he does not, in his final conclusions, use precisely the same language in his finding with respect to the night work as he does in his finding with respect to the day work, I think he meant to find that in one case he did not, while in the other he did, find such a substantial addition to pre-existing noises as amounted to a legal nuisance. And though he does not say in so many words that on both findings he bore in mind the circumstances of the locality, I, nevertheless, think that that also was his meaning. Having considered the evidence, I find myself unable to differ from the decision of Warrington, J., as I understand it, and, in my opinion, the appeal ought to be dismissed.

COZENS-HARDY, L.J.—This is an appeal from the judgment of Warrington, J., who has granted an injunction restraining the defendants from so working a printing machine as to occasion a nuisance to the plaintiff. The plaintiff has for seventeen years been residing with his family at 8, Gough-square, Fleet-street. In the lower part of the house he carries on a milk business. The defendants' machine is next door to the plaintiff's house. This is a district specially devoted to the printing and allied trades, most of which are noisy, though not all equally noisy. The district is one in which it is not reasonable to expect the same quiet and freedom from noise as might be looked for in more purely residential neighbourhoods. Warrington, J., has stated the legal principles which it was his duty to apply as follows. [His lordship then read the portion of the judgment of Warrington, J., that appears above.] In my opinion that is a statement of the law which is not only accurate, but adequate. He then proceeds to deal with the evidence. He does not leave us to infer the conclusions at which he has arrived, for he states certain definite findings of fact. The first is that, although in the daytime the plaintiff must have been subject to some noise from printing works in the immediate neighbourhood, no disturbance at night was caused by noise arising from any of these sources. He finds, secondly, that as regards ordinary working hours in the daytime the plaintiff had not proved such a substantial addition to pre-existing noises as would amount to a legal nuisance. He finds, thirdly, that the night working of the defendants' machine causes a serious disturbance to the plaintiff and his family such as had not previously been experienced by them, and he held this to be a legal nuisance entitling the plaintiff to an injunction. In my opinion it is not right for the Court of Appeal in a case like this to overrule the decision on issues of fact of a judge who has seen and heard the witnesses; and, this being so, I think the appeal must fail. I cannot doubt that the learned judge did apply the legal principles he himself enunciated, and I do not think we ought to embark upon the consideration of the question whether his mind may not have been influenced by some other legal view than that expressed by him, but some arguments were raised by counsel for the appellants and for the respondents to which I desire shortly to refer. It was strenuously contended by Mr. Duke that a person living in a district specially devoted to a particular trade cannot complain of any nuisance by noise caused by the carrying on of any branch of that trade without carelessness and in a reasonable manner. I cannot assent to this argument. A resident in such a neighbourhood must put up with a certain amount of noise. The standard of comfort differs according to the situation of the property and the class of people who inhabit it. This idea is expressed by Lord Thesiger, L.J., in *Sturges* v. *Bridgman*, when he said that what might be a nuisance in Belgrave-square would not be a nuisance in Whitechapel. But whatever the standard of comfort in a particular district may be, I think the addition of a fresh noise caused by the defendants' works may be so substantial as to create a legal nuisance. It does not follow that because I live, say, in the manufacturing part of Sheffield I cannot complain if a steam-hammer is introduced next door, and so worked as to render sleep at night almost impossible, although previously to its introduction my house was a reasonably comfortable abode, having regard to the local standard; and it would be no answer to say that the steam-hammer is of the most modern approved pattern and is reasonably worked. In short, if a substantial addition is found as a fact it is no answer to say that the neighbourhood is noisy, and that the defendants' machinery is of first-class character. It was, on the other hand, urged by Mr. Terrell that any kind of noise occasioning discomfort is actionable unless the defendant can prove a prescriptive right to create a noise. I do not think this argument can be supported, and I see no ground for supposing that Warrington, J., was influenced by it. The lower standard of comfort existing in Whitechapel would equally exist in one of the numerous districts which have sprung up in late years on the outskirts of the city, and which are occupied by persons of the same class as those who occupy the older houses in Whitechapel. In short, prescription has nothing to do with the case. In the result I accept Warrington, J.'s, findings of fact and his enunciation of legal principles, and I think that this appeal must be dismissed.

Solicitor for the appellants, *M. W. Stikeman.*

Solicitor for the respondent, *H. E. Griffith.*

From Chan. Div. (Vaughan Williams, Stirling, and Cozens-Hardy, L.JJ.) — Nov. 1, 2, 8.

MARCHIONESS OF HUNTLY v. GASKELL. (a.)

Practice—Pleading—Embarrassing endorsement of writ—Abuse of process of court—Striking out—Married woman—Separate estate—Restraint on anticipation—Costs—Married Women's Property Act, 1893 (56 & 57 *Vict. c.* 63), *s.* 2.

Where a writ is embarrassing because the endorsements thereon state claims wilfully framed in a manner that cannot be supported, that are not made in good faith, and that are intentionally too general, it is the proper course to strike out the writ altogether with its endorsements, but with leave to issue a fresh writ in proper form.

A married woman, who is the real plaintiff in an action, may, when her action is dismissed with costs, be ordered, under section 2 *of the Married Women's Property Act,* 1893 (56 & 57 *Vict. c.* 63), *to pay costs, when taxed, out of property settled for her separate use without power of anticipation, but it is not necessary to appoint a receiver.*

This was an appeal from a judgment of Kekewich, J. It appeared that the plaintiff, who was a daughter

(a.) Reported by HENRY STEPHEN, Esq., Barrister-at-Law.

of Sir William Cunliffe Brooks, Bart., deceased, had commenced proceedings in the Scotch courts for a declaration that her father, the testator, was a domiciled Scotchman at the date of his death, and that she was for that reason entitled to *legitim* out of his personalty.

The Scotch courts decided that he was a domiciled Englishman at the time of his death, and the plaintiff appealed to the House of Lords, where the appeal is now pending.

The present action was brought against the trustees of the will of Sir William Cunliffe Brooks, and the writ, *inter alia*, claimed in its indorsements administration of the deceased's real and personal estate, a declaration that until plaintiff's claim for *legitim* was satisfied none of the deceased's assets should be disposed of; a declaration that plaintiff was entitled to a lien on the Scotch real estate on account of permanent improvements thereon.

These indorsements were considered by the defendants an abuse of the process of the court because the claims were not within the jurisdiction of the English courts, and it was held by Kekewich, J., that certain of the claims should be struck out as being embarrassing and an abuse of the court's process, and from this order the plaintiff appealed.

P. O. Lawrence, K.C., and *Ward Coldridge*, for the appellants.—There is nothing frivolous and vexatious in an action, the object of which is to preserve plaintiffs' interests pending an appeal to the House of Lords. An action should not be stopped merely because it is embarassing. The plaintiffs are acting *bonâ fide*.

Stewart Smith, K.C., and *C. G. Church*, for respondents, were not called upon.

VAUGHAN WILLIAMS, L.J.—The judgment of Kekewich, J., was too lenient. When an indorsement is as vicious in the way this one is the court should, instead of striking out this and that portion, strike out the whole of the indorsement and leave plaintiff at liberty to issue a new writ wherein he shall state the claims on which he really relies. With respect to the claim for *legitim*, it is obvious that the right of *legitim* gives no specific right against real property, plaintiffs had no right to administration of the real estate and the claim was intentionally framed in a manner that could not be supported; in other paragraphs there are claims not made *bonâ fide*, since their basis is the Scotch right of *legitim* and are claims held unfounded by the Scotch courts; other indorsements disclose an intentional want of particularity and are embarassing because of their generality. In these circumstances, having regard to what has been deliberately done, we shall strike out the writ altogether and leave plaintiff at liberty to issue a new writ in which she may state her claims intelligibly, and not claims that cannot be supported. In substance, therefore, the judgment of Kekewich, J., will be affirmed, but the form of the remedy will be different, and the appeal should be dismissed with costs.

STIRLING, L.J., was of the same opinion. The writ in its present form is an abuse of the process of the court.

COZENS-HARDY, L.J.—I agree. It would be shocking if we were not at liberty to put a stop to a plain abuse of the court's process and an attempt to use that process for an illegitimate object. We should not tinker and amend the writ in the circumstances of this case. I think our proper course is to strike out the writ and leave plaintiff at liberty to commence an action claiming such relief as she may be advised, and in a form not open to such objections as in this action. The judgment of Kekewich, J., was right as far as it went.

Nov. 8.—*Church*, for the respondents, stated that under her father's will plaintiff had certain property settled to her separate use without power of anticipation. He asked that the costs when taxed should be paid out of her separate estate, notwithstanding the restraint, under section 2 of the Married Women's Property Act, 1893 (56 & 57 Vict. c. 63).

He cited *Pawley* v. *Pawley*, 53 W. R. 375, [1905] 1 Ch. 593.

Ward Coldridge, for appellant.—Husband and wife are in this case co-plaintiffs. There is no authority for making such an order.

VAUGHAN WILLIAMS, L.J.—The section covers the case, and an order will be made for payment of the costs when taxed out of the plaintiffs' separate property but there will be no order for receiver.

Solicitors for appellants, *L. C. Weatherley*.

Solicitors for respondent, *Rackham & Co.*

High Court of Justice.

Chan. Div. Farwell, J. — Nov. 24, 28.

In re GRANT, BULCRAIG, & CO. (*a*.)

Solicitor—Costs—Taxation—Taxing-master's certificate—Alteration by substitution of item—Correction of arithmetical error—Inclusion in bill of costs of deposit under Bankruptcy Rules, r. 147—*Solicitors Act*, 1843 (6 & 7 *Vict. c.* 73).

On a review of taxation of bills of costs,

Held, that the taxing-master may not allow an improper item in a bill to stand in place of a proper item omitted, but that he may correct an arithmetical error, because he and his client are equally able to check the result in the latter case. A deposit paid under rule 147 *of the Bankruptcy Rules, on presentation of a bankruptcy petition, is properly included in a bill of costs.*

In re Carven, 8 *Beav.* 436; In re Walters, 9 *Beav.* 299; In re Thompson, 34 *W. R.* 112, 30 *Ch. D.* 441, *followed.*

Summons.

This was a summons to review taxation under the Solicitors Act, 1843, under the following circumstances:

Messrs. Grant, Bulcraig, & Co. had acted as solicitors for a Mr. Croft, and had delivered three bills of fees, charges, and disbursements amounting respectively to £110 3s. 8d., £16 13s. 10d., and £7 14s. 6d., a total of £134 12s.

A common order under the Solicitors Act, 1843, was obtained on the 8th of December, 1904, ordering the taxing-master to tax and settle these three bills, and containing the usual provision that if more than one-sixth were taxed off the bills the solicitors were to pay the costs of taxation, but if less than one-sixth were taxed off, then Mr. Croft was to pay the costs of taxation.

The taxing-master taxed off £22 4s. 6d., and in his certificate stated that he had taxed and settled the bills at £111 7s. 6d., and that this sum, as he had dealt with the bills, entitled the solicitors to the costs of taxation.

At the taxation three objections were taken by the

(*a*.) Reported by C. H. CARDEN NOAD, Esq., Barrister-at-Law.

solicitors representing Mr. Croft, and overruled by the taxing-master, any one of which, if allowed, would have caused the costs of the taxation to be paid by Messrs. Grant, Bulcraig, & Co. instead of by Mr. Croft:

1. An item of 3s. 4d. "for attending and drawing up order and copies" was admitted not to be chargeable, but had been allowed by the taxing-master because the solicitor on the same occasion might have charged 4s. 6d. for "notice of application and copies to file and service," but had not done so.

2. The bill of £7 14s. 6d. was discovered to be wrongly added, and had been allowed by the taxing-master to stand as if it had been originally delivered for a total amount of £6 14s. 6d.

3. An item of £5 for a deposit paid on the presentation of a bankruptcy petition was entered in the bill of costs, but was objected to on the ground that it ought to have appeared in the cash account and should be carried over to such account. It had been allowed by the master on the ground that it was a court fee and as a payment made by the solicitors in pursuance of their professional duty. This summons asked for the review of the taxing-master's decisions on these three points.

Ashton Cross, for the applicant, now asked for a reversal of all three decisions, objecting that the first two were outside the sphere of the master's discretion when taxing a bill, and that the third item was wrongly allowed, being of the nature of the payment in the case of *In re Kingdon and Wilson*, 50 W. R. 533, [1902] 2 Ch. 242, where it was decided that payments for estate duty should not be included in a bill of costs.

Cozens-Hardy, for the respondents.

Cur. adv. vult.

FARWELL, J., in a considered judgment, stated the above facts and continued: There is an unbroken line of authorities since the passing of the Act which establishes that, for the purposes of taxation under the Act, and the costs thereof, the solicitor is bound by the bill that he has delivered. In the case of *In re Carven*, 8 Beav. 436, Lord Langdale says that, "if a solicitor has delivered his bill, he is bound by it, and the taxation must be on that bill; he is not entitled as of course to reduce his demand or to reserve the power of delivering a bill containing other charges." Another general rule was recognized and approved by the Court of Appeal in *In re Heather*, 18 W. R. 1079, 5 Ch. App. 694; and again in *In re Thompson*, 34 W. R. 112, 30 Ch. D. 441, where Cotton, L.J., says, at p. 448: "Now it has been well established that, when a solicitor sends in his bill, he gives the client to whom he sends it a right to have that bill taxed. . . . The rule has been carried so far that even when objections have been made to particular items of a bill delivered, and the solicitors have, with the assent of the client, taken back the bill for the purpose of reconsideration, and have struck out certain items, the court has held that the bill to be taxed must be the bill as it was originally sent in and not the bill as amended." Nor has the taxing-master any power to add or strike out items; his functions, as defined by the order, are to tax and settle. To "tax" is to deal *seriatim* with each item by way of allowance or disallowance. To "settle" is finally to ascertain the amount (if any) recoverable. The only way in which the solicitor can add or strike out items, or increase amounts, is by special application to the court, as was done in *In re Walters*, 9 Beav. 299, and *In re Whalley*, 4 W. R. Ch. Dig. 91, 20 Beav. 587; but such alteration is not allowed to affect the costs of taxation of the original bill, it is merely to prevent the solicitor from losing charges which he is entitled to make, but has overlooked; in neither case is he allowed to diminish the amount of his charges. The reason for the rule is stated by Cotton, L.J., in *In re Thompson*: "it was laid down to prevent any attempt being made by solicitors to impose on clients, who did not know what the proper charges were, by sending in a bill which could not stand taxation and then, when taxation was insisted on or threatened, sending in a bill which they knew would stand taxation." The solicitor is treated strictly because he is dealing with his client in a matter in which the solicitor is an expert and the client is not, but the reasoning has no application to details which are not the subject of taxation and the accuracy of which the client is as well able to test as the solicitor; such matters become mere matters of evidence, and the taxing-master may allow the solicitor to correct blunders therein if, in his discretion, he thinks proper to do so. Thus, in *Williams* v. *Barber*, 4 Taunt. 806, it was held that a mistake in the dates (*e.g.*, Trinity Vacation instead of Hilary) did not vitiate a bill so as to support a motion for a new trial on the ground that the plaintiff had not delivered a correct bill such as was required by the statute then in force. By parity of reasoning, I think that the taxing-master might tax an item although the date was wrongly given and might allow the error to be corrected if he finds that he can do so without injustice to the client. The principles that I have stated dispose of the first two items. The first is: "3s. 4d. for attending and drawing up order and copies." This is admittedly not chargeable at all; but the solicitor might have charge 4s. 6d., for notice of application and copies to file and service, and omitted to do so. The taxing-master, to quote his own words, "has left the 3s. 4d. item, which is not strictly chargeable, to cover the work done in respect of the above named." In other words, he has disallowed the item as charged and has altered the bill by substituting another item. In my opinion, he cannot do this, and the summons succeeds in respect of this 3s. 4d. The second item is an error in casting. The bill delivered is for £7 14s. 6d., but the items amount only to £6 14s. 6d. The taxing-master has c rrected the casting, and I am of opinion that he was right in so doing. This is not taxation, but arithmetic, and the client was as competent to add up a row of figures as the solicitor. It is objected that the order mentions £7 14s. 6d. as the amount of the bill to be taxed, but this is only for the purpose of identifying the bill. If necessary, I should have no difficulty in amending this error under the slip order. The last item is £5, the deposit paid under rule 147 of the Bankruptcy Rules, 1896. It was contended on the authority of *In re Buckwell*, 50 W. R. 629, [1902] 2 Ch. 596, and *In re Kingdon*, 50 W. R. 533, [1902] 2 Ch. 242, that this sum ought to have been included in the solicitors' cash account and not in the bill of costs. The taxing-master disallowed the objection, and there was a dispute before on the question whether he had stated that it was the settled practice to insert such deposit in the bill of costs, although this is not the reason given for his decision. I accordingly reserved my judgment in order that I might communicate with the senior taxing-master, because, in matters of this sort where no principle of justice is involved, I should be slow to disturb the settled practice, even although such practice should appear inconsistent with decisions in cases that appear analogous. The taxing-master informs me, after inquiry amongst his brother taxing-masters, that there is no settled practice in the Chancery Taxing Office, but he refers me to rule 112 (1) of the Bankruptcy Rules and the scale of costs thereunder, and I find in the latter (set out in Williams on Bankruptcy (6th ed.), p. 563) the following: "Attending official receiver with deposit,

6s. 8d. The amount of the deposit is to be charged in the petitioning creditor's bill of costs." I hold, therefore, that this £5 was rightly inserted in the bill of costs and that the client's objection thereto fails. The result is that the applicant succeeds on the 3s. 4d. and fails on the £1 and the £5—*i.e.*, he succeeds on one and fails in two of his three objections. I accordingly give him one-third and order him to pay two-thirds of the costs of this application. In other words, there will be a set-off of the costs, and he will pay the solicitors one-third of the costs of this application.

Solicitors, *Coburn & Co.; Grant, Bulcraig, & Co.*

Chan. Div. }
Joyce, J. } Nov. 2, 18.

In re WALBRAN, DECEASED.
MILNER *v.* WALBRAN. (*a.*)

Will—Construction—Bequest between the children of A. and B.

By her will the testatrix gave a moiety of certain property to be equally divided between the children of F. M., now of Leeds, and J. C., of New York, or their heirs. Both F. M. and J. C. were nephews of the husband of the testatrix, and were both alive and had children living at the death of testatrix, but F. M. had not then been for some years living with his family.

Held, that the gift was to the children of F. M. and to J. C. personally, and that the division was to be into moieties, one moiety going to the children of F. M. and the other moiety going to J. C.

Adjourned summons.

The testatrix, Jane Walbran, by her will dated the 26th of September, 1903, after appointing the plaintiffs to be the executors and trustees thereof, made this devise: "And I declare that they (the trustees) shall sell all my messuages, lands, tenements, and hereditaments, situate at or near Fellbeck, Pateley Bridge, Yorks, and after paying all expenses of duties shall divide the proceeds into two parts. One equal part I leave to John Thomas Walbran, now of Dallas-road, Victoria, B.C., and the other equal part to be equally divided between the children of Francis Maximilian Walbran, now or late of 9, Marlborough-grove, Leeds, and James Christopher Walbran, 420, Ninth-street, South Brooklyn, New York, or their heirs."

The testatrix died on the 26th of June, 1904, and her will was duly proved by the executors.

The said John T. Walbran, Francis Maximilian Walbran, and James Christopher Walbran were nephews of the late husband of the testatrix, J. T. Walbran and J. C. Walbran being brothers.

Both F. M. Walbran and J. C. Walbran had children living at the date of the death of the testatrix, but F. M. Walbran had not been living with his wife and children for the last five years.

This summons was taken out by the executors of the testatrix to determine whether upon the true construction of the said will the moiety of the net proceeds of sale of the textatrix's hereditaments at or near Fellbeck, Pateley Bridge, Yorks, which the textatrix directed to be equally divided between the children of Francis Maximilian Walbran and James Christopher Walbran or their heirs, was divisible (*a*) between the defendant James C. Walbran and children of the said Francis Maximilian Walbran in equal shares *per capita*, or (*b*) between the defendant J. C. Walbran and the children of the said F. M. Walbran, the defendant J. C. Walbran taking one-half thereof and the children of the said F. M. Walbran taking the other half equally between them, or (*c*) between the children of the defendant J. C. Walbran and the children of the said F. M. Walbran in equal shares *per capita*, or (*d*) between the children of the defendant J. C. Walbran and children of the said F. M. Walbran, the children of the defendant J. C. Walbran taking one half thereof equally between them and the children of the said F. M. Walbran taking the other half thereof equally between them, or to determine in what other manner the said moiety was divisible.

R. M. Pattisson, for the summons.—To ascertain the meaning of the will the circumstances of each case must be looked at, also the position in which the parties were placed: *Stummvoll* v. *Hales*, (1864) 12 W. R. 1137, 34 Beav. 124.

Mark Romer, for the defendant James Christopher Walbran.—The first question is whether upon the construction of the will J. C. Walbran takes a share, or whether only his children are entitled to take the share. To enable the children to take the word "of" should have been used or it must be understood: *In re Featherstone's Trusts*, (1882) 31 W. R. 89, 22 Ch. D. 111. In order to override this grammatical construction there must be a very strong intention to that effect manifested in the will, which is entirely absent in the present case, and therefore it is submitted that only J. C. Walbran takes a share, and that his children have no interest in the share. This is a gift to the children of A. and to B. rather than a gift to the children of A. and to the children of B. Upon the question as to whether the division should be *per capita* or *per stirpes* the word "between" strictly construed imports a division in equal shares as between two parties only, and therefore it is submitted that the division ought to be *per stirpes* and not *per capita*.

Younger, K.C., and *Goldberg*, for the children of Francis Maximilian Walbran.—The parties entitled to take are the children of Francis Maximilian and J. C. Walbran, and the division should be *per capita*. This is in accordance with the plain grammatical sense of the words as they stand: *Hawes* v. *Hawes*, (1880) 14 Ch. D. 614, 28 W. R. Dig. 197. It was expressly decided by Kay, J., in *In re Featherstone's Trusts*, upon the proper grammatical construction of the words used, a bequest to children of A. and B., that it would be necessary to insert the word "of" in order to enable the children of B. to take, and he so decided after his attention had been called to the opinion expressed by Mr. Vaughan Hawkins in his book on Wills, which opinion was against this view. The grammatical construction ought to be followed unless there is something in the will to lead the court to come to a different conclusion. Upon the question as to whether the division should be *per capita* or *per stirpes*, all the authorities are in favour of a division *per capita*. In *Dowding* v. *Smith*, (1841) 3 Beav. 541, where there was a bequest to A. and to the children of B., to be equally divided, it was held that the children took *per capita*. The word "between" was absent in that case.

T. R. Hughes, K.C., and *T. T. Methold*, for the children of James Christopher Walbran.—Upon the true construction of the gift the children of James Christopher take and not James Christopher himself. *Primâ facie* the gift is for an equal division between the children of Francis Maximilian and the children of James Christopher, who were in the same degree of relationship to the testatrix. Whether the father or the children take, the division should be *per stirpes*

(*a.*) Reported by R. FRANKLIN STUBBING, Esq., Barrister-at-Law.

and not *per capita*. The more strict way of construing this bequest would be to insert the word "of." One very important circumstance to be taken into account is whether A. and B., the two donees of the gift, were in the same degree of relationship to the testatrix. In *Mason* v. *Baker*, (1856) 2 K. & J. 567, 4 W. R. Ch. Dig. 112, where the bequest was to all the children of my brother R. and my sister M to be equally divided between them share and share alike, it was held by Wood, V.C., that the gift was to the children of R. and the children of M. in equal shares, as there was nothing from which an intention that M. was to take an equal share with the children of R. could be inferred. In *Lugar* v. *Harman*, (1786) 1 Cox 250, a bequest amongst all the children of my late cousin E. L. and my cousin P. F. and their lawful representatives was held to be a bequest to the children of E. L. and to P. F. himself, and not to the children of of P. F. But this case was disregarded by Romilly, M.R., in the case of *In re Davies' Will*, (1860) 9 W. R. 134, 7 Jur. N. S. 110, 29 Beav. 93, and he held that a gift of residue between and amongst all and every the child and children of A. deceased and B. in equal shares and proportions, was a gift to the children of A. and the children of B. *in esse* at the testator's death *per capita*. [JOYCE, J.—As it is not a question of technical terms, how can these cases help in deciding the present case.] Only to show how other judges have regarded it. *Hawes* v. *Hawes* was a very plain case and it was impossible that it should have been decided otherwise than it was. In the present case there is no reason for putting James Christopher upon the same footing as the children of Francis Maximilian. In *Dicker* v. *Mitford*, (1782) 3 Brown's Ca. in Par. 442, a testator gave the whole of his fortune to be equally divided between any second or younger son of his brother J. W. and his sister S. The sister had a younger son, but the brother had none, and it was held that the younger son of the sister was entitled to the whole. There it was otherwise shewn that the testator meant the children of both. It is an instance of a document drawn up in the common form of speech. Lord Eldon in *Lady Lincoln* v. *Pelham*, (1804) 10 Vesey, at p. 176, said that a bequest to the younger children of A. and to the younger children of B. meant the same exactly as a bequest to the younger children of A. and B. This *dictum* was cited and followed in *Fletcher* v. *Fletcher*, L. R. Ir. 9 Ch. D. 301.

M. Romer, in reply on the question of the admissibility of extrinsic evidence to enable the court to construe a difficult will where the words themselves required no interpretation, but the difficulty was only in the construction of the sentence in which the words occur, referred to the dissentient judgment of Rigby, L.J., in *In re Grainger, Dawson* v. *Higgins*, 48 W. R., at p. 674, [1900] 2 Ch., at p. 763, which was cited with approval by Lord Davey in *Higgins* v. *Dawson*, 50 W. R. 337, [1902] A. C. 1. Rigby, L.J., decided that the will must be construed without the aid of extrinsic evidence. In all the cases in which the courts have decided in favour of the children taking there has been some indication of intention in the will which the courts have laid hold of.

Cur. adv. vult.

Nov. 18.—JOYCE, J.—In this case the testatrix by her will gave a portion of her estate to be equally divided between the children of Francis Maximilian Walbran, now or late of 9, Marlborough-grove, Leeds, and Charles Christopher Walbran, of 420, Ninth-street, South Brooklyn, New York, or their heirs.

Now, if it is to be determined what is the effect of a gift to A. or B., you must know who A. and B. are: see the judgment of Jessel, M.R., in *In re Sibley's Trusts*, (1877) 5 Ch. D. 494, 25 W. R. Dig. 317. In order to determine the effect of a gift to the children of A. and B. you must know something about A. and B. In the first place, notwithstanding what may have been said or may hereafter be said to the contrary, I cannot doubt that the proper grammatical reading of the expression "children of A. and B.," the preposition not being repeated before B., and A. and B. not having or being capable of having children together, is the children of A. and the individual B., not his or her (viz., B.'s) children. But the expression "the children of A. and B." may mean the children of A. and the children B., and in a will it must have that meaning if B. to the knowledge of the testator be dead, leaving children still alive.

In the present case A. and B. were both living. Each is a nephew of the testatrix, but A.—that is, Francis, had deserted, or at all events was living apart from his family. On the other hand, no reason is suggested by the testratrix to pass over B.—that is, James, in favour of his children. I hold the division to be between James, not his children, and the children of Francis. Now as to the mode of division. The gift is not to the children of A. and B as tenants in common or in equal shares, but it is to be equally divided. Something is given to be equally divided between the children of A. and B. In strictness the word "between," as its etymology suggests, when it is a matter of dividing, implies a division into two parts rather than more, and when you consider the nature of the gift in this case I think it would be very strange to make a class of one nephew and the children of another and divide among them in equal shares. Upon the whole I think that the testatrix intended, and the will expressed, that the division should be into moieties, the one moiety going to the children of Francis and the other moiety going to James.

Solicitors, *Rawle, Johnstone, & Co.*, for *L. & W. Wilkinson*, Blackburn; *Williamson, Hill, & Co.*, for *D'Angibau & Malim*, Boscombe.

K. B. Div.
(Lord Alverstone, L.C.J., and Lawrance and Ridley, JJ.) — Aug. 5, 1905.

LONDON COUNTY COUNCIL v. SCHEVZIK. (a.)

London—Structure—Projection beyond general line of buildings—London Building Act, 1894 (57 & 58 *Vict. c. ccxiii.*), *s.* 22; *s.* 73, *sub-section* 8.

An iron framework affixed to the front wall of a building by means of bolts and stay rods, was filled in on the front and sides with leaded glass, and covered on the top with zinc, came forward about 4 *feet* 6 *inches from the front wall of the building, the bottom being about* 11 *feet above the pavement.*

Held, that the iron framework was not a "building structure" within the meaning of section 22, *sub-section* 1, *of the London Building Act*, 1894, *and following* Hull *v.* London County Council, 49 *W. R.* 396, [1901] 1 *K. B.* 580, *that it was not a "projection" within section* 73, *sub-section* 8, *of that Act.*

Case stated.

On the 2nd of June, 1904, the respondent appeared to answer two informations which had been laid against him by Thomas Chilvers on behalf of the

(a.) Reported by ALAN HOGG, Esq., Barrister-at-Law.

London County Council. The first of the informations charged that the respondent on or about the 21st of December, 1903, at No. 86A, Brick-lane, in the Metropolitan Borough of Stepney, and within the Metropolitan Police District, did unlawfully erect a structure in contravention of Part III. of the London Building Act, 1894 (57 & 58 Vict. c. ccxiii.)—to wit, a structure beyond the general line of buildings of a street called Brick-lane aforesaid—without the consent in writing of the appellants, whereby the respondent became liable to the penalty prescribed by section 200, sub-section 3, of the said Act as amended by the London Building Act, 1894 (Amendment) Act, 1898 (61 & 62 Vict. c. 137), and to have an order made against him to demolish the said structure. The second information charged that the respondent at the time and place above mentioned did unlawfully extend from a building a projection beyond the general line of buildings in the street aforesaid without the permission of the appellants contrary to section 73 (8) of the London Building Act, 1894.

The two informations were heard together, and the following facts were either proved or admitted.

The respondent is the proprietor of the premises situate at 86A, Brick-lane aforesaid, and known as the Russian Vapour Baths, and he had caused to be placed over the doorway leading to the said baths the thing complained of which is hereinafter referred to as the alleged structure or projection.

The alleged structure or projection consisted of an iron framework filled in on the front and sides with leaded glass and covered over on the top with zinc, and was about 10 feet, 6 inches long, about 5 feet, 6 inches high from the bottom to the top of the gable, and came forward about 4 feet 9 inches from the front wall of the building, the bottom being about 11 feet above the pavement. There were letters on the glass of the said alleged structure or projection forming on the front the words "The Russian Vapour Baths," and on the side "Vapour Baths," indicating the position of the baths, and these were made visible at night by means of about twenty electric lights arranged inside.

The alleged structure or projection was beyond the general line of buildings as defined by the superintending architect, and was erected without the consent in writing of the appellants.

The alleged structure or projection was fixed to the front wall of the said building by means of six bolts at the bottom and two stay rods at the top, which latter went right through the said wall.

The appellants contended that the respondent had erected and brought forward a structure in contravention of the provisions of Part III. of the London Building Act, 1894, and that he had also extended a projection from the said building in contravention of section 73 (8) of the said Act.

The respondent contended that the alleged structure or projection was neither a structure nor a projection within the meaning of the sections above referred to.

Upon the above facts the magistrate came to the conclusion that the alleged structure or projection was not a structure within the meaning of Part III. of the London Building Act, 1894, nor was it *ejusdem generis* with any of the matters or things described or referred to in Part III., nor was it a projection within the meaning of section 73 (8) of the said Act, nor *ejusdem generis* with any of the matters or things described or referred to in any part of that section.

The magistrate dismissed both the informations.

The question for the opinion of the court was whether upon the above facts the magistrate was right in law in dismissing the informations or either of them.

By the London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), s. 22, sub-section 1: "No building or structure shall, without the consent in writing of the council, be erected beyond the general line of buildings in any street."

Section 73, sub-section 8: "Except in so far as is permitted by this section in the case of shop-fronts and projecting windows, and with the exception of water pipes and their appurtenances, copings, stairs, courses, cornices, facias, and other like architectural decoration, no projection from any building shall extend beyond the general line of buildings on any street except with the permission of the council after consulting the local authority."

Avory, K.C., and *Daldy*, for the appellants.

Danckwerts, K.C., and *Randolph*, for the respondent.

The arguments sufficiently appear from the judgments.

The following cases were cited in argument: *Hull* v. *London County Council*, 49 W. R. 396, [1901] 1 K. B. 580; *Coburg Hotel* v. *London County Council*, 16 Times L. R. 9, 63 J. P. 805, 48 W. R. Dig. 120; *London County Council* v. *Illuminated Advertisements Co*, 53 W. R. 220, [1904] 2 K. B. 886.

Lord ALVERSTONE, L.C.J.—We are all of opinion that this structure does not come within section 22 of the Act, and I only refer to my observations in *London County Council* v. *Illuminated Advertisements Co.* with regard to the sections following section 22 to indicate that in my opinion section 22 is a building section, and that it does not extend to or include things which are added on to buildings. It is not necessary to say more on this part of the case, except that there is no finding of fact in this case which would bring this structure within the decision in *Cobury Hotel* v. *London County Council*. With regard to the second question in the case, which turns on section 73, sub-section 8, speaking for myself only, I do not withdraw anything which I have said as to not being satisfied with the decision in *Hull* v. *London County Council*, but the reasoning of that case (and the judgment was delivered after consideration) undoubtedly applies to this case. I think the principle of *Hull* v. *London County Council* is that section 73 forms part of a group of sections which deal with the question of the construction of buildings. I do not refer again to all the sub-sections of section 73, I will only point out that the section deals with such things as balconies, verandahs, outside steps, barge boards, cornices, pipes, shop fronts, copings. Therefore I think, looking at the section it is easy to see that at any rate there is a ground for contending that the view which was the view of Bruce and Phillimore, JJ., in that case was the right one, though I should have been better pleased had the matter been looked at from rather a broader standpoint. I come clearly to the opinion that this is a projection from the building, and I think that ought to be distinctly stated. I think that no one can look at this thing without seeing that it is a projection from the building; but if my brother Bruce is right, a mere projection from a building is not of itself sufficient, and this argument is strengthened by the fact that there are a considerable number of undoubted projections which, either adopting the reasoning of my brother Bruce or accepting the views suggested, I particularly call attention to those very heavy lamps which are hung on big brackets and are as rigidly fixed to the walls as this is, and which, on the reasoning of my brother Bruce, and possibly on the view taken or presented in argument, do not come within this section. Speaking for myself, I do not accept the argument that the London County Council could not deal with such things under section 164. I quite understand

Mr Avory's point, that under section 164 there is only power to make bye-laws regulate them, but it seems to me by no means to follow that under that power there may not be bye-laws providing that their structure and method of erection and fastening and matters of that sort shall be subject to the approval of the London County Council. Be that as it may I do not think the matter has been left absolutely at large by the Legislature. I think there are other sections in that Act which apply to it. It is important also to remember that this is *primâ facie* a building Act, and therefore we should expect to find in such sections as sections 22 and 73 provisions with regard to buildings. It seems to me that, looked at fairly, this obstruction is in the nature of a hanging porch fastened to the wall of the building, and I am of opinion that it undoubtedly projects from the building, but that it does not project from the building in the sense of section 73 as construed by the court in the case of *Hall* v. *London County Council*, although I should have been better pleased if the decision in that case had dealt with the question on broader lines as indicated in *London County Council* v. *Illuminated Advertisements Co.* I cannot see any distinction or ground upon which I ought to distinguish this case from *Hull* v. *London County Council*. I only desire to say, coming to that conclusion, that there is an important matter which I have mentioned more than once since I have been sitting in this court, and I refer to it again because of its extreme importance, and that is the importance of uniformity in the decisions of this court. The Court of Appeal have recently recognized that it is in the public interest, and in order that people may know with certainty what their position is, that courts of co-ordinate jurisdiction should follow their decisions unless there are strong grounds which enable the courts to say that the previous decisions should not be followed. I have no doubt that the matter can so be arranged that these cases can be reviewed by the Court of Appeal. There is no difficulty about that being done if it is really desired to take the matter further. But failing that, as I cannot on any ground satisfactory to my own mind distinguish the principle of this case from the principle of *Hull* v. *London County Council*, I have come to the conclusion that this appeal should be dismissed.

LAWRANCE, J.—I have come to the conclusion that *Hall* v. *London County Council* was rightly decided. It seems to me, looking carefully at the Act, that the language of section 73 does not cover the structure, if I may call it so, which we are considering in this case. I think section 102 in Part IX. contains the true definition of this particular sort of a thing affixed to a building. That section says "the expression 'structure' includes any building, wall, or other structure, or anything affixed or projecting from any wall or other structure." That is exactly what this is—not a part of the building, but something affixed to and projecting from a building, wall, or other structure. If that language had been used in section 73 I should have come to the conclusion that *Hall* v. *London County Council* had been wrongly decided. The matter may also be dealt with, I think, under section 164. How far it may be dealt with under that section it is not necessary to decide at the present moment, but power is given to make bye-laws for the regulation of lamps, signs, and other structures overhanging the public highway, so that in two parts of the statute you have this very structure itself, this projection, dealt with; but in section 73 it is not, in my opinion, dealt with. That leads me to the conclusion that *Hall* v. *London County Council* was rightly decided, and I am willing to follow it in this decision. I am therefore of opinion that this appeal must be dismissed.

RIDLEY, J.—In this case I agree with the court, but I must say that, speaking personally, I should have come to the conclusion that this structure is a projection extending from the building within the meaning of section 73. I do not think that it is a building connected with part of the building itself, and therefore it is not within that part of the judgment which I gave in *Coburg Hotel* v. *London County Council*, but I should have thought it was a projection. I agree that according to section 73 there has to be something of a permanent character—something permanently attached to the building, something which is not merely to be regarded as temporarily put there; not of a light character which, to use the words of *Hull* v. *London County Council*, does not extend over the roadway. But when a permanently constructed framework like the present one is attached to a building in the way this one is attached I should have thought that it was a projection within the meaning of section 73, and that we ought so to regard it. I am therefore hampered in the present instance by the previous decision in *Hull* v. *London County Council*. If that case is to be taken to apply to a projection like the present, I think it is wrong. I should certainly have come to the contrary conclusion myself, but I follow what the Lord Chief Justice says, and I consider myself bound by that case. Before, however, I conclude what I have to say I wish to point out that in that case I cannot help thinking the court was more or less influenced, in coming to the conclusion at which they arrived, by considering the way in which the sign or wooden box was attached to the wall, and by the fact that there was a space between it and the wall and that it did not extend at all over the highway, and generally the small and insignificant character of that which was the subject of the case. If the reasoning of Bruce, J., is considered, it will be seen that he said: "A projection from a building means a part of a building projecting or jutting out; it means a prominence extending from the building in the sense of coming out from the building as part of the building." Now, I think that in the general sense of these words this framework does so. "If the words are taken in this sense they fall in with the scope of the section. It is quite clear that the object of the section is to preserve the width of the street and the general line of building frontage in order to preserve uniformity." In the case with which Bruce, J., was dealing, I do not think anyone could have said that the wooden box did interfere with the width of the street or the general line of building frontage, nor had it anything to do with the maintenance of architectural uniformity, but when one finds a framework of this kind which projects solidly and for a considerable distance over the highway, on which the public are accustomed to walk, it seems to me that, if one is to judge of the proper meaning of this section by considering what the object of it was, this was within the object of the section, while the other was not. It is easy enough when dealing with a small matter such as a lamp might be, or as the box was in *Hull* v. *London County Council*, to deal with that under section 164. The power to regulate it is sufficient. But when you have a structure like this, and I do not use the word structure advisedly—I mean a framework of a heavy kind projecting from a building, as this was—then it appears to me that a different set of considerations arise. More than a regulation is required; a power is wanted which will enable one to do that which section 73 does enable the London County Council to do with regard to architectural projections.

However, although that is my view, I am unable to say that what I have been pointing out as possibly the reason which actuated the court in the case of *Hull* v. *London County Council* is really the distinction between the two cases. I do not pretend to say that it is. I think I must adopt the reasoning in *Hull* v. *London County Council*, and agree with the rest of the court; but I should, if I had been left to myself, and without decision, have come to the conclusion that this structure could have been dealt with as a projection under section 73.

Appeal dismissed.

Solicitor for the appellants, *W. A. Blaxland.*

Solicitors for the respondent, *Pritchard, Englefield, & Co.*

IN BANKRUPTCY.

K. B. Div. (Bigham, J.) July 17; Aug. 1, 1905.

In re DUNKLEY & SONS.
Ex parte WALLER. (*a.*)

Bankruptcy—Payment to creditor after petition—Protected transaction—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 49.

A payment made by a debtor before receiving order to one of his creditors in good faith and for valuable consideration, and taken by the creditor without notice of any available act of bankruptcy, is a protected transaction within section 49 *of the Bankruptcy Act,* 1883, *even though made after the presentation of a petition against the debtor.*

In re Badham, Ex parte Palmer, 10 *Morr.* 252, *distinguished.*

Motion to set aside a deed of assignment executed by the bankrupts after the presentation of the petition.

In November, 1904, Dunkley & Son, the bankrupts, applied to the Inland Revenue authorities for the return of income tax overpaid by them, and on the 23rd of November an order was made for payment to them of the sum of £117 16s. 9d. On the 28th of November they committed an act of bankruptcy by noncompliance with the requirements of a bankruptcy notice, and on the 1st of December a petition was presented against them. On the 5th of December they executed an assignment of the money due to them from the Inland Revenue to a creditor named Crane as security for a past debt. They had no intention of preferring Crane, and Crane had no knowledge of the petition or of the act of bankruptcy at the time when the assignment was executed. A receiving order was made against Dunkley & Son on the 10th of December, they were adjudicated bankrupts and a trustee was appointed on the 22nd of December. The trustee now moved to set aside the assignment.

July 17.—*Hansell*, for the motion.—The assignment is bad because it was made after presentation of the petition, and a creditor cannot then get security for a past debt even without notice of an act of bankruptcy, because the property has ceased to be the debtor's. It is true that the assignment cannot be a fraudulent preference within section 48 of the Bankruptcy Act, 1883, because it was made after the petition had been presented, nevertheless the creditor is not protected by section 49 because he has been paid out of moneys of the trustee: *In re Badham, Ex parte Palmer*, 10 Morr. 252.

Herbert Smith, for the respondent.—In that case there was fraudulent preference which is not suggested in the present case. An assignment made by a bankrupt after act of bankruptcy was held good in *In re Seaman, Ex parte Furness Finance Co.*, 44 W. R. 496, [1896] 1 Q. B. 412.

Hansell, in reply.—A creditor who is unsecured at the date of the act of bankruptcy cannot get a valid security after that event.

Cur. adv. vult.

Aug. 1.—BIGHAM, J.—On the 28th of November, 1904, the debtors committed an act of bankruptcy. On the 5th of December they assigned to one of their creditors named Crane a debt to secure £76 owing to Crane, and Crane gave notice of the assignment. On the 10th of December a receiving order was made against the debtors on a petition which had been presented on the 1st of December, and on the 22nd of December they were adjudicated bankrupt. The question is whether the assignment is good as against the trustee. I think it is. The title of the trustee no doubt related back to the date of the act of bankruptcy committed on the 28th of November, and thus, *primâ facie*, the assigned debt forms part of the estate which vests in the trustee. But the effect of section 49 of the Act has to be taken into consideration. That section protects a transaction such as the one in question, provided it takes place before the date of the receiving order and the person entering into it has not at the time notice of any available act of bankruptcy committed by the bankrupt. The assignment of the debt to Crane did take place before the date of the receiving order, and it is not suggested that Crane had notice of any act of bankruptcy. In these circumstances it appears to me that section 49 applies, and that therefore Crane has a good title as against the trustee. It was argued, however, on behalf of the trustee, that the case was governed by the decision in *In re Badham, Ex parte Palmer*. In that case the trustee sought to invalidate two payments made by the bankrupt on the ground that the bankrupt when making the payments intended to prefer the creditors to whom the payments were made. There was no doubt that the bankrupt had that intention; but inasmuch as the petition had been presented before (not after) the date of the payments, the learned judge was constrained to find that the section dealing with fraudulent preference (section 48) did not apply. He then, however, allowed the notice of motion to be amended by striking out the claim to invalidate the payments on the ground of fraudulent preference, and by substituting an allegation that they were made contrary to the policy of the bankruptcy laws. On this amended motion the question arose whether the payments were not protected by section 49. They were certainly made before the date of the receiving order, and the payees equally certainly had no notice of any available act of bankruptcy, but the learned judge held that the payments were not made in good faith, that they were contrary to the policy of the bankruptcy law, that they amounted in effect to a common law fraud, and that therefore section 49 did not apply. I do not know on what grounds these conclusions were arrived at, but of course I am bound by the judgment, and I am certainly anxious to give effect to it. It is, however, distinguishable in its facts from the present case. Here the assignment of the debt to Crane was not, in my opinion, made in bad faith. It was no doubt made after petition, but it does not therefore follow that it was made in bad faith; if it did so follow, then no transaction entered into after petition and before receiving order would be within section 49. The preference given by the

(*a.*) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

bankrupts to Crane was perfectly good at common law, and it is not suggested that it was fraudulent under section 48; and not being tainted with bad faith, as appears to have been the case in *In re Badham*, I see no reason why the creditor should not have the benefit of the protection afforded by section 49.

Application dismissed.

Solicitors for the trustee, *Ward, Bowie, & Co.*

Solicitor for the respondent, *W. J. Hart.*

Prob. Div. & Adm. Div. Probate. (Bargrave Deane, J.) — Oct. 30.

In the Goods of ISABELLA WALLAS, DECEASED. (*a.*)

Probate—Administration—Probate Act, 1857, *s.* 73—*Divorce.*

The Court allowed a person entitled to administration in priority to the applicant to be passed over without citing him, it being (taken as) proved that his claim to administration was put an end to by a valid decree of divorce.

On the 9th of October, 1904, Isabella Wallas died intestate, leaving an estate of about £60.

In 1885 the husband of the intestate deserted her, and in 1891 obtained a divorce in America on the alleged ground that his wife had deserted him. He was last heard of in 1893, at which date he wrote to his mother saying that he was in the hospital at Chicago.

Advertisements had been inserted in various newspapers, but no further information respecting the husband was forthcoming, and he had not been cited.

The deceased left two sons, one of whom applied for administration under the 73rd section of the Probate Act, 1857.

Bayford, for the applicant.—It is not necessary to cite a spouse if the marriage bond has been severed by a decree of divorce: *In the Goods of Nares*, 36 W. R. 528, (1888) 13 P. D. 35.

BARGRAVE DEANE, J.—You may take a grant, but certainly justifying security must be given.

Solicitors for the applicant, *Harrison & Powell.*

NOTE.—In this case counsel assumed that the decree obtained in America was a valid decree.—G. H.

House of Lords.

From C. A. (England). — July 24, 1905.

CROSFIELD & SONS (LIMITED) AND OTHERS *v.* MANCHESTER SHIP CANAL CO. (*b.*)

Arbitration—Jurisdiction—Private Acts—Corporation and traders—Argument—Waiver—Practice—Manchester Ship Canal Act, 1885 (48 & 49 *Vict. c. clxxxviii.*), *ss* 88, 202—*Manchester Ship Canal Act*, 1896 (59 & 60 *Vict. c. clxxxii.*), *s.* 43.

Under the Manchester Ship Canal Acts, 1885 *and* 1896, *the Corporation of Warrington must resort to arbitration as provided by the Acts for the adjustment of differences between the corporation and the canal company, but the traders therein referred to may take proceedings in the courts in the usual way.*

This was an appeal from an order (52 W. R. 635, [1904] 2 Ch. 127), of the Court of Appeal (Vaughan Williams and Stirling, L.JJ.; Cozens-Hardy, L.J., dissenting), where the case and the various sections of the Acts are set out at length.

The appellants (the plaintiffs in the action) were Crosfield & Sons, Fairclough & Sons, and Monks Hall & Co., traders and manufacturers carrying on business at or near Warrington, and the mayor, aldermen, and burgesses of the borough of Warrington.

The respondent company was the Manchester Ship Canal Co.

The question of competency was alone argued and the various provisions of the Acts are dealt with in their lordships' judgments.

By an agreement made on the 9th of April, 1896, between the corporation of Warrington and the company, after reciting that disputes and differences had arisen between the corporation and the company in connection with the dredging, and that for the purpose of settling such disputes and differences the corporation and the company had agreed to enter into and execute the agreement now being stated, and also reciting that the traders and manufacturers and other persons then or thereafter carrying on business at or near Warrington were entitled to use portions of the canal and River Mersey and the lock and works at Walton on the terms and conditions therein referred to, and that the corporation and the company had agreed to alter those terms and conditions as thereinafter mentioned, it was provided, amongst other things, as follows:—

Clause 1: "Sub-section 14 of section 88 shall for the purposes of this agreement be read and have effect as if the same were in the words following (that is to say): (*a*) The company shall forthwith at their own cost dredge the bed and banks of the River Mersey (meaning thereby a channel in and along the River Mersey having a minimum width of fifty feet at the bottom) and for ever after maintain the same dredged so that at all times there shall be a depth of eight feet of water at low water of spring tides in the said channel between the western boundary of the works of Monks Hall & Co. (Limited) at or near Bank Quay and Howley Lock. The portion of the old bed of the River Mersey between the westerly end of the river diversion and Walton Lock (which portion of the River Mersey is shewn on the plan hereunto annexed and therein coloured blue) is admitted and agreed to be a portion of the River Mersey within the limits aforesaid."

Clause 4: "The company bind themselves effectually to execute and complete at their own cost the several dredging and other works prescribed by this agreement."

Clause 5: "All penalties (if any) incurred by the company to the corporation under or by virtue of the said agreement of the 12th day of December, 1893, are hereby absolutely waived and released."

Clause 6: "If and whenever the company shall fail to maintain the channel referred to in the first clause of these presents and navigation is thereby obstructed then and in each such case the traders and manufacturers carrying on business at Warrington shall have the right of navigation in respect of vessels passing through the Walton Lock of the portion of the Manchester Ship Canal extending from Eastham to the Walton Lock and of the portion of the River Mersey within the limits described in clause 1 (*a*) of

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(*a.*) Reported by GWYNNE HALL, Esq., Barrister-at-Law.

(*b.*) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

this agreement free of all tolls and dues until the aforesaid channel shall have been made and completed to the reasonable satisfaction of the surveyor for the time being of the corporation. Provided always that no such trader or manufacturer as aforesaid shall be entitled to the right of navigation referred to in this clause if the company immediately on the receipt of a written notice from the surveyor for the time being of the corporation certifying the fact of such obstruction and its position and extent commence to dredge and continue to dredge the aforesaid channel to the reasonable satisfaction of the surveyor for the time being of the corporation."

Clause 7: "Notwithstanding anything hereinbefore contained it is hereby declared and agreed that if the company fail to fulfil any of the provisions of this agreement and shall not within six months after receiving notice in writing from the corporation comply with such notice and fulfil the provisions of this agreement then upon any such event the rights, powers, and privileges of the corporation and of the said traders and manufacturers under the Act of 1885 (except sub-section 6 of section 88) shall thereupon revive and have full force and effect notwithstanding this agreement or the said agreement of the 12th day of December, 1893, and as if such agreements had never been executed.

Clause 8: "If and whenever the company shall neglect or fail to maintain the channel referred to in the first clause of these presents and the corporation shall give to the company a written notice specifying the obstruction to such channel and its nature and extent then and in any such case and so often as the same shall happen upon the expiration of six calendar months after the time of giving such notice the corporation may if they think fit remove such obstruction and the company shall thereupon pay to the corporation the costs reasonably incurred by them in effecting the removal of such obstruction: Provided always that if and whenever the corporation elect to avail themselves of the power hereby conferred upon them the operation of clause 7 of this agreement shall for the time being and from time to time as often as the corporation shall avail themselves of such power be suspended and shall not operate or take effect until notice (in addition to the notice required by clause 7) has been served upon the company by the corporation that they have not availed and do not intend to avail themselves of the power hereby conferred upon them."

Clause 9: "Save as hereinbefore expressly mentioned nothing in this agreement contained shall affect lessen or take away any rights powers or privileges enjoyed by or conferred upon the corporation and the manufacturers and traders of Warrington under or by virtue of any Acts relating to the company or otherwise and save as aforesaid such rights powers and privileges are hereby reserved accordingly."

Clause 10: "If any difference shall arise between the company and the corporation as to the true intent and meaning of this agreement or as to anything to be done or not to be done thereunder such difference shall be determined by an engineer to be appointed (unlese otherwise agreed on) on the application of the company or the corporation by the president for the time being of the Institution of Civil Engineers whose decision shall be final and binding on both parties and the cost of the reference shall be borne as he shall direct."

Clause 12: "The corporation shall have all rights and privileges under and shall be deemed to be traders within the meaning of this agreement."

The agreement of the 9th of April, 1896, was embodied in the schedule to the Manchester Ship Canal Act, 1896.

The company, it was alleged, made default in making and maintaining the channel of the River Mersey between the points referred to in clause 1 of the agreement of 1896 for the minimum width and depth therein provided, and the navigation of the river was always since the date of the agreement obstructed.

From time to time the surveyor of the corporation served written notices on the company certifying that the channel was obstructed but the company did not dredge or continue to dredge the channel to the reasonable satisfaction of the corporation's surveyor.

The Court of Appeal considered the jurisdiction of the court was ousted, with respect to the corporation, and also as regards the traders until the arbitrator should have given his decision.

Neville, K.C., and *Bousfield, K.C.* (*Hughes, K.C.*, and *F. Thompson* with them), for the appellants.

Moulton, K.C., and *Cripps, K.C.* (*Leigh Clare* with them), for the respondents.

THE HOUSE took time for consideration.

Earl of HALSBURY, L.C., expressed his concurrence with the judgment of Cozens-Hardy, L.J.

Lord MACNAGHTEN.—It is no wonder, I think, that the preliminary question as to competency, which was argued fully before your lordships, led to much difference of opinion in the courts below. The provisions in the Manchester Ship Canal Acts, 1885 and 1896, as to arbitration are so various and inconsistent that it is impossible to arrive at a conclusion which can be regarded as satisfactory from every point of view.

The question was raised for the first time when the parties went to trial. It does not seem to have been argued very seriously before Byrne, J., who tried the case. His opinion was that the provision contained in sub-section 22 of section 88 of the Act of 1885 would have been enough to oust the jurisdiction of the court if it had not been for the introductory words of the section, which declare that the provisions that follow shall have effect "unless otherwise agreed on between the corporation and the company." He thought that the parties might waive a provision which they were authorised to alter by agreement. I think there is a good deal to be said in favour of that view. But I am not satisfied that mere omission to insist on a statutory provision is equivalent to an agreement that the provision shall not have effect. The enactment at the commencement of section 88 seems to require something more than tacit abandonment

Upon appeal, the decision of Byrne, J., as to competency was reversed by a majority of the court. The action so far as it was brought by the corporation was dismissed; so far as it was brought by the traders it was stayed till further order. For some reason which I do not quite understand, Vaughan Williams, L.J., held that the provision in sub-section 22 of section 88 in the Act of 1885 was not one of the provisions which the corporation and the company were competent to deal with by agreement. He thought that the jurisdiction of the court as between the corporation and the company was ousted by sub-section 22. Without expressing a decided opinion as to whether the traders had independent rights which they could enforce, he came to the conclusion that such rights, if they existed, could not be enforced unless and until the default of the company had been established in an arbitration between the company and the corporation. He did not think it necessary to consider section 202 of the Act of 1885, which enacts that if any question should "arise between the company and any person touching

anything to be done, or not to be done, or any money to be paid," under the provisions of the Act, then, unless by the Act otherwise expressly provided, such question should be "determined by arbitration in manner provided by the Railways Clauses Consolidation Act, 1845." Stirling, L.J., agreed with Vaughan Williams, L.J., in his view of sub-section 22 and in the general result of his opinion, though he thought the traders were entitled to enforce the provisions in their favour contained in section 88. But he relied mainly, if not entirely, on section 202, which Vaughan Williams, L.J., left out of consideration. On the other hand, Cozens-Hardy, L.J., while agreeing that the jurisdiction of the court was ousted as between the corporation and the company, held that the traders had statutory rights which they could enforce independently of the corporation, and that they were not compelled to resort to arbitration or to await the result of arbitration between the corporation and the company. His view was that section 202 did not apply to a refund such as that which the traders claimed. It may have been intended, he said, to apply only to cases specified in the earlier parts of the Act, which provide for arbitration without designating the arbitrator or prescribing the mode of arbitration. At any rate, he thought that section 202 was not so expressed as to exclude the jurisdiction of the court.

On the whole, I am disposed to agree with Cozens-Hardy, L.J. I have no doubt that the Manchester Ship Canal Acts do confer upon the traders independent rights which they are entitled to enforce. I do not find in either of those Acts anything which compels the traders to resort to arbitration for the purpose of enforcing their rights unless section 202 of the Act of 1885 be held to have that effect, and on this point I agree with Cozens-Hardy, L.J. It is an unfortunate result, as Vaughan Williams, L.J., observes, that cases relating to the same alleged obligations of the company should not be disposed of by one and the same tribunal, but I am by no means sure that the result would be more satisfactory if the questions between the company and the corporation under the Act of 1885 were referred to an arbitrator appointed by the Board of Trade, and those under the statutory agreement confirmed by the Act of 1896 to an arbitrator appointed by the president of the Institution of Civil Engineers, while the very same questions arising between the company and the traders were referred to arbitration in manner provided by the Railways Clauses Consolidation Act, 1845.

It seems to me that the corporation should be struck out as co-plaintiffs with the traders, but that the action should proceed as between the traders and the company, and that the company should pay the traders their costs both here and below, except so far as such costs have been increased by making the corporation co-plaintiffs.

Lord JAMES OF HEREFORD.—In this case the Corporation of Warrington and certain traders are co-plaintiffs and the Manchester Ship Canal Co. are the defendants. The action is brought principally to recover certain tolls paid to the canal company on the ground that certain dredging operations imposed by statute on that company had not been fulfilled.

Upon the hearing of the cause before Byrne, J., it was submitted that the arbitration provisions contained in the original Ship Canal Act of 1885, and in an agreement affirmed in a subsequent Act, so completely ousted the jurisdiction of the courts that even the assent of the parties could not give power to the court to hear and determine the matters in dispute, and this preliminary objection has now been dealt with. After considerable hesitation I have come to the conclusion that the judgment given by Cozens-Hardy, L.J., is correct, and that it ought to be followed. I agree with the view entertained by the Court of Appeal as between the Corporation of Warrington and the Ship Canal Co. The provisions of the Act of 1885 and the agreement of 1896 (confirmed by the Act of that year) being duly considered, the result is that the provisions of sub-section 22 of section 88 of the Act of 1885 amount to an ouster of the jurisdiction of the ordinary courts, and that the tribunal created by that sub-section alone can determine the matters now in difference between the corporation and the canal company.

But I agree with Cozens-Hardy, L.J., in holding that the case of the traders individually stands upon a different ground. The traders are not mentioned in the provisions I have referred to. But it is argued that section 202 of the Act of 1885 places them in the same position as the Corporation of Warrington, and that therefore, equally in respect to the traders, the jurisdiction of the court is ousted. For the reasons given by the Lord Justice I do not accept this view; and although I think that the corporation may for some purposes represent the traders, I cannot agree that because the corporation must proceed by arbitration, that therefore the traders must do so also. Each of these traders may have an independent claim for damages, yet would not be entitled to appear upon an arbitration between the corporation and the canal company.

I therefore think that the traders are entitled to proceed in the action, and that so far the appeal should succeed, and I agree with Lord Macnaghten's view as to costs.

Appeal of the traders allowed; appeal of the corporation dismissed.

Solicitors for appellants, *Burton, Yeates, & Hart*, for *Alex. Wilson & Cowie.*

Solicitors for respondents, *Grundy, Kershaw, Simson, & Co.*

Court of Appeal.

From Chan. Div. (Vaughan Williams, Stirling, and Cozens-Hardy, L.JJ.) — Aug. 2, 1905.

BADISCHE ANILIN UND SODA FABRIK v. HICKSON. (a.)

Patent—"Vend within the realm"—Contract made in England for the sale of patented articles manufactured abroad—Articles to be delivered abroad.

A contract for sale within the realm of patented articles, which are to be delivered abroad, followed by a notification to the purchasers within the realm that the goods abroad are at their disposal, is not a "vending" within the realm of the patented articles so as to infringe the rights of the patentees.

Saccharin Corporation v. Reitmeyer & Co., 49 W. R. 199, [1900] 2 Ch. 659, *followed.*

Appeal by the plaintiffs from the decision of Buckley, J.

The action was brought to restrain infringment by the defendant Hickson of letters patent granted in 1887 to the plaintiffs for an invention relating to the manufacture of dye stuffs. The patent, which was in

(a.) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

the usual form, gave to the patentees the sole privilege "to make, use, exercise, and vend" the subject-matter of the patent within the United Kingdom, and to have and enjoy "the whole profit, benefit, and advantage" accruing from the invention.

The dye stuffs alleged to be infringments were purchased by the defendant Hickson, who resided in England, from a foreign company who manufactured them abroad, and were to be delivered to the defendant or his order at Antwerp. The defendant, by a contract made in England, then resold the dye stuffs to an English firm, to whom they were to be delivered at Antwerp, and by whom they were subsequently imported into England.

The plaintiffs claimed damages or an account of profits against the defendant and delivery up of the dye stuffs imported into England.

Buckley, J., considered that the decision in *Saccharin Corporation* v. *Reitmeyer & Co.*, 49 W. R. 199, [1900] 2 Ch. 659, governed the present case, and dismissed the action.

The plaintiffs appealed.

J. C. Graham and *Colefax*, for the appellants.—By a contract made in England with an English firm the defendant contracted to sell these infringing dye stuffs to an English firm, and although the dyes were to be delivered to the English firm at Antwerp, still the contract amounted to a vending by the defendant of the patented articles within the realm. The defendant knew perfectly well that the English firm buying the article from him intended to import it into England. The decision in *Saccharin Corporation* v. *Reitmeyer & Co.* is not consistent with the *dicta* of Lord Herschell in *Badische Anilin Fabrik* v. *Basle Chemical Works*, 46 W. R. 255, [1898] A. C. 200, at p. 207. The defendant by the course of action he adopted in fact deprived the plaintiffs of some of the "profit and advantage" accruing from their invention: *Elmslie* v. *Boursier*, 18 W. R. 665, L. R. 9 Eq. 217, at p. 222.

A. J. Walter, for the respondent.—*Saccharin Corporation* v. *Reitmeyer & Co.* exactly covers this case; there Cozens-Hardy, J., held that an English merchant who in pursuance of a contract made in England with an English firm delivered a patented article at a foreign port to the English importer, did not thereby "vend" the patented article within the realm. In the earlier case of *Badische Anilin Fabrik* v. *Basle Chemical Works* the House of Lords expressly left this particular point open.

Colefax replied.

VAUGHAN WILLIAMS, L.J.—This is a case in which there has been in one sense a sale of a patented article within the realm, because there has been a contract of sale and such subsequent appropriation of goods that property has passed, and that contract of sale is a contract which, on the facts, I take it, took place in England. Then it is suggested that those facts are sufficient to constitute an infringement of the statutory rights of the patentees. Really the whole question is whether there is any infringement of the statutory rights of the patentees unless there has been a sale accompanied by a delivery in England, meaning thereby, of course, a delivery by a person who entered into or was a party to the contract of sale, and who is the defendant in the action. Now, here Mr. Hickson is the defendant in this action; there has been a contract with him under which property has passed, and there has been a delivery by Mr. Hickson. That delivery was not within the realm, but was a delivery on the Continent, and that was a delivery made in pursuance of the contract.

The question here is one which I do not think myself was absolutely decided by the case of *Badische Anilin und Soda Fabrik* v. *Basle Chemical Works, Bindschedler*, in the House of Lords. I should point out with reference to that case that Lord Davey, who delivered the last judgment, says this (at p. 209 of [1898] A. C.): "Like my noble and learned friend opposite (Lord Herschell), I desire to express no opinion upon the nice question which might have arisen under other circumstances, but which in my opinion does not arise in the circumstance of this case." That is what he says, and when we look at the judgments of Lord Halsbury and Lord Herschell we see that they both of them seem to take as a material fact to be considered in the case before them, that the sale in the sense of the contract of sale had not been made within the jurisdiction. I need not read at length again the passage to which I called attention in the course of the argument. It is in Lord Halsbury's judgment at p. 205. But it seems to me that Lord Halsbury and Lord Herschell both expressly refrained from dealing with what might be the result on the question of infringement if the contract had been made, as the contract here was made, in England. I had thought from the reports in the Law Reports that in the case of *Saccharin Corporation (Limited)* v. *Reitmeyer & Co.*, [1900] 2 Ch. 659, before Cozens-Hardy, J., the contract there was abroad; but Mr. Walter has shown to us the report in the Patent Office Reports, and it appears that the contract in that case, as in this case, was in England. Really, therefore, the decision of Cozens-Hardy, J., in *Saccharin Corporation (Limited)* v. *Reitmeyer & Co.* covers the present case. I think that it must have occurred very often in past times that there have been agents and merchants in England who have made it their business to sell English patented productions which have been manufactured abroad. And I have no doubt that of recent years the practice has been to evade the intention of the Statute of Monopolies and the intention of the grant to the patentees by taking care that in form the merchant thus selling the goods is not a party to the delivery in England. Under these circumstances I do not think that we ought to extend the rule that was arrived at in *Elmslie* v. *Boursier* beyond the point to which it has already gone. *Elmslie* v. *Boursier* was a case where under the contract the goods were delivered in England. The contract was one that was made by an Englishman in France. There have been several attempts to extend the doctrine of that case further, and they have not been successful. It is not for me to offer any opinion as to whether it is desirable, in the interests of English patentees and the promotion of invention in England, that any statutory legislation should be passed for the protection of the privileges with which the Legislature has already thought it right that the inventors of useful inventions should be rewarded. But if it were right to do such a thing I have no doubt that it would be done, because there have been quite sufficient cases in late years to draw the attention of the Legislature and of everybody else to this practice. In fact the practice has now become so prevalent that everyone knows the exact steps that you must take to enable you to get patented articles distributed within the realm, and yet deprive the patentee of the remuneration which he thinks he is entitled to have. I ought to have said one word upon a part of Mr. Graham's argument. He did not put his case entirely upon there having been a sale within the realm. He put it partly upon the words with regard to profits, and said that there had been a depriving of the patentee of the profits that the statute intended him to have. I do not think any one of the decisions ever got within a practical distance of holding such a proposition to be accurate. The result is that this appeal fails, and is dismissed with costs.

STIRLING, L.J.—I am of the same opinion. The question is whether in this case the defendant has infringed the plaintiffs' patent. Now, in order that that may be established, I think that it must be made out that the defendant made, used, exercised, or vended the patented invention within the United Kingdom. That is the mode in which the letters patent are expressed, and that is the mode in which law is stated by Lord Herschell at the commencement of his speech when addressing the House of Lords in the case of *Badische Anilin und Soda Fabrik* v. *Basle Chemical Works, Bindschedler*. What is said here is that the defendant has vended a patented article in this country. What has taken place is this: He entered in this country into a contract with another person in this country for the sale to the purchaser of a certain quantity of the patented article, it being a stipulation of the contract that the article sold should be delivered to the purchaser, not in this country, but abroad. He procured the subject-matter of the contract abroad, and had it delivered to his orders in Antwerp. He then directed the persons in whose custody it was physically at Antwerp to hold it to the order of the purchaser, and then in England he communicated to the purchaser in England the fact that it was at the order of the purchaser at Antwerp, and thus he completed the bargain and sale to the purchaser in England of this article, which was all the time outside the realm. Then the purchaser brought it into England. The purchaser is not before the court, and we have nothing to do with him. The simple question is whether the defendant in these circumstances has infringed the plaintiff's patent. Now the question therefore is, is a sale made in England in circumstances such as would by the law of this country pass the property in the article to the purchaser, a "vending" of the article within the meaning of the letters patent, the article being all the while abroad? I think that it is not.

There is very little precise authority on the question; but as I have pointed out already, it seems to have been the opinion of Lord Herschell in the case to which I have just referred that in order that vending in this country should take place it was necessary that both the sale and delivery should be in this country.

That was also the decision in *Saccharin Corporation* v. *Reitmeyer & Co.* by my brother Cozens-Hardy in 1900, and from that decision I am not prepared to depart. I think that the consequences of holding otherwise might be very serious in this country. Articles which are subject to English patents, but which are made and sold in large quantities abroad, may be made the subject of mercantile contracts in this country, the patented article never being brought within this country, but sold and transferred abroad. And under these circumstances with regard to such articles, according to English law, the property might pass from one merchant to another. I think it would be an extremely serious thing to interfere with contracts of that sort. It is true in the present case that the article was intended to be brought within the realm, and probably an infringement was committed when the article was brought within the realm, but I do not see that we can look at that. The intention in other cases might be perfectly harmless, being simply that the property should be dealt with entirely abroad, and never come within the realm at all. For these reasons I think that the decision appealed from is quite right, and that the appeal should be dismissed.

COZENS-HARDY, L.J.—This is really an appeal from my own decision in *Saccharin Corporation* v. *Reitmeyer & Co.*; I therefore content myself with saying that the extremely able argument of Mr. Colefax has not satisfied me that the views I expressed five years ago are inaccurate.

Appeal dismissed.

Solicitors for the appellant, *J. H. & J. Y. Johnson.*

Solicitors for the respondents, *Emmett & Co.*, for *Rawnsley & Peacock*, Bradford.

From Chan. Div. (Vaughan Williams, Stirling, and Cozens-Hardy, L.JJ.) — July 12, 1905.

MEARS v. WESTERN CANADA PULP AND PAPER CO. (LIMITED). (a.)

Company—Shares—Minimum subscription—Payment in cash—Allotment—Companies Act, 1900 (63 & 64 *Vict.* c. 48), s. 4 (1).

Payment in cash of the sum payable on application for the minimum subscription to the shares of a limited company must be paid to and received by the company before allotment. Payment by cheque is permissible, but the cheque must be cleared before allotment.

Motion.

The defendant company had issued a prospectus offering certain shares therein for public subscription, the minimum subscription upon which the directors might proceed to allotment being fixed at 200,000 shares.

The plaintiff had authorized an underwriting company to apply for shares in his name, paid the sum due on application therefor, and the shares were in due course allotted to him.

At the time the allotment was made the defendant company had not cleared several cheques forwarded in payment of the application money, and some of these cheques were not paid on presentation, although they were afterwards made good.

Upon these facts being made known to the plaintiff, he claimed that the allotment was irregular and should be rescinded, that the register should be rectified, and that the money paid by him should be returned, upon the ground that the sum payable on the minimum subscription had not been paid to and received by the company before allotment; and that the defendant company should be restrained from parting or otherwise dealing with such money.

Swinfen Eady, J., held that the Companies Act, 1900 (63 & 64 Vict. c. 48), s. 4 (1), had not been complied with, because at the date of the allotment the sum payable on application for the minimum subscription had not been paid to and received by the company, and he made the order prayed by the plaintiff.

The defendant company appealed.

Gore-Browne, K.C., and *Kirby*, for the appellants.—Payment had been made before allotment. A cheque dishonoured but afterwards made good is sufficient payment to be within the Act. The allotment was valid.

They cited *Glasgow Pavilion (Limited)* v. *Motherwell*, 6 F. 116; *Currie* v. *Misa*, (1875) L. R. 10 Ex. 153; *Ex parte Matthew*, 32 W. R. 813, (1884) 12 Q. B. D. 506.

E. C. Macnaghten, K.C., and *Jessel*, for the respondent, were not called upon.

(a.) Reported by HENRY STEPHEN, Esq., Barrister-at-Law.

VAUGHAN WILLIAMS, L.J.—This appeal must be dismissed. I approve of Swinfen Eady, J.'s, decision; he says that to be within section 4 of the Companies Act, 1900, "to enable an allotment to be made the sum payable on application must have been paid to and received by the company in cash. Of course payments may be made in the ordinary course by cheques, but then the cheques must be cleared before the date of the allotment." Any cheque forwarded in payment of application money can be cleared before allotment, and then there will be a payment "received by" the company. In *Glasgow Pavilion (Limited)* v. *Motherwell* the cheques were met on presentation, and it was properly held that there had been a payment to and receipt by the company prior to allotment.

STIRLING, L.J., agreed. In this case some cheques sent to the company before allotment were not cleared before allotment. When presented they were dishonoured. There was no sum "paid to and received by the company." The giving of a cheque does not extinguish a debt. [He cited *Cohen* v. *Hale*, 26 W. R. 680, (1878) 3 Q. B. D. 371.]

COZENS-HARDY, L.J., was of the same opinion. It was not necessary to express any opinion as to the result of the appeal if the cheques had been honoured on presentation. The Legislature intended that no allotment should be valid unless the amount of the minimum subscription had actually been received in cash. No allotment need be made until cheques received have been cleared.

Appeal dismissed with costs.

Solicitors for the appellants, *Christopher & Roney.*

Solicitors for the respondents, *Blundell, Gordon, & Co.*

High Court of Justice.

Chan. Div.
Kekewich, J. } Nov. 13, 14.

MOLYNEUX v. RICHARD. (a.)

Landlord and tenant—Lease—Specific performance—Reservation of minerals—Covenant to erect houses—Particulars of houses specified—Lessee owner of minerals—Compromise of action brought by mortgagor—Damages.

The defendant had, in 1894, taken a lease of a certain piece of land for ninety-nine years, by which he covenanted to erect seven dwelling-houses similar to those already erected in a certain road, and to deliver them up at the end of the term in good and substantial repair. The lease also contained a reservation of the mines and minerals (which did not belong to the lessor) in favour of the person who would, if the lease had not been made, be for the time being entitled thereto, with power to enter upon the demised premises and occupy the surface thereof and to work the minerals under the lands, without leaving any support for the surface or any buildings thereon, and for that purpose to sink pits and to make pit-hills and spoil-banks, paying reasonable compensation to the lessee and his assigns for the damage so caused. The lands the subject of the lease had been assigned by the lessor, and the assignee mortgaged them to the plaintiff. The defendant was also by another lease granted by the owner of the minerals, and prior in date to the present one, entitled to the mines and minerals under the demised land. As the defendant had not complied with his covenant to erect the seven houses, although he had erected other buildings, the mortgagor had brought an action for possession on the ground of the breach, but that action had been compromised. The plaintiff, who was the mortgagee of the demised land, now sued for specific performance of the covenant to build the seven houses.

Held, that the defendant was bound to comply with his covenant to build, notwithstanding that he was entitled under his mining lease to use the whole surface of the land for mining operations; that the particulars of the houses to be erected under the covenant were sufficiently specified so that specific performance could be decreed; that a decree for specific performance was the only remedy available, as the damages for the injury done to the reversion would necessarily be infinitesimal, on account of the length of the lease, and would therefore be no adequate compensation for the depreciation of the reversion; and also that the compromise of the action brought by the mortgagor for possession on the ground of the non-compliance with the covenant to build was no defence to the present action, as the mortgagor's action was not maintainable, and therefore its compromise could not affect the mortgagee.

Witness action.

This action was brought by R. M. Molyneux, as the reversioner of a certain lease, against the lessee, the defendant, P. Richard, for specific performance by the defendant of a covenant to build contained in the said lease, and in the alternative for damages for breach of the covenant.

By a lease dated the 28th of July, 1894, and made between Isaac Colquhoun as lessor of the one part and the defendant of the other part, the lessor demised to the defendant four parcels of land at or near Percy-street, Gorse-road, Swansea, Glamorganshire, except the mines and minerals and the mining rights therein mentioned, for a term of ninety-nine years from the 25th of March, 1894, at the yearly rent of £50; and the defendant covenanted that he would within three years from the said 25th of March, 1894, erect and build seven messuages or dwelling-houses on the demised premises with all suitable outbuildings thereto in a workmanlike manner and under the direction and to the satisfaction of the surveyor or agent for the time being of the lessor, and similar to the messuages or dwelling-houses and premises which were at that time already erected in Percy-street aforesaid, and also would at all times during the said term keep the said dwelling-houses and all other buildings connected therewith erected or to be erected on the demised premises in good and substantial repair and condition, and in such good and substantial repair and condition would deliver up the same to the lessor at the end or sooner determination of the said term. It was thereby further declared that all rights and obligations of the lessor and lessee respectively thereunder should be incident to and devolve with the reversion expectant on the said demise and the leasehold interest thereby created, and should accordingly be enjoyed and observed and performed by the person or persons in whom such reversion and leasehold interest respectively should for the time being be vested. The lease also contained an exception and reservation out of the demise therein contained unto the person or persons who would, if the lease had never been executed, be for the time being entitled thereto of all coal, culm, ironstone, iron ore, quarries, stone, clay, and other mines and minerals lying and being within and under the demised premises, with full power to enter upon and occupy the surface thereof or any part thereof and to search for and work, win,

(a.) Reported by R. FRANKLIN STUBBING, Esq., Barrister-at-Law.

and get the said mines and minerals or any mines and minerals in, under, or upon other lands without leaving any vertical or lateral support for the surface of the said land demised or any buildings then or which thereafter might be erected thereon, and for the purposes aforesaid or any of them to sink pits, erect buildings, furnaces, ovens, machinery and apparatus, and to make and use railroads and other roads, pit-hills, spoil-banks, and generally to do upon, over, and under the surface of the said premises all things which might be found necessary, convenient, or proper for the purposes aforesaid, or any of them, making and paying from time to time to the lessee, his executors, administrators, and assigns, reasonable compensation for the damage which might be so done, the amount thereof to be settled by arbitration in manner therein provided.

By an indenture dated the 16th of October, 1894, I. Colquhoun conveyed the lands the subject of the before-mentioned lease to one Albert Mason in fee simple, subject to and with the benefit of the said lease and the covenants and provisions therein contained.

By an indenture dated the 19th of November, 1895, Mason conveyed the said lands and premises to the plaintiff Molyneux and one J. W. Carew as joint tenants in fee simple, subject to, but with the full benefit of the covenants, benefits, and advantages contained in, the said indenture of lease, by way of mortgage to secure a sum of £3,250 and interest, and this mortgage debt was still due and owing.

The defendant entered into possession and occupation of the premises under the lease upon the granting thereof and had since continued to have and enjoy the benefits thereof.

The mines and minerals under the premises comprised in the lease of the 28th of July, 1894, never were vested in I. Colquhoun, but were on the conveyance to him by the trustees of one Calvert Richard Jones excepted and reserved by such trustees, with powers of working the same and entering upon the surface of such lands; and by an indenture dated the 21st of March, 1894, and therefore made prior to the before-mentioned lease of the surface, the trustees had demised to the defendant for the term of forty-two years from the 1st of January, 1894, all the seams of coal beyond the depth of fifty feet below a certain seam of coal lying underneath the lands comprised in the lease of 28th of July, 1894, with full power and liberty for the lessee at all times to enter upon and occupy the surface of the land or any part thereof, and to search for, work, win, and carry away the said minerals and for the purposes aforesaid to sink pits, erect buildings, furnaces, ovens, machinery, and apparatus, and to make and use railroads and other roads, pit-hills and spoil-banks, and to make water-courses, ponds, and reservoirs, and collect water, and generally to do upon, over, and under the surface of the said lands all things which might be found necessary, expedient, or convenient for the purposes aforesaid, or any of them; the lessee so exercising the rights aforesaid or any of them and thereby causing damage to the owners of the surface, their heirs or assigns, or their lessees or tenants, to make and pay from time to time to such owners, lessees, or tenants reasonable compensation for such damage, the amount whereof was to be settled by arbitration in manner therein provided.

The defendant did not build the seven houses upon the demised land as provided by the covenant in the lease of the 28th of July, 1894. In February, 1903, the plaintiff required the defendant to build the said seven houses, and the defendant having neglected to comply with the plaintiff's requirements, the plaintiff by his surveyor prepared and delivered to the defendant plans showing the structure, elevation, and particulars of the houses which he required to be built under the defendant's covenant, such houses being similar in design to the houses already in Percy-street, which were cottages for miners and artizans, and let at rents of not less than 3s. 6d. per week. These houses were all built upon a similar plan with the exception that there were some slight modifications in a few of them.

As the defendant still refused to perform his covenant and build the seven houses, the plaintiff commenced the present action.

The defendant pleaded, as an alternative defence, that on the 25th of October, 1899, an action had been brought in the Queen's Bench Division by the above-mentioned Albert Mason against the defendant. Mason was at that time the mortgagor entitled to the possession of the said premises and to the receipt of the rents and profits thereof, the mortgagees having given no notice of their intention to take possession of the mortgaged property or to enter into possession of the rents and profits. In that action Mason claimed possession of the premises comprised in the lease of the 28th of July, 1894, and damages for the breach of the defendant's covenant to build the seven messuages on the demised premises. The defendant delivered his defence in that action and pleaded (*inter alia*) a payment into court of £25 in respect of the damages claimed for breach of the covenant, which amount was accepted by the said Mason in satisfaction of his claim; and on the 1st of June, 1901, an order was made that, the plaintiff accepting the amount paid into court, all further proceedings should be stayed, the defendant paying the costs of the plaintiff Mason.

The defendant contended that the compromise in the before-mentioned action constituted a bar to the plaintiff's claim in the present action, and he further said that in 1896 he had erected two houses and partly performed his covenant, but upon the evidence it appeared that these were not dwelling-houses, but were in the nature of offices. The defendant also contended that all the lands comprised in the lease of the 28th of July, 1894, except that part upon which the two houses had been erected had been used and occupied for the purpose of working and getting the mines and minerals demised by the mining lease of the 21st of March, 1894, and under the powers therein contained and for the purpose of performing the lessee's obligations thereunder, and that further dwelling-houses could not now be erected upon such lands, and that if any additional houses had been erected they would have been destroyed or rendered useless in the exercise of the lessee's powers under the mineral lease. The defendant also alleged that in any event the plaintiff was not entitled to specific performance.

P. O. Lawrence, K.C., and *Waggett*, for the plaintiff.—The houses to be erected under the covenant are the only real security for the rent reserved in the lease, the rest of the land having been rendered valueless by the pit-hills and spoil-banks. The only real remedy which plaintiffs have is to obtain specific performance of the building covenant, as they have no sufficient remedy in damages. The settlement in the action of *Mason* v. *Richards* cannot be set up as an answer to the present action. There would have been a good defence to that action if it had been tried. A mortgagor, although he can receive and sue for rent, cannot sue on covenants so as to affect his mortgagee: Judicature Act, 1873, s. 25, sub-section 5; *Matthews* v. *Usher*, 49 W. R. 40, [1900] 2 Q. B. 535. The action which Mason brought for possession was one which he could not properly maintain, and therefore the com-

promise is not binding on the present plaintiff, who had no knowledge of it. The covenant which has to be performed by the defendant is perfectly clear and explicit, and the buildings which he has erected cannot be held to be a performance of it as alleged. It is no defence in a court of equity for the defendant to say that he was unable to perform his covenant, because it conflicts with the powers granted to him in the earlier mining lease. The defendant cannot be heard to say that he is entitled to go, under his mining lease, upon this land and demolish the buildings and then compensate himself, because that would be to make null and void the covenant to build the seven houses which was the consideration by which the defendant obtained the surface lands, and would be contrary to all the principles of equity. Although the court does not as a rule decree specific performance of a covenant to build, yet there are three exceptions when it will do so, and the present case falls within all three: (*a*) When the buildings are sufficiently defined; (*b*) where no adequate compensation can be given by means of pecuniary damages; (*c*) where the lessee has obtained possession of the land upon the faith of having entered into the covenant to build: *Mayor, Aldermen, and Burgesses of Wolverhampton* v. *Emmons*, 49 W. R. 553, [1901] 1 K. B. 515. The words in the covenant, "similar to the messuages and dwelling-houses and premises erected in Percy-street," are quite clear and sufficiently definite, and the houses in Percy-street are sufficiently of one type to render compliance with this covenant perfectly simple. The damages which a reversioner of a lease with ninety years to run could obtain for an existing breach would, after deducting discount for payment down at the present time, be very small, and therefore afford no proper compensation for such a breach: *Whitham* v. *Kershaw*, 34 W. R. 340, 16 Q. B. D. 613. The enforcement of the covenant to build the houses would be the only adequate compensation for such a breach as in the present case, as the land itself is decreasing in value owing to the tipping on it. The case of *Ebbetts* v. *Conquest* [1895] 2 Ch. 377, 43 W. R. Dig. 91, is an authority for the proposition that in ordinary cases the proper measure of damages is the decrease in the value of the reversion occasioned by the failure to perform the covenants, but no case can be found where damages have been granted to the reversioner of a ninety-nine years' lease.

Stewart Smith, K.C., and *Meager*, for the defendant.—The only damages which the plaintiff is entitled to are damages as mortgagee, but as he has not realized his security it is not certain that there ever will be any damages at all. The measure of his damages is his loss on his security, and that can only be ascertained after he has realized his security. Specific performance cannot be decreed, because the buildings to be erected are not described with sufficient definiteness in the covenant to build. Further, specific performance will only be decreed where the damages are substantial, whereas in the present case they are merely nominal. Under the covenant the plans are to be prepared by the lessee, and the only right which the lessor has under the lease is that the buildings were to be built under the direction and to the satisfaction of his surveyor. *Mayor, Aldermen, and Burgesses of Wolverhampton* v. *Emmons* can be distinguished on the ground that in that case there was a contract outside the covenant which made it more definite, and this is absent in the present case: see also *Fairclough* v. *Marshall*, 27 W. R. 145, L. R. 4 Ex. D. 37. The defendant is entitled to tip all over the ground. The reservation in the plaintiff's conveyance is in the same terms as the grant of the surface to the defendant, who has the right to tip anywhere, although it may only be in a certain order as to different parts of the surface.

Lawrence, K.C., was not heard in reply.

KEKEWICH, J.—This case is by no means free from difficulty, and both parties treated the main point as being one of very considerable difficulty in ascertaining the principle of law and how to apply it. But, as I have had the advantage of hearing a full argument, there will be no benefit in postponing giving my decision upon the points which arise.

The defendant is the lessee of certain lands for a term of ninety-nine years at a rent of £50 under a lease of the 28th of July, 1894, by which (*inter alia*) he covenanted within three years from the 25th of March, 1894 (that is, not later than the 25th of March, 1897), to erect and build seven messuages or dwelling-houses on the premises, with all suitable outbuildings thereto. [After reading the covenant, his lordship continued:] Now, the first question raised is the question of the construction of the lease. The defendant contends that he was not bound by that express covenant to build seven or any other number of messuages or dwelling-houses, and the argument is this: The lease, it is said, contains, and it does contain, very large powers of interfering with the surface, and there is express power to cover the surface with pit-hills and spoil-banks, and there is also power to work the minerals underneath the surface without leaving any vertical or lateral support for the surface or for any buildings which might be erected thereon. It is said that the two provisions of the lease are contradictory, and that the power is inconsistent with the covenant to build. It cannot have been intended, so it is argued, that the lessee should have been bound to erect seven houses when there is an express provision that he should be at liberty to cover all the land with brick-kilns, pit-hills, and spoil-banks. To-day, it is said, he may erect the houses, and to-morrow he may pull them down to put his pit-hills and spoil-banks there; and the evidence goes to show that even now there is not much room for the houses, and by-and-by all the land will be required for the pit-hills and spoil-banks. I use that as a comprehensive term to include every interference with the surface in connection with the working of the minerals. The answer to that argument seems to me to be that he is bound by solemn covenant to erect these houses, and he has further entered into a covenant to maintain and deliver them up at the end of the term. Whether that is consistent or not with the power to cover the surface with pit-hills and spoil-banks it is not for me to say. Some method might possibly be found for reconciling the right to erect pit-hills under the liberty reserved to the lessee, with the obligation to build under the covenant. It is not necessary for me to inquire whether the defendant's claim to pull down the houses if erected and make pit-hills and spoil-banks could be upheld or not. All I do decide is that there is here an express covenant to build seven messuages or dwelling-houses, and that that cannot be said to be extinguished by the liberty, not yet exercised, to cover the land with pit-hills and spoil-banks. Therefore it seems to me that we have here a legal covenant binding on the lessee, by the very terms of which he has bound himself to erect these houses, and it is admitted that he has not fulfilled it. But it is said, when you have got so far, the plaintiff is entitled to no remedy. The defendant does not expressly say that the plaintiff has no remedy, but the argument comes to that, although in form it was that the plaintiff is not entitled to specific performance. Now I must take the objections to specific performance *seriatim*. But first let us see

what the tests of the right to specific performance are. It is not necessary nowadays to go back to the old cases, because we have the law laid down in the plainest terms by the Court of Appeal in the case of *The Mayor, Aldermen, and Burgesses of Wolverhampton* v. *Emmons*, 49 W. R. 553, [1901] 1 K. B. 515. It was there recognized that the general rule in equity was, that an agreement to erect buildings could not be specifically performed, although Collins, L.J., thought—and if I may respectfully say so, I agree with him—that the courts of equity had not always been consistent in following that rule. But it was also recognized that there had been established certain exceptions to that general rule, and the exceptions are clearly stated by A. L. Smith, M.R., and Romer, L.J., and are referred to also by the present Master of the Rolls, and they may be taken to have stated accurately the extent of the exceptions. A. L. Smith, M.R., said: "The authorities to which reference has been made appear to me to show that where there is a definite contract by which a person who has acquired land, and in consideration thereof has agreed to erect on the land so acquired a building of which the particulars are clearly specified, and the erection of which is of an importance to the other party which cannot adequately be measured by pecuniary damages, that is a case in which, according to the doctrine acted upon by the court of equity in relation to such matters, specific performance ought to be ordered." Romer, L.J., also states the three points, and I will not pause to read his language. The first thing to be considered is whether there is here what A. L. Smith, M.R., calls "a building of which the particulars are clearly specified." In that particular case it was admitted that the particulars of the building had not been in the first instance clearly specified, but after some dispute plans were submitted to the defendant, and there was no question that if the buildings were to be erected they were to be erected according to the plans. So far there is a distinction between that case and this, but the Lords Justices, in laying down that rule, did not rest it upon the particular circumstances in that particular case. They did not define what is meant by clear specification; they only mentioned that where there is a clear specification of particulars, then specific performance may follow. But it is argued that there is no clear specification here. The language of the covenant is this: "to erect and build seven messuages or dwelling-houses on the demised premises with all suitable outbuildings thereto." Then follow words which are not inappropriate where they stand, but which must be treated parenthetically with reference to the question as to what class of buildings are to be erected. These words put there parenthetically, only apply to the buildings to be erected, and are as follows: "in a workmanlike manner and under the direction and to the satisfaction of the surveyor or agent for the time being of the lessor." They do not in the least specify what the buildings are to be; but the words which follow these words do so specify, and must be read as immediately following the words "suitable outbuildings thereto." They are: "and similar to the messuages or dwelling-houses and premises already erected in Percy-street aforesaid." Part of the ground forming the demised premises abutted on Percy-street. Percy-street was known to the parties and there were erected a number of cottages. The lessee is to erect buildings coming within the terms "messuages or dwelling-houses." The covenantor has only to look at the houses in Percy-street to find out what they are, and then he has to erect buildings, not identical with, but similar to, those houses. The only difference between the two words for this purpose being that he would not be liable for breach of covenant if he departed in some non-essential particulars, but not in substance, from the houses in Percy-street. So far there is no difficulty. But then it is said that the houses in Percy-street are not all the same and that there is sufficient variety to make it uncertain which is to be followed. They are all workmen's cottages, and built on similar lines. They vary in form to some extent, and though they were mostly four-roomed cottages, there were some of five rooms, and one of six. They have in some cases been increased by additions to the original erections. I have nothing to show that there was this variety when they were originally built, or what it consisted in, but I will assume that there was some variety then. Still it seems to me that the covenantor is under no difficulty. He is not bound to copy the very best of these houses. He would be complying with his covenant if he copied that which was least onerous to himself and built an ordinary four-roomed house, of which there are several there. It seems to me that the houses to be built are quite sufficiently defined within the meaning of the language of the Court of Appeal. One of the plaintiffs' witnesses had prepared for submission to the defendant, plans on those lines, and there was no difficulty in recognizing the similarity of the houses on his plans to the Percy-street houses, and a builder says he would have no difficulty in constructing houses according to that plan without any further plans. It seems to me that to hold that specific performance is not to be decreed on the ground that the particulars of the buildings are not clearly defined because of the existence of some slight variety in the houses to be copied, even admitting that there was at the date of the lease some slight variety, would be to cut down the language of the Court of Appeal unfairly. It cannot have been intended that the words "clearly specified" should mean "leaving no room for doubt." That gets rid of the first objection.

The second objection is that the plaintiff is only a mortgagee, and it is said as mortgagee he can only recover damages on the footing of his security being in danger or insufficient; and that that cannot be proved until he has attempted to realize, and that in fact it may turn out that he has a wholly sufficient security. No case has been cited in support of this part of the defendant's argument. The argument must go to this, that on that ground no mortgagee where he is without an express grant of the benefit of a covenant in any lease could ever sue. Take the case of the ordinary grant of a mortgage in fee of lands which are leased to farmers. There happens to be a covenant in one of the leases not to erect a public-house on the demised premises. There is evidence that the erection of a public-house would seriously damage the rest of the property. According to the argument put forward on behalf of the defendant, the plaintiff is out of court, because it may be that until he has attempted to realize his security he cannot say whether it is sufficient or not, and therefore cannot sue. In my opinion such an argument goes far to oust the right of any mortgagee to sue on many covenants such as are found in many leases. I do not think that it requires anything further to be said in overruling that objection.

I will leave to the last the most serious point of the case, but will, before dealing with it, touch on another point which has been raised. It is said that the defendant has settled with the mortgagor, and compromised the matter in the action in *Mason* v. *Richard*, as he had a right to do. I have the proceedings in that action before me, and they show that ultimately an arrangement was made that the sum of £25 in court should be paid to the plaintiff in satisfaction of the cause of action. What was the

cause of action? The indorsement on the writ shows that the action was to recover possession of this very property. The plaintiff asked for possession, and for damages in respect of the breaches in the lease. On account of the defendant's breach of covenant in not building houses on the premises in accordance with his covenant, the plaintiff sued to recover possession. I need not go further. There is distinct authority in the case of *Matthews* v. *Usher* that such an action brought by a mortgagor was not maintainable. The point was there thoroughly considered, and the decision is exactly applicable to this case. The Court of Appeal held that the mortgagor had no cause of action; therefore, in *Mason* v. *Richard* there was nothing to be settled, and the mortgagor had no power to accept a compromise; and it was impossible that the settlement by way of compromise could in any way prejudice the rights of his mortgagee.

There remains one further point, and that requires separate consideration. In the passage I have quoted from the judgment of A. L. Smith, M.R., in the *Mayor, Aldermen, and Burgesses of Wolverhampton* v. *Emmons*, it is laid down that, beyond the clear specification of the buildings to be erected, you must find, in order that specific performance may be ordered, a definite contract by which a person who has acquired land in consideration thereof, has agreed to erect on the land so acquired buildings of which the particulars are clearly specified, and the erection of which is of an importance to the other party which cannot adequately be measured by pecuniary damages. That there was here such a definite contract, I am perfectly clear. It was part of the bargain by which the defendant obtained possession of this land; therefore we need not pause to inquire how far the acquiring the land entered into the consideration of the contract. But it is said here that the erection of these buildings is not of such importance to the other party to the contract, the plaintiff, that the breach cannot be adequately measured by pecuniary damages; and this is the question which I will now consider. What is the object of inserting such a covenant as this? It was explained by the experts, and it is common ground, and it is so clear that it hardly wants an explanation, that the object of inserting in a lease a covenant to erect houses and maintain them and yield them up at the end of the term, is to secure the rent. If a demise is made with liberty only to build, at a certain rent, the lessor has the advantage of the covenant for payment of rent, and if his lessee is a solvent person he can recover it in that way. But he can in no way protect himself except by recovering possession of the land if the rent is not paid, and upon entering into possession he may find that the land is not so valuable as he supposed, or as it was before the demise. Therefore it is usual where building is contemplated, and especially where it is part of the bargain by which the lessee obtained possession of the land, to insert in the lease an express covenant to build. Thus the lessor gets a security for the performance of the covenant and for the payment of the rent. The building is not erected as yet, but he gets security by the covenant to erect it. The buildings are to be of a certain character, as provided in this case by reference to the Percy-street houses. Money must be spent on them; and not only is the lessor extremely likely to recover his rent if he has to enter into possession, but in the meantime he has a very valuable lever by which he can extract money from the lessee, who, having spent money in erecting buildings, would be unwilling to give up possession and will be more easily persuaded to pay his rent. That doubtless was the reason for inserting this covenant here. It stands to reason that it must have been so. But the buildings have not been erected and the lessor has not got that security for his rent for which he contracted. It may be that he has miscalculated the value of the houses, and that they would not bring him in the whole rent of £50 a year; but even on the defendant's own showing they would bring in one-half of it. The defendant's answer to that is this, as I understand it: That he has erected a large number of other buildings on this land; he is carrying on there a large brick-making business, and in connection with that business and in connection with the colliery he has erected certain buildings—offices, an engine-house, and stabling—all of which cost a considerable sum of money; and if they remain there and are kept up, and the brick-making business and colliery continue, there will at any rate be a considerable security for the rent. An endeavour is made to show that they will be a better security for the rent if they remain there, than the seven houses would be if erected on the property, and therefore there is no reason to suppose that the plaintiff will not be adequately compensated in damages. Now, one has to pause to consider what the damages would be. I understand the rule of the court as to the remedy not being adequately measured by damages, to mean such damages as can be assessed by the court upon well-recognized principles if the action is for damages and not for specific performance. Now what would the damages be here? It is agreed that the damages assessed upon the principle in *Ebbetts* v. *Conquest* would be practically nil. It is agreed on both hands that the damages the plaintiff would recover would be the damages to the reversion at the end of the term by the houses not being on the land, less discount for immediate payment; and that on a lease having ninety years to run payment down now of a very small sum would be equivalent to all the damages which the plaintiff could recover. So that the defendant's argument really amounts to this, that the plaintiff is not entitled to any remedy—not to specific performance — because his remedy can be adequately measured in damages; and not to any damages because none could be assessed upon any known principle of law. Why are the damages, if any, which he can recover, the real measure of the importance to him of having the cottages built? It is said for this reason that there are all these other buildings on the land which are an equivalent. To test that, I asked counsel what security the lessor had that these buildings should be yielded up at the expiration of the lease in good condition. I was told that under the building covenant the lessee was bound to maintain them; but I cannot find any such provision. He was bound to build seven dwelling-houses, with suitable outbuildings thereto, and to maintain, not any buildings erected on the land, but the said dwelling-houses and all other buildings connected therewith. Obviously that does not apply to these buildings which he was under no obligation to erect. Therefore he may let them fall into decay or convert them to some other purpose which would be of no use as security for rent. That is no security in the sense in which I have endeavoured to explain the meaning of the term "security for rent." Therefore we are reduced to the plain question whether pecuniary damages will be an adequate remedy for the non-performance of the covenant to build these cottages irrespective of these other buildings on the land. The plaintiff's argument seems to me to dispose of that. Putting it at the lowest, a cost of £120 each for the erection of the seven cottages, there must be some security, and even if they produce £25 a year rental, that would be some security. It seems to me that this case is within the exceptions laid down by

the Court of Appeal, and that the plaintiff is entitled to specific performance.

Solicitors, *Guscotte, Wadham, & Co.*, for *Sparkes, Pope, & Thomas*, Exeter; *Spencer, Chapman, & Co.*, for *John R. Richards*, Swansea.

K. B. Div.
(Lord Alverstone, L.C.J.) Dec. 4.

HUTTON *v.* RAS STEAMSHIP CO. (*a.*)

Ship—Mercantile law — Naval court — Jurisdiction — Merchant Shipping Act, 1894 (57 & 58 *Vict. c.* 60), *ss.* 225, 480-486.

A naval court summoned in accordance with sections 480-486 *of the Merchant Shipping Act*, 1894, *is a court of record, and its orders cannot be impeached providing they are "duly" made—i.e., providing the proceedings are regular and the matter is one within the jurisdiction of the court. The powers given to a naval court by section* 483 *of the said Act may be exercised in respect to offences under section* 225. *Hence the court has power to "discharge a seaman from his ship" for an offence under section* 225, *which provides that the seaman for such offence "shall be liable to be punished" summarily.*

Action tried before the Lord Chief Justice of England.

The facts, in so far as they are material, are fully set out in his lordship's judgment.

Robson, K.C. (*Wyre* and *Morgan* with him), for the plaintiff.

Batten, K.C. (*Bailhache* with him), for the defendants.

Lord ALVERSTONE L.C.J., read the following judgment: This was an action in which the plaintiff, formerly employed as a donkey-man on board the steamship *Ras Bera*, sued to recover wages alleged to be due to him in respect of his employment on board that steamer. The defendants set up as a defence that the plaintiff was dismissed his ship at Yokahama, by the order of a naval court sitting under the Merchant Shipping Act, 1894. The case is of importance inasmuch as there are several other seamen who were dismissed at the same time and who are making similar claims. The facts proved and admitted before me were as follows: The plaintiff shipped at Barry under articles for a voyage for three years for Port Arthur *viâ* Barry (or) any ports within certain limits, which included Japan, and back to a final port of discharge in the United Kingdom. The vessel loaded a cargo of coals at Barry and arrived at Port Arthur on the 18th of January, 1904, during the siege, and the coals were there discharged. The vessel was at Port Arthur during a portion of the bombardment. she got away from Port Arthur on the 11th of February, went in ballast to Moji, a port on the west coast of Japan, from whence she proceeded to Hongkong. At Hongkong *The Ras Bera* was chartered by the Nippon Tusen Kaisha, the Royal Mail Steamship Co. of Japan, on a voyage to carry passengers to all parts of the world except British North America and Magellan, including Japanese ports. The charter provided that the steamer should fly at the mainmast head during her stay in port any private signal or home flag of the charterers. It was also provided by clause 26 of the charter-party that the charterers should not employ the steamer in carrying of troops or contraband of war. Under this charter she was to proceed to Moji and from Moji to Yokohama. The manifests for the two voyages before her arrival at Yokohama were put in, and it was alleged by the plaintiff that the steamer carried on these two voyages, among other things, rails and other railway materials. By Russian proclamations published in the *London Gazette* of the 1st and 22nd of March materials for the construction of railways were declared by Russia to be contraband of war. Upon arrival at Yokohama the plaintiff and others of the crew objected to continuing the voyage on the ground that the vessel was carrying contraband of war, and declined to work until some arrangement was made that in the event of capture they should be indemnified and their wives and families compensated and cared for. While the question was under discussion the plaintiff and others who objected declined to do any work, but except in respect of such refusal it was not alleged that they refused to discharge their duty. Upon this question being raised by the men a naval court was held under sections 480 and 486 of the Merchant Shipping Act, 1894, which court, after hearing the evidence of the plaintiff, the master, and other witnesses, decided that the plaintiff and others were guilty of continual neglect of duty without good and sufficient cause. The judgment further stated that the sailors' plea that the carrying of contraband vitiated the agreement was without force, the voyage remaining an ordinary commercial venture, any risk or responsibility that might be incurred being borne by the ship. The court further discharged the plaintiff and the other seamen from the steamship *Ras Bera* and forfeited their wages. Evidence was given before me by the plaintiff that at Yokohama the vessel was both taking in and discharging railway materials, and, if the matter was for me, I should hold upon the evidence that this was the case, as I was not satisfied, from the evidence of the master, that no railway materials were being shipped. Upon the other hand, evidence was also given by the plaintiff that military stores were being shipped and men in uniform carried as passengers; but upon the evidence, as far as it is for me, I do not find that either the vessel was fitted for carrying troops or members of the Japanese Navy, or that any were so carried.

The main question in the case, however, is not what was in fact on board, but whether, having regard to the provisions of section 483 of the Merchant Shipping Act, 1894, the plaintiff is entitled to maintain this action. It was contended on behalf of the defendants that they had not dismissed the seamen, that their discharge from the ship was the act of the court, and therefore no question of wages subsequent to the date of discharge could possibly arise. It was contended on behalf of the plaintiff that the order of the naval court was bad and not binding upon the plaintiff, and that inasmuch as he had been only discharged from the ship thereunder, his wages continued to run under the provisions of the Merchant Shipping Act. The main ground of contention of the plaintiff was that the decision and order of the naval court were made without jurisdiction, and that the offence in respect of which the men were charged, being an offence under section 225, having regard to the provisions of that section, the court had no power to discharge the plaintiff from his ship. It was further contended that the passage of the judgment with regard to contraband of war above quoted showed that the judgment was contrary to natural justice, and therefore could not be enforced. In order properly to appreciate these arguments it is, in my opinion, necessary to consider, in the first place, what is the position of a court held

(*a.*) Reported by MAURICE N. DRUCQUER, Esq., Barrister-at-Law.

under sections 480 and 486 of the Merchant Shipping Act, and on what grounds, if any, the decision of such a court can be impeached. It is, in my opinion, a British court sitting by virtue of the authority of a British statute and administering British law. It summons the parties before it, and has jurisdiction to investigate any charges, made under the sections of the Act, which can be entertained by courts having summary jurisdiction; this is clearly provided by section 483 (1) (*b*). But in my opinion the powers of the court, so far as punishment is concerned, are not confined to section 225 or earlier sections of the Act; express power is given by section 483 (1) (*c*) to discharge seamen from the ship, and by section 483 (1) (*d*) the court has power to forfeit wages. These powers are in excess of those given by section 225. Section 483 (2) provides that all orders duly made by a naval court under the powers of that section shall in subsequent legal proceedings be conclusive of the rights of the parties. In my judgment this provision was required in order to give orders of the court the effect of judgments *inter partes*; the court was a new court, created by statute, and but for this statute some question might have arisen as to whether its decisions were final and conclusive, as those of a court of record. In my opinion, therefore, unless the plaintiff could have successfully maintained that the order of the court was made without jurisdiction, it is an answer to the plaintiff's claim. It was contended by Mr. Robson that the word "duly" in section 483 (2) implies "correctly made in point of law," and that the statement in the order in question as to the way in which the court dealt with the plea that the carriage of contraband vitiated the agreement showed that the order was not duly pronounced. I cannot accede to this argument as to the meaning of the word "duly." At the outside it seems to me that it enacts that the proceedings must be regular—*i.e.*, the parties summoned on some definite charge, and parties and witnesses heard, and the case determined. I have, however, looked through the evidence which was before the court, and I am not satisfied that the passage which has been so much criticized bears the construction which the plaintiff puts on it. Whatever may have been the true facts there was no substantial evidence before the court that the vessel was carrying contraband of war, and in my opinion it is quite consistent with the above passage that the court rejected the plea upon the ground that they were not satisfied with the allegations made by the witnesses called on behalf of the seamen. In the view I take it is unnecessary to consider what the rights of the plaintiff would have been if the question for decision were the effect upon the contract of service of the carrying of contraband of war. Some claim was made on behalf of the plaintiff in respect of the seamen's effects, but no facts were proved before me to show that the defendants were responsible for the loss of the seamen's effects, and inasmuch as the action was really brought to try the question whether the seamen were entitled to their wages, notwithstanding that they had been dismissed from the ship, I think that this action must be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the plaintiff, *John T. Lewis.*

Solicitors for the defendants, *Holman, Birdwood, & Co.*

K. B. Div. (Warrington, J.) Nov. 23, 27.

NORTON AND OTHERS v. YATES. (*a*.)

Company—Judgment creditor—Garnishee order nisi—*Debentures — Floating security — Appointment of receiver and manager—Right to garnished debt as between receiver and garnishor.*

A judgment creditor of a company obtained a garnishee order nisi *attaching a debt due to the company and served the order* nisi *upon the debtor of the company. After service of the garnishee order* nisi, *but before it had been made absolute, an order was made in a debenture-holders' action against the company appointing a receiver and manager. On the day following the appointment of the receiver and manager the garnishee order* nisi *was made absolute.*

Held, that, regard being had to the conditions indorsed upon the debentures, as well as to the general nature of a debenture security, the receiver was entitled to the garnished debt as against the judgment creditor.

The dictum *of* James, L.J., *in* Ex parte Joselyne, 26 *W. R.* 645, 8 *Ch. D., at p.* 330, *to the effect that service of a garnishee order* nisi *transfers the property in the debt absolutely to the garnishor, disapproved.*

Interpleader issue.

The question to be determined in this issue was whether the receiver and manager appointed by the court on behalf of the debenture-holders of a company was entitled to receive certain sums of money paid into court by various debtors of the company to abide the trial of this issue, as against a judgment creditor of the company who had obtained garnishee orders *nisi* attaching the debts due to the company, and had served the orders *nisi* upon the debtors of the company prior to the appointment of the receiver.

On the 17th of January, 1905, the defendant Yates (referred to in this report as "the judgment creditor") obtained judgment against Walter Jones & Sons (Limited) (referred to in this report as "the company") for the sum of £520, and upon the same day obtained garnishee orders *nisi* attaching certain debts due to the company and served the orders *nisi* upon Henry Tate & Sons (Limited) and other debtors of the company.

On the 19th of January, 1905, an order was made in a debenture-holders' action against the company appointing the plaintiff Norton receiver and manager, and by a letter of even date notice was given by the solicitors for the debenture-holders to the judgment creditor of his (Norton's) appointment as receiver.

On the 20th of January the garnishee order *nisi* against Tate & Sons were made absolute.

By a letter dated the 23rd of January, notice was given by the solicitors for the debenture-holders to the judgment creditor that the receiver claimed the amount due from Tate & Sons and all other debts due to the company, and in consequence of this claim an order was obtained on the 9th of February directing the payment into court of the moneys due from Tate & Sons. On the 1st of March the judgment creditor applied by summons for payment out to himself of the moneys paid into court, and an order was made directing the trial of this issue and that certain of the debenture-holders should be joined as co-plaintiffs with the receiver.

Certain other judgments were also obtained against the company by the judgment creditor, and in consequence of such judgments garnishee orders *nisi* were

(*a*.) Reported by E. WAVELL RIDGES, Esq., Barrister-at-Law.

served upon various debtors of the company either on or subsequently to the 19th of January, 1905. The moneys so attached were, in consequence of the claim made by the receiver, directed by various orders to be paid into court to abide the trial of this issue; but only the question with regard to the £434 due from Tate & Sons was argued at the hearing, as being most favourable to the judgment creditor.

The conditions indorsed upon the debentures in so far as material to the present issue were as follows:

By condition 1 the debentures were to be "a specific charge upon the property of the company," and the company was not to be at liberty "to create any mortgage or charge in priority" to the debentures.

By condition 2 the principal moneys secured were immediately to become payable if the company should "assign, charge, or attempt to assign, charge, or otherwise deal with its book debts out of the ordinary course of business," and also if any of the property subject to the security should be "taken in execution or otherwise by operation of law be taken out of the control of the company."

By condition 5 the company was to be at liberty "in the course of its business and for the purpose of carrying on the same to use, employ, sell, lease, exchange, or otherwise deal with all or any part of the said property until one or more of the contingencies specified in condition 2 should have arrived, and from and after the happening of such contingency the liberty and authority hereinbefore given to the company should forthwith cease and determine, and the debenture charge should immediately become payable."

Jenkins, K.C., and *Leeke*, for the plaintiff Norton.

Gore-Browne, K.C., and *Disturnal*, for the co-plaintiffs.

Manisty, K.C., *Edward Morten*, and *J. G. Wood*, for the defendant.

In the course of the argument the following cases and authorities were referred to: *In re Combined Weighing and Advertising Machine Co.*, 38 W. R. 67, 43 Ch. D. 99; *Cole* v. *Eley*, 42 W. R. 561, [1894] 2 Q. B. 180; *In re London Pressed Hinge Co.*, 53 W. R. 407, [1905] 1 Ch. 576; *Robson* v. *Smith*, 43 W. R. 632, [1895] 2 Ch. 118; *In re National United Investment Corporation*, [1901] 1 Ch. 950, 49 W. R. Dig. 36; *In re Standard Manufacturing Co.*, 39 W. R. 369, [1891] 1 Ch. 627; *Government Stock Investment Co.* v. *The Manila Railway Co.*, 45 W. R. 353, [1897] A.C. 81; *In re Horne & Hellard*, 29 Ch. D. 736, 33 W. R. Dig. 234; *Davey* v. *Williamson*, 46 W. R. 571, [1898] 2 Q. B. 194; *In re Hill Pottery Co.*, L. R. 1 Eq. 649, 14 W. R Ch. Dig. 148; *In re United English and Scottish Life Insurance Co.*, 16 W. R. 451, L. R. 5 Eq. 300; *Ex parte Joselyne*, 26 W. R. 645, 8 Ch. D. 327; *In re Yorkshire Woolcombers' Association*, 53 W R. 113 (sub. nom. *Illingworth* v. *Houldsworth*, [1903] 2 Ch. 284; affirmed sub. nom. *Illingworth* v. *Houldsworth*, [1904] A. C. 355); *Robinson* v. *Burnell's Vienna Bakery Co.*, 52 W. R. 526, [1904] 2 K. B. 624; *Badeley* v. *The Consolidated Bank*, 35 W. R. 106, 34 Ch. D. 561; *Pritchett* v. *The English and Colonial Syndicate*, 47 W. R. 577, [1899] 2 Q. B. 428; *Geisse* v. *Taylor*, [1905] 2 K. B. 658, and *Rogers* v. *Whiteley*, 37 W. R. 611, affirmed [1892] A. C. 118; Buckley on the Companies Acts (8th ed.), p. 188.

WARRINGTON, J., after stating the facts as set out above and the conditions indorsed upon the debentures, proceeded as follows: One of the questions which arises in this case is as to the effect of a garnishee order. Now it is easier to say what its effect is not than what it is, and that question arose in *In re Combined Weighing and Advertising Machine Co.*, 38 W. R. 67, 43 Ch. D. 99, the point in that case being whether, after the garnishee order had been made absolute, the garnishor became a creditor of the garnishee; that is to say, whether the garnishee order absolute operated as an assignment of debt to the garnishor. The Court of Appeal held that the garnishor did not become a creditor of the garnishee, and that the debt did not pass to the garnishor either absolutely or by way of assignment. Bowen, L.J., says, in the course of his judgment (43 Ch. D., at p. 105): "I cannot see here that this statutory relation which was created originally by the Common Law Procedure Act, 1854, and was perpetuated in the rules under the Judicature Act, is really a relation involving the creation of a fresh debt. There cannot be said to be any equitable debt. There is no assignment in equity, and I cannot see that there is any legal debt. There is an order of a court of common law that a sum equal to the original debt shall be paid by the garnishee to the judgment creditor, or, as an alternative, that execution may issue; but I think that the relation which is created by that section and the orders made under it does not create a debt at all; it creates an attachment of a portion of the debt, and in case of non-payment confers the right of issuing execution, and nothing more." Fry, L.J., in his judgment (43 Ch. D., at p 105), puts the same thing in rather different language: "The question, I take it, is, what is the meaning of the words 'bind the debt in his hands'? Now, it has been argued that it amounts to a transfer of the debt. If that was the meaning, it is remarkable that that word was not used, and that the order does not say 'transfer' the debt; but, further than that, the whole scheme of the order is inconsistent with its being a transfer of the debt. It is plain to my mind that there is no transfer of the debt. It is equally plain to my mind that the garnishee order, therefore, does not make the garnishor a creditor of the garnishee. What the order does is this, it gives the garnishor certain statutory rights; it enables the garnishor to say to the garnishee, 'You shall not pay to your creditor the money which you owe him.' It enables him to give a valid receipt and discharge for the money. It enables him, in the event of the money not being paid, to obtain execution. He has all those rights, but there is no transfer of the debt, and he is not created a creditor." Now it was argued by the defendant that the Court of Appeal had previously given a decision contrary to this in *Ex parte Joselyne*, 26 W. R. 645, 8 Ch. D. 327, and that James, L.J., in his judgment held that the property in the debt passed to the garnishor. That being so, it is necessary to see what the court actually decided in that case, and how far the *dictum* of James, L.J., is necessary to the decision. It seems to me that the real question in that case resolves itself under two heads: (1) Whether there is any difference between a garnishee order *nisi*, and an order absolute; (2) whether the judgment debtor could not still receive payment of the debt although the order *nisi* had been served. James, L.J., says in his judgment (8 Ch. D., at p. 330), that "this property in the debt . . . was absolutely transferred from the judgment debtor to the judgment creditor. . . . The property in the debt was transferred, and there was a complete and perfect security the moment the order of attachment was served." I do not think that was necessary to establish the decision in that case, and it has been pointed out by Lord Alverstone, L.C.J., in *Geisse* v. *Taylor*, [1905] 2 K. B., at p. 663, that the *dictum* of James, L.J., cannot be taken

literally. For these reasons I think *Ex parte Joselyne* does not prevent me from holding that service of the order *nisi* does not transfer the debt from the judgment debtor to the garnishor. What it does is simply to give the garnishee the right to say, "I will not pay the debt to my original creditor, but to the garnishor." That being so, the debt remains the property of the judgment debtor, and such right as the garnishor has over it is subject to all the rights and equities attaching to it in the judgment debtors' hands. This point has often been decided, and I need only refer to two authorities—namely, *Badeley* v. *Consolidated Bank*, 35 W. R. 136, 38 Ch. D. 328, and *In re London Pressed Hinge Co.*, 53 W. R. 407, [1905] 1 Ch. 576.

The right of the garnishor, then, in the present case, being subject to all the rights and equities attaching to the debt in the hands of the company, it remains to consider what the true effect of the debenture security is. It is true that it is a floating security, but that is not all. It is subject to certain terms and conditions, and the real question is, what is the meaning of a floating security, having regard to the terms and conditions embodied in the debenture document itself? In the *Government Stock Investment Co.* v. *The Manila Railway Co.*, 45 W. R. 353, [1897] A. C. 81, Lord Macnaghten says in his judgment, [1897] A. C., at p. 86: "A floating security is an equitable charge on the assets for the time being of a going concern. It attaches to the subject charged in the varying conditions in which it happens to be from time to time. It is of the essence of such a charge that it remains dormant until the undertaking charged ceases to be a going concern, or until the person in whose favour the charge is created intervenes. His right to intervene may, of course, be suspended by agreement. But if there is no agreement for suspension, he may exercise his right whenever he pleases after default." In *In re Yorkshire Woolcombers Association*, [1903] 2 Ch. 284, Romer, L.J., referring to the effect of a deed charging the book debts of the company, says in his judgment at p. 296: "Treating this as a commercial document—as it is—what was the meaning of it? Did it not contemplate that until the trustees thought it necessary to intervene . . . that a debtor might go and pay to the company a particular debt, and the company might receive it, and deal with the cash in the ordinary way in which it would be dealt with in the ordinary course of business? I think that certainly is what is contemplated by this deed . . . for if the trustees had been compelled or obliged to give notice to all the debtors of this company so as to perfect their security . . . the business of the company must have been stopped." Both these judgments seem to me to go upon the footing that debentures create a general charge capable of becoming a specific charge on the happening of certain specific events, but a charge existing before the happening of those events. In fact, that is the basis for the orders which are frequently made in the Chancery Division enforcing the debenture security before the happening of the specific events. That being so, the receivership order operates upon all the property of the company, and I have already held that this debt was the property of the company subject to the garnishor's right, and the right of the latter was subject to the debenture-holder's rights. *Robson* v. *Smith*, 43 W. R. 632, [1895] 2 Ch. 118, is not really an authority to the contrary, because there the garnishor had actually obtained payment of the debt from the garnishee, and the debenture-holders had not appointed a receiver, but had only given notice to the debtors to pay their debts to them. In my opinion it is not an authority which applies to the present case at all. It has been argued that, even if the garnishor takes the debt subject to such rights as the debenture-holders may have, the company has power to deal with its debts in the ordinary course of business, and that the effect of a garnishee order *nisi*, being equivalent to an assignment of the debts, amounts to a dealing in the ordinary course of business. I do not think that an attachment of a debt under a garnishee order *nisi* is a dealing in the ordinary course of business, and to support this view I need only refer to the judgment of Lord Russell of Killowen, C.J., in *Davey* v. *Williamson*, 46 W. R. 571, [1898] 2 Q. B. 194. Referring to the effect of an execution under a judgment he says ([1898] 2 Q. B., at p. 194): "We cannot assent to the view of the learned county court judge that a seizure under an execution on a judgment against the company is a dealing by the company in the ordinary course of business within the third condition indorsed on the debentures." The result, then, is that the receiver is entitled to the moneys paid into court by Tate & Sons to abide the trial of this issue, and *à fortiori* to the moneys paid into court under the other orders.

Judgment for the plaintiffs accordingly.

Solicitors, *Witty & Co.*; *Flux, Leadbitter, & Neighbour*; *Tarry, Sherlock, & King.*

K. B. Div.
(Lord Alverstone, L.C.J., and Lawrance and Ridley, JJ.) — Aug. 2, 1905.

WORTHINGTON v. KYRNE. (a.)

Adulteration—Food and drugs—Adulterated milk—Inspector of nuisances, power to take proceedings—Local authority—Analyst—Justices—Jurisdiction—Sale of Food and Drugs Acts, 1875 (38 & 39 *Vict. c.* 63), *ss.* 6, 10, 11, 12, 13, 14, 20, 26; 1899 (62 & 63 *Vict. c.* 51), *ss.* 3, 25, 28—*Local Government Act*, 1888 (51 & 52 *Vict. c.* 41), *s.* 39.

Magistrates have jurisdiction to hear and determine an information preferred under section 6 *of the Sale of Food and Drugs Act*, 1875, *by an inspector of nuisances duly appointed by a town council, on behalf of the said council, although the said council be not one of the authorities referred to in section* 10 *of the said Act, and therefore not authorized to appoint an analyst for the Acts, and consequently not a local authority as defined by section* 25 *of the Act of* 1899. *Such a condition of things only affects the question as to the allocation of the fine inflicted by the magistrates, as dealt with in section* 25 *of the Act of* 1875.

Case stated by the justices of peace for the East Riding of the County of York under the Summary Jurisdiction Acts.

On the 10th of September, 1904, an information was preferred by the appellant, an inspector of nuisances for the borough of Bridlington under 38 & 39 Vict. c. 63, s. 6, against the respondent for that on the 4th of August, 1904, the said appellant did demand from the respondent as and for a sale to him a certain article of food—to wit, new milk, and that she the respondent then and there did unlawfully and wilfully sell to him and to his prejudice as and for

(a.) Reported by MAURICE N. DRUCQUER, Esq., Barrister-at-Law.

such article of food a certain article of food which was not of the nature, substance, and quality of the article of food so demanded by the said appellant as such purchaser.

The justices refused to fully hear and determine the said information and dismissed the summons.

The grounds of their decision as set out in the case were as follows:

1. That the said proceedings were taken throughout under the direction and at the cost of the town council of the borough of Bridlington, and that such council was, by the appellant, the prosecutor.

2. That the said council not being one of the authorities referred to in section 10 of the Sale of Food and Drugs Act, 1875, and the charter of incorporation of the said borough providing as follows: "The council of the borough shall not exercise any of the powers or duties or be subject to the liabilities of the Acts relating to the police force or other matters mentioned in section 39 of the Local Government Act, 1888, but all the powers, duties, and liabilities in respect of such matters shall be exercised by and attached to the County Council of the Aministrative County of the East Riding of Yorkshire, and the area of the said borough shall for all purposes of the Acts relating to the county police force or other matters mentioned in the said section form part of the county in like manner as if it were not a borough"; such council was not a local authority authorized to appoint an analyst for the purposes of the Sale of Food and Drugs Acts, and consequently not a local authority as defined by section 25 of the Sale of Food and Drugs Act, 1899.

3. That the said town council was not a local authority entrusted with the execution of the laws relating to the sale of food and drugs, and that it was not the duty of the said council to put such Acts into force and to direct its officers to procure samples as provided by section 3 of the Sale of Food and Drugs Act, 1899, and pay the costs thereof and of analysis.

4. That the said town council not being such a local authority as aforesaid, the appellant could not, under the direction and at the cost of the said town council, procure such sample of food and submit the same to be analyzed, and subsequently under such direction and at such cost and on behalf of the said council institute the said proceedings.

The following facts appeared from the case: That the appellant was an inspector of nuisances for the said borough duly appointed by the said council, and that he had, under the direction and at the cost of the said council taken a sample of milk from the respondent; that at such cost aforesaid he had caused such sample to be analyzed by the public analyst appointed by the county council for the administrative county of the East Riding of Yorkshire; that Bridlington is a small incorporated borough not having a separate court of quarter sessions or a separate police establishment; that the town council had not power to appoint an analyst for the purposes of the Sale of Food and Drugs Acts, and no such analyst was appointed; that in consequence of the result of the analysis so made as aforesaid the appellant had been instructed by the sanitary committee or town council of the said borough to prosecute the respondent.

The town clerk of the said borough appeared, on behalf of the town council, to conduct the prosecution.

Macmorran, K.C. (*Bonsey* with him), for the appellant, having stated the facts and read sections 10, 11, 12, 13, and 14, of the 1875 Act, and section 25 of the 1899 Act, the court stopped him.

Avory, K.C. (*E. W. Walker* with him), for the respondents.—The question is not whether the appellant, as an individual, could take proceedings, but whether he could do so as representing the town council. The justices must first determine whether the appellant could prosecute in the capacity in which he did, before they make an order, for this reason: The order when drawn up, in the event of a conviction, must set out where the penalty inflicted, if any, is to go. Section 26 of the 1875 Act deals with the matter, providing that if a private individual prosecutes then the fine is to be allocated as directed in the case of other fines; but if the local authority prosecutes the penalty is to be paid over to it to defray the expenses of the working of the Acts. Hence, to ensure the practicability of drawing up the order, the justices must first determine whether the appellant can sue on behalf of the borough, and the case states that he could not.

Lord ALVERSTONE, L.C.J.—I do not quite understand what has induced some ingenious person to take the point, nor how it could appeal to the magistrate. The Acts provide two sets of clauses, one to protect people who are proceeded against, and the other to protect people whose food is adulterated. The seller is protected by such clauses requiring samples to be taken, and by provisions making it compulsory on the local authorities to appoint analysts. The buyer is protected by the taking of samples and, upon the result of the analysis of such samples, being enabled to take proceedings against the seller. It is said that the jurisdiction of the magistrates to hear and determine such a case as this depends upon whether or not the inspector is appointed under such circumstances that the authority for whom he is appointed can itself take proceedings. I believe the only distinction is where the fine is to go in the event of a conviction. If section 26 is relied on, even then the case is covered by the second clause of that section. However, in my view the jurisdiction is imposed upon the magistrates, to hear and determine the case wherever an article of food is sold constituting a breach of the statute, as a result of an analysis taken in due form. I am clear in my own mind that the magistrates ought to have heard the case.

LAWRANCE and RIDLEY, JJ., concurred.

Appeal allowed.

Solicitors for the appellant, *Neve, Beck, & Kirby*, for *R. E. Matthewman*, Bridlington.

Solicitors for the respondent, *Bockett, Stunt, & Nash*, for *J. R. Proctor*, Beverley.

K. B. Div. (Kennedy and Ridley, JJ.) May 18, 1905.

WILLIAMS v. BRITON FERRY BURIAL BOARD. (a.)

Burial Acts—Consecrated and unconsecrated parts of a cemetery—Sanction of Secretary of State—Rights of incumbent—"Services rendered"—Burials by Nonconformist minister—Burial Acts, 1852 (15 & 16 *Vict. c.* 85), *s.* 32; 1853 (16 & 17 *Vict. c.* 134), *s.* 7; 1900 (63 & 64 *Vict. c.* 15), *s.* 3.

A part of a cemetery which has been duly consecrated for the purposes of burials in accordance with the rites of the Church of England is consecrated ground, although the sanction of the Secretary of State, under section 7 *of the Act of* 1853, *has not been obtained. The possible effect of the absence of such sanction may be that the fees could not be enforceable at law.*

The incumbent of a parish is not entitled to any fee under section 3, *sub-section* 4, *of the Burial Act,* 1900, *unless he has rendered services in respect of the burial.*

Appeal from the decision of the judge of the County Court of Neath.

The facts are sufficiently set out in the judgments of the court.

S. T. Evans, K.C. (*John Sankey* with him), for the defendants, the present appellants.

Meager, for the plaintiff, the present respondent.

KENNEDY, J.—I am of opinion that this appeal should be allowed. The claim was by an incumbent for fees in respect of the burial of two persons in a cemetery which is under the control of the defendants, the Burial Board of Briton Ferry. The burials took place in a part of the cemetery marked C upon the plan, which was a portion of a large piece of land divided into four plots, and given to the district by Lord Jersey for use as a burial-ground. The plan was submitted in 1879 to the then Home Secretary for his sanction, which was necessary under section 7 of the Burial Act, 1853, of an allotment of the ground partly as consecrated and partly as unconsecrated ground. The sanction was given to the division into consecrated and unconsecrated portions "as marked on this plan," and the plan clearly showed that it was intended that only the green part, marked A, should be consecrated. But it is a curious fact that in 1882 the defendants themselves, by their clerk, presented a petition for consecration to the bishop of the diocese, in which for some reason or other he was requested to consecrate a portion of the cemetery which included plot C as well as plot A; in accordance with the prayer of the petition both plots were consecrated in due form. During the incumbency of the late vicar, who died in 1902, there were thirty-three burials in plot C, all these burials being those of persons who were not members of the Church of England, and who were not buried in accordance with the rites of that Church. The next burial was that of the late vicar himself, who was buried there because it was found impossible to comply with his wish to be buried in the churchyard of his own church. No doubt his relations buried him where they believed he would have desired to be buried—that is to say, in consecrated ground. I have no doubt that the decision of the learned county court judge as to the effect of consecration was correct and that this ground must remain consecrated until, as Lord Coleridge, C.J., said in *Wood* v. *Headingly Burial Board*, 40 W. R. 390, [1892] 1 Q B. 713, there has been some act which would have the effect of annulling the consecration that had been duly performed according to law; until this event happens this plot must, from the ecclesiastical point of view, remain consecrated ground. It is none the less consecrated because there has been no compliance with the direction in the proviso to section 7 of the Burial Act, 1853, as to obtaining the sanction of the Secretary of State to the division of the cemetery into consecrated and unconsecrated ground. It is unnecessary for us to decide, and I do not intend to express an opinion whether by reason of the noncompliance with the statutory provision contained in section 7 of the Burial Act, 1853, and the want of the prescribed sanction of the Secretary of State, the rights of parties who would otherwise be entitled, in respect of the consecrated ground, to the payment of burial fees are affected in regard to the power of enforcement at law. The county court judge has not expressed an opinion on this point, and in my view the consideration of it is not necessary to the decision of the case. So far I have dealt with the only point dealt with by the county court judge, and I agree with him it is impossible to treat this ground as anything but consecrated ground, because the ecclesiastical act of consecration was one to which the sanction of the Secretary of State was not necessary, and if a piece of ground is consecrated in accordance with the law of this realm in the Church of England it is equally consecrated whether that sanction has been obtained or not.

But now we come to the consideration which seems to me fatal to the plaintiff's claim. It seems to me to be the contention on behalf of the plaintiff that, assuming this to be consecrated ground, the plaintiff is entitled to recover these fees by reason of the provisions of section 3 of the Burial Act, 1900. I think that that is not so. As I read that section, putting it in its shortest and simplest form, the result is that, subject to certain reservations in favour of vested rights, there is to be no fee except for services rendered. There were matters existing at the passing of that Act in respect of which fees were payable, such as exclusive burial, erection of monuments, &c., and in respect of these, but these only, there is to be a reservation of right for the life of the then incumbent or fifteen years, whichever might be the longer period, but, subject to that only, services rendered are to entitle the incumbent to a fee. The burials in the present case were those of Nonconformists, and were conducted without any service in respect of burial being rendered by the plaintiff. It is clear that they were not burials which would entitle the plaintiff to fees for his services. Nor did they take place under section 5 of 43 & 44 Vict. c. 41, commonly known as Osborne Morgan's Act. There could be no claim to these fees under that Act. There is, I think, a further ground on which our decision might be based, and that is that, even assuming that these two fees might be payable although no services were rendered by the incumbent, the claim for such a fee could not upon the evidence before us properly be made against the burial board, whether it might be made against someone else or not. I think, therefore, for the reasons I have given, that the claim cannot be upheld and that the judgment should be reversed.

RIDLEY, J.—I am of the same opinion. I agree that this was without doubt consecrated ground. The ceremony of consecration was performed upon it, and not merely were the words of consecration uttered, but the legal act took place which made it

(a.) Reported by MAURICE N. DRUCQUER, Esq., Barrister-at-Law.

consecrated ground; it must remain so. That is in accordance with the view of Lord Coleridge, C.J., in the case of *Wood* v. *Headingley Burial Board*.

If that were the only point for us to decide—and it seems to me to be the only point decided in the court below—there would be an end of the case; but we cannot let it remain there, for the real question is whether certain fees are recoverable from the defendants, the plaintiff's case being that they are recoverable simply because the ground is consecrated ground. I am unable to come to that conclusion. Under the Act of 1852 burial boards had the power of appropriating ground for the purposes of a cemetery and having it consecrated for the use of members of the Church of England. Under section 32 of the Act fees were recoverable by the incumbent or minister, who should "perform the duties and have the same rights and authorities for the performance of the religious service in the burial in such burial ground or in the consecrated portion thereof of the remains of parishioners or inhabitants of the parish of which he is such incumbent or minister, and shall be entitled to receive the same fees in respect of such burials which he has previously enjoyed and received." It seems obvious that under that section the fees recoverable for burials in such portions of the ground as were alloted were to be earned and paid in the same way as former fees, and paid to the persons who performed the duties. Even before that statute it seems to have been the law that burial fees were only recoverable by those who performed the duties; and that is clearly the meaning of the statutory enactment. In the present case the plaintiff has performed no services, and it is plain to my mind that he does not come under section 32 of the Act of 1852; indeed, I think that this was practically admitted by the plaintiff's counsel. I do not treat as an obstacle in the way of the plaintiff the provisions of section 7 of the Burial Act of 1853, which besides re-enacting the sections I have already mentioned and applying them to the country generally as well as to the metropolis, adds a proviso that the new burial ground is to be divided into consecrated and unconsecrated portions in such proportions as may be sanctioned by one of his Majesty's Secretaries of State. In the present case this sanction was, by mistake or accident, not given to the allotment of this particular plot as part of the consecrated portion of the cemetery, and it may be assumed, though it is unnecessary for us to determine the question, that so far as the recovery of the fees is concerned (but only so far) there is no consecrated part of the cemetery unless the allotment of that consecrated portion has been sanctioned by the Secretary of State. I do not think it necessary to decide that point, because, wholly apart from it, there is obviously no right in the present case to recover these fees.

If the plaintiff cannot recover these fees under section 32 of the Act of 1852—and I have already given my reason for holding that he cannot—neither can he for the same reason recover them under section 5 of Osborne Morgan's Act. I understand it to be admitted by the plaintiff's counsel that these particular burials did not take place under that Act, and upon being asked under what Act the plaintiff was entitled to recover these fees, the answer was that they were claimed under section 3 of the Burials Act, 1900. No doubt if that section gives him the right to these fees, the plaintiff would be in a strong position, for there would then only remain the objection alluded to by my brother Kennedy, that the plaintiff is suing the burial board, who have not received the fees, but I do not think that that section assists the plaintiff's contention. The part of the section which has been quoted to us does not, I think, refer to this class of fees at all; it has, I think, relations to fees which are earned for other matters than services rendered. There may be such fees which an incumbent may be entitled to receive in respect of a burial ground analogous to those which he was formerly entitled, and may still be entitled, to receive in respect of a church or churchyard—that is, fees in respect of rights of exclusive burial or the erection of monuments or other matters covered by the language of section 3 of the Burials Act, 1900—"Any other matter whatsoever except for services rendered by him." It is obvious that section 3, subsection 4, refers to these fees and not to fees earned by services at burials. The proviso upon which the plaintiff's counsel relied turns immediately upon that subsection, and says: "Where at the passing of this Act fees other than for services rendered are payable in respect of any matter arising in any burial ground attached to or used for the purposes of a parish"—then follow words giving the incumbent the right to recover them for fifteen years. I think that the language of the proviso was the same as the language of the section which they follow. They do not refer to services in respect of burials at all, but simply to fees which are outside such services rendered and in respect of other matters, and for that reason I think that the plaintiff cannot rely upon that statute. I agree with what my brother Kennedy has said as to the remaining objection, and I think that, although this is undoubtedly consecrated ground, the plaintiff is not entitled to succeed in this action.

Appeal allowed.

Solicitors for the plaintiff, *C. Valentine Pegge*, Neath.

Solicitors for the defendants, *Edmund Hodgkinson*, for *Alfred Curtis & Son*, Neath.

Court of Appeal.

From Chan. Div. (Vaughan Williams, Romer, and Stirling, L.JJ.) } May 9, 10; June 6, 1905.

RAINFORD v. KEITH & BLACKMAN CO. (LIMITED). (a.)

Company—Shares—Transfer—Non-production of share certificate on transfer—Inquiry as to non-production—Duty and liability of company—Loan to officer of company—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 22.

A company dealing with shares in the company for its own benefit is affected with notice of a third party's interest where the agents, who managed the transaction on its behalf, are aware of the third party's interest. In such case the third party can recover from the company the proceeds of a sale of the shares effected in disregard of that interest of which it had notice.

Appeal from the decision of Farwell, J. (reported [1905] 1 Ch. 296).

The board of directors of the defendant company were empowered by the articles of association to confer on certa n of the officers of the association such powers as the board itself had, and to lend money and undertake other financial operations which might be useful to the general business of the company.

It appeared that a servant of the company and a registered holder of certain of its shares had borrowed from the plaintiff certain money which was secured by a transfer of the shares and the handing over of the share certificate.

After the loan the borrower obtained an advance from the company which was to be repaid partly by a sale of the same shares to a third party, who was to pay the defendant company the price thereof. This was done, and the sale came before the board for registration, and was registered without the production of the share certificate.

Thereafter the plaintiff applied to have the transfer to him registered, and produced the certificate, which bore on it the following memorandum: "Without the production of this certificate no transfer of the shares mentioned therein can be registered."

This registration was refused on the ground of the prior transfer without the production of the certificate, the absence of which had been accounted for by the borrower declaring that it was in the possession of a friend, but that there was no charge thereon. The plaintiff then commenced legal proceedings and claimed damages for the company's refusal to register the shares to him and for wrongfully registering a transfer of the same shares to a transferee without a production of the certificate therefor and without making any proper inquiry as to the non-production or without having any sufficient reason given for its non-production.

At the trial Farwell, J., gave judgment for the defendant company ([1905] 1 Ch. 296), and the plaintiff appealed.

The facts of the case are fully stated in the judgment of Stirling, L.J.

Gore-Browne, K.C., and *T. Clarkson*, for the appellant.—The company had notice of the facts. The certificate should have been produced or accounted for in accordance with the note on the certificate. The company were guilty of a breach of duty.

They cited *Maxfield* v. *Burton*, 22 W. R. 148, (1873) L. R. 17 Eq. 15; *Oliver* v. *Hinton*, 48 W. R. 3, [1899] 2 Ch. 264; *Bradford Banking Co.* v. *Briggs*, 35 W. R. 521, (1886) 12 App. Cas. 29; *Shropshire Union Railways and Canal Co.* v. *Reg.*, 8 L. R. 7 H. L. 513; *In re Bahia and San Francisco Railway Co.*, 16 W. R. 862, (1868) L. R. 3 Q. B. 584; *Consolidated Co.* v. *Tomkinson*, [1893] A. C. 396; *Simm* v. *Anglo-American Telegraph Co.*, 28 W. R. 290, 5 Q. B. D. 188; *Société Générale de Paris* v. *Walker*, 34 W. R. 662, (1885) 11 App. Cas. 20; *Colonial Bank* v. *Whinney*, 34 W. R. 705, (1886) 11 App. Cas. 426.

Upjohn, K.C., and *Clauson*, for respondents.—Notice to affect the company must be given to an officer *qua* officer. What was told the officers in question was told them as individuals. The company had no constructive notice of the borrower's circumstances. The director had no power to lend money without express delegation; the loan was *ultrà vires*.

They cited *Société Générale de Paris* v. *Tramways Union Co.*, (1884) 14 Q. B. D. 424, 33 W. R. Dig. 44; *In re David Payne & Co.*, [1904] 2 Ch. 608, 53 W. R. Dig. 23; *In re Marseilles Extension Railway Co.*, 19 W. R. 379, (1871) L. R. 7 Ch. 161; *In re Hampshire Land Co.*, 45 W. R. 136, [1896] 2 Ch. 743; *Cave* v. *Cave*, [1880] 15 Ch. D. 639; *Barwick* v. *English Joint Stock Bank*, 15 W. R. 877, (1867) L. R. 2 Ex. 259; *Foss* v. *Harbottle*, (1843) 2 Ha. 461; *Shropshire Union Railways and Canal Co.* v. *Reg.*, L. R. 7 H. L. 509.

Gore-Browne, K.C., replied.—The company had power to advance money to their officer. The company is liable for not requiring the production of the certificate; the money was loaned for the company.

He cited *Biggerstaff* v. *Rowatt's Wharf (Limited)*, 44 W. R. 536, [1896] 2 Ch. 93.

Cur. adv. vult.

June 6.—VAUGHAN WILLIAMS, L.J., stated the facts as above and said: Now, the judgment of Farwell, J., delivered at the conclusion of the trial deals principally with points of law, and the facts are only stated in so far as is necessary to raise those points; the main facts so stated being that the learned judge finds that the board of directors acted with complete *bona fides* and believed Casmey's explanation of the absence of the certificate, but that if they did in fact owe a duty to the plaintiff to take reasonable and proper care they did not in fact discharge it. The learned judge then proceeds to discuss whether the defendants, by reason of the note at the foot of the certificate, or otherwise, have a duty to the plaintiff not to register without taking reasonable and proper care to have the non-production of the transferor's share certificate accounted for. He points out that the plaintiff, so far as he relies on the footnote to the certificate, must contend that it amounts to a representation which the defendants are estopped from denying, or that it is a contract with all persons to whose hands the certificate may come. He disposes of the estoppel on the ground that the estoppel is based on a representation (if representation there be), not of fact, but of intention of law, and that, as established by *Citizens Bank of Louisiana* v. *First National Bank*, 22 W. R. 194, L. R. 6 H. L. 352, 360, no action will lie; and also on the ground that the plaintiff does not allege that he saw the footnote before he made the loan. And as to the suggestion that the footnote amounts to an offer to anyone into whose hands the certificate might pass—accepted and acted on by the plaintiff when he received the certificate as security for his loan, the learned judge holds that the foot-note is a warning only, and not an offer to contract. It is to be observed, however, that Mr. Gore-Browne, in his argument on behalf of the plaintiff, did not rely on the foot-note, but contended that a duty arose independently of the foot-note by reason

(a.) Reported by HENRY STEPHEN, Esq., Barrister-at-Law.

of the operation of the certificate as a document of title issued by the company for the purpose of enabling persons to whom share certificates might be offered for sale or pledge to act upon the certificate as a document of title, and thus giving to shares a negotiability highly advantageous to the company issuing the certificate, which negotiability would be defeated if companies had no duty to call in one certificate of shares before it issued a s-cond certificate in respect of the same shares, or at least to obtain information reasonably accounting for the non-return of the certificate of the transferor.

I propose, before dealing with any of these questions of law, to state the facts as I understand them, because I think that it may be that the plaintiff has a good cause of action, independently of the question of law dealt with by Farwell, J., by reason that the defendant company may have received the £90, the proceeds of sale, with such notice and under such circumstances that *ex æquo et bono* they ought to treat the £90 as received to the use of the plaintiff, or because the plaintiff may be entitled to damages by reason that the defendants have by their conduct put it out of their power to exercise their discretion as to whether or not they shall register a transfer to the plaintiff based upon an equitable charge of which the defendant company had notice at the time when, by registering the transfer to Younie, the company did so put it out of their power to exercise such discretion. Now the facts seem to me to be these. The defendant company, by a cheque of the company, signed by the managing director, Keith, and countersigned by the secretary, Shillito, dated the 24th of June, 1903, and receipted on the cheque by Casmey on the 25th of June, and cashed on the 27th of June, made a loan of £180 to their servant Casmey. Such a loan it is now admitted was, having regard to article 116 (*e*), not *ultrà vires* of the company in the sense that it could not be ratified by the company; and it follows that the only question of *ultrà vires* which remains is the question whether the managing director had delegated authority to do that which it is admitted under the articles the board of directors might have done if not *ultrà vires* of the company. Now, the loan was arranged by Keith, the managing director, and Shillito, and I have not any doubt but that in making the loan Keith and Shillito professed and purported to act on behalf of the company. They submitted the proposed loan to the report of Hampsheir, the trusted accountant of the company, and he made a report which bears the stamp of receipt by the company dated the 26th of June, 1903. This report discloses that the certificate for Casmey's shares had been and was deposited as security for a loan. It follows that Keith, Shillito, and Hampsheir were all aware of the deposit of the share certificate as security for the loan. Farwell, J., rejected this document as not being evidence against the company; but, in my judgment, the report, bearing as it does the stamp of receipt by the company placed on it by an officer of the company whose duty it was to register the receipt, *primâ facie* is evidence against the company, and I find nothing in the evidence given in this action negativing this presumption of agency which makes this report admissible in evidence against the company. On the contrary, the evidence to which I will presently call attention shows ratification by the defendant company of the loan with reference to the making of which Hampsheir's report is addressed. Of course, if the conclusion is right that the report was received by the officers of the company in the execution of their duties, one must, unless and until the contrary is proved, impute to the board of directors, and through them to the company, notice of the fact that Casmey, to whom the company made the loan of £180, had pledged the share certificate with somebody as security for a loan; but even apart from the report there is written evidence that the company had notice or knowledge that the shares the transfer of which the company registered in the name of Younie were in fact held by a friend of Casmey's, although Casmey says for no consideration. I refer to the receipt and declaration of Casmey bearing date the 25th of June, as to which the solicitors of the defendant company write on the 26th of October the following letter to Mr. Brown, who, as solicitor for the plaintiff, had written on the 24th of October, 1903, threatening to institute proceedings against the defendant company. [His lordship read the letter, which inclosed copies of the receipt and the declaration and refused to recognize any claim by the plaintiff, and continued:] It seems to me impossible not to treat this letter of the 26th of October as conclusive against the company to show that the inclosed documents, both the receipt and the declaration, were received by the company on the 25th of June, and the company must be taken to have had notice of the contents of these two documents at the time when the company received the cheque dated the 27th of June for £90, the consideration for the transfer from Casmey to Younie, which cheque, it is to be noted, is drawn to the order of the company and at the time when the company registered the transfer to Younie. The result is that the company must be taken, at the date of the registration, to have had knowledge of the loan of £180 to Casmey and of the arrangement whereby Casmey was to repay that loan by the sale of 120 shares and by deductions to be made in future from his salary. The cheque for £90, drawn upon the Commercial Bank of Scotland, duly passed to the credit of the defendant company at the Bank of Scotland on the 29th of June. It seems to me not only must, on this evidence, knowledge of the contents of these documents be imputed to the company, but also the knowledge of the agents through whom the transaction thus ratified by the company was carried out. This does not mean that the company are affected with notice of a trust, but it does mean that the company received the £90 under such circumstances and with such knowledge that *ex æquo et bono* the money must be treated as received to the use of the plaintiff. I will now deal with some of the objections which were urged in argument against the conclusion which I have just mentioned. It was urged that the managing director Keith had no authority to enter upon the loan arrangement with Casmey, or to draw the cheque for £180 for the purpose of making the loan, without a special delegation under article 98 of the articles of association, which runs thus: [His lordship read it, and continued:] The answer to this seems to me to be that even if, generally, it is necessary to prove such special delegation, the receipt of the 25th of June is sufficient ratification of the loan arrangement which Keith purported to make on behalf of the company to render antecedent delegation unnecessary. There is no direct evidence as to whom this receipt was given, but the cheque for £180, and the cheque for £90 in part repayment, were recognized by the company without objection. Next, it is said that this evidence of ratification, or, at all events, the imputation of the knowledge of the loan and its terms, is negatived by the evidence of Mr. Alsop, the chairman. I cannot agree. The evidence of Mr. Alsop goes to his personal knowledge only. The letter of the 26th of October is *primâ facie* evidence that the loan transaction was brought to the knowledge of the company at or

about the date of the inclosed documents. It was for the defendants to displace this *primâ facie* proof. They do not do this. Not a word is said in explanation of the letter of the 26th of October, or in correction of the facts therein alleged. Of course, if one is to assume that which Farwell, J., seems to find —that the company received the £90 in good faith without the knowledge of facts from which the reasonable inference was that they were receiving moneys which Casmey had no right to deal with as against the plaintiff Rainford—the defendant company have a right to retain that money; but I think that it is impossible to assert this of Keith, the director, or of Hampsheir, the agents who carried through the transaction and whose act in making the loan and receiving part repayment out of the proceeds of the sale of the shares was, if not a transaction within their authority, at least a transaction ratified by the company as a transaction done on behalf of the company: see *Thompson* v. *Clydesdale Bank*, [1893] A. C. 282. The result is that I think this appeal must be allowed, and the defendant company ordered to pay to the plaintiff the £90, the proceeds of the sale to Younie of the shares in question; and, as I understand the plaintiff is content with this result, it is unnecessary to deal with the questions of law raised by Mr. Gore-Browne as to whether a company, by issuing a certificate, incur any obligations except to the persons to whom the share certificate is issued.

ROMER, L.J.—I have had the advantage of reading the judgments of my learned brethren, and, having carefully considered the facts of the case, will only say that I agree with them.

STIRLING, L.J.—In June, 1903, one William Casmey was in the employment of the defendant company as manager of the company's business at Leeds, and was the registered holder of 120 shares in the company. On the 23rd of June, 1903, he wrote to James Keith, the managing director of the defendant company, a letter in which he stated that he was in financial difficulties and asked for assistance, saying that he would like an advance of £180, which he would return at £25 quarterly and pay 6 per cent. for it. Keith replied by a letter dated the 24th of June to the effect that, having consulted Mr. Shillito, the secretary of the company, he had sent Mr. Hampsheir, the accountant of the company, who would do his best to arrange matters, and to whom he, Casmey, was to be perfectly frank and open and disclose everything, and whatever Hampshier proposed he must agree to in writing. Hampshier made arrangements which, according to documents dated the 25th of June, signed by Casmey, amounted to this, that an advance of £180 should be made to Casmey by the company, and should be repaid, as to £90 by the proceeds of sale at that price of Casmey's 120 shares to one Alexander Younie, and as to the balance by monthly deductions from his salary of not less than £8. Casmey accordingly executed a transfer dated the 25th of June, 1903, of the shares to Younie, who paid the price by giving a cheque dated the 27th of June, 1903, in favour of the defendant company for £90. This cheque was paid into the company's bankers and duly honoured on the last-mentioned date. On the 29th of June, 1903, the transfer by Casmey to Younie came before the board of directors for registration and was passed and registered. During all this time the certificate of the shares was in the hands of the plaintiff, having been deposited with him by Casmey as security for a loan. In October, 1903, the plaintiff discovered that the shares had been transferred and registered in the name of the transferee without any notice to him, and threatened legal proceedings against the company. Thereupon the company's solicitors wrote a letter to the plaintiff's solicitors, dated the 26th of October, 1903, in which they say, "We think it only fair to Mr. Rainford and yourself to forward you a copy of two documents which were signed by Mr. Casmey and given by him to our clients on the 25th of June last, of the existence of which documents we think it clear that both you and Mr. Rainford must have hitherto been ignorant. Under the circumstances our clients cannot, of course, recognize any legal claim by Mr. Rainford in the matter, and of course if he still chooses to institute legal proceedings against our clients they will defend such proceedings, and the result may be somewhat serious to Mr. Casmey." The documents, of which a copy was inclosed, were in the following terms:

"Leeds, June 25, 1903.

"Received of Messrs. James Keith & Blackman Co. (Limited) the sum of £180, which is to be repaid as follows:

"Witness—J. W. Hampsheir.

"W. H. CASMEY.

"By the sale of 120 fully-paid ordinary shares of £1 each in James Keith & Blackman Co. (Limited), for which I have this day signed a transfer deed in favour of Mr. Alexander Younie, the proceeds of which sale—viz., £90—I hereby authorize and request the said James Keith Blackman Co. (Limited) to retain £90

By the deduction from my salary of not less than £8 per month from and including the month of July, 1903, which reduction I hereby authorize and request the said James Keith & Blackman Co. (Limited) to make until the balance of £90 is repaid in full £90

£180

"W. H. CASMEY.

"Witness—J. W. Hampsheir."

"Leeds, June 25, 1903.

"To the Directors of James Keith & Blackman Co. (Limited).

"I hereby declare that my share certificate No. 50 for 120 ordinary shares in James Keith & Blackman Co. (Limited) is in the possession of a friend of mine; that I have signed no transfer deed in respect of the said shares excepting only that deed in favour of Mr. Alex. Younie, and that the said shares are not held by my friend as a charge against any loan or other consideration. In consideration of your honouring the transfer deed in favour of Mr. Younie and issuing a certificate in his favour, I hereby agree to hold you indemnified against all loss arising from the non-return of my certificate No. 50. "W. H. CASMEY.

"Witness—J. W. Hampsheir."

The plaintiff issued his writ in this action on the 13th of May, 1904, and thereby claimed (1) a declaration that, by virtue of the deposit with him by Casmey of the certificate of the shares for the purpose of securing the repayment of the sum of £100, with interest at 5 per cent., lent to Casmey on the 18th of September, 1901, the plaintiff became entitled to an equitable mortgage on the shares, and on any moneys to arise from the sale thereof, for the amount of the loan, with interest; (2) to recover the sum of £90 paid to the company upon the transfer of the shares to Younie; (3) damages for wrongfully registering the transfer of the shares to Younie. At the trial the only witness called for the plaintiff was the plaintiff himself, who proved the deposit of the certificate with him as security for the loan mentioned. The plaintiff's counsel also put in the correspondence between Casmey

and Keith in June, 1903; the cheque of Younie, the purchaser of the shares, dated the 27th of June, 1903, in favour of the defendant company; the letter of the defendant company's solicitors of the 26th of October, 1903, and the two documents there referred to; and also a third document signed by Casmey on the 25th of June, 1903, of which disclosure was made by the company's affidavit of documents. This last document the learned judge refused to admit. For the defendants the only witness called was the chairman of the board of directors of the defendant company, who stated that he was present at the board meeting of the 29th of June, 1903, when the transfer of Casmey's shares was passed and registered; that no certificate was produced to the board, but that they were shown Casmey's declaration of the 25th of June; that Casmey had been a faithful and confidential servant of the company for sixteen years and had always proved trustworthy; and that they believed him. He also said that he had not the remotest idea that Casmey was in financial difficulties, that Keith was present at the meeting, but he (the witness) had no idea why the transfer to Younie was made, and knew nothing of Younie's cheque to the company. On re-examination he said that nothing was said at the board on the 29th of June as to how the £90 was going to be paid or anything about it. Keith, Shillito, and Hampsheir were all present at the trial, but none of them were called. The learned judge held that the plaintiff had failed to make out any case for payment to him of the £90 received from Younie; and as regards the claim for damages, he further held that the plaintiff had failed to establish the evidence of any duty on the part of the defendant company, when considering the propriety of registering a transfer, to take reasonable care in registering the transfer, though, if such a duty did exist, he was of opinion that they had failed to discharge it. The judgment of the learned judge on the second part of the case, as to the liability of the defendants in damages for wrongfully registering the transfer of Casmey's shares, is reported in [1905] 1 Ch. 296; but there is no report of his judgment on the first part of the case, and we are ignorant of the grounds on which he came to the conclusion that that part of the case failed. Upon the appeal the decision of the learned judge was challenged as to both parts of the case. Now, the first of the two documents of the 25th of June, 1903, shows that a transaction was purported to be entered into between the defendant company and Casmey, one of the terms of which was that the repayment of the £90, part of the loan, was to be repaid by a sale of Casmey's shares. This document was certainly an equitable assignment of the proceeds of the sale of the shares to Younie; but, in my opinion, it went beyond this, and if the sale to Younie had gone off would have conferred on the company a right in equity to have the shares sold and the proceeds applied in payment of the advance made to Casmey. The persons who negotiated and carried out this transaction were the managing director and two officers of the defendant company. The loan was made out of the funds of the defendant company, and the cheque of the purchaser of the shares was made out in favour of the defendant company and was paid to the defendant company's account with their bankers. By this transaction the defendant company, *primâ facie* at all events, acquired for its own benefit an equitable interest in Casmey's shares. The declaration made by Casmey stated that the certificate of the shares was not in his possession, but in that of a friend; and although it was also stated that the shares were not held by the friend "as a charge against any loan or other consideration," it appears to me that any person dealing with Casmey in respect of those shares was thereby affected with notice that the holder of the certificate might have a charge on or other interest in the shares, and could not prudently deal with Casmey without ascertaining what the real interest of the holder of the certificate was. Where a company in which the shares are held sees fit to deal with the shares for its own benefit, then that company is liable to be affected with notice of the interest of a third party, and is affected with such notice if it is brought home to the agents who managed the transaction on its behalf: see *Bradford Banking Co.* v. *Briggs*, 35 W. R. 521, 12 App. Cas. 29. Now, Keith, Shillito, and Hampsheir all had such notice. Further, the two documents of the 25th of June, 1903, passed into the possession of the company and were put forward by the solicitors of the company acting on its behalf in October, 1903, as documents which justified the company in dealing as they did. It seems to me that in these circumstances the plaintiff makes out a *primâ facie* case entitling him to recover from the defendant company the proceeds of a sale carried into effect in disregard of the rights of the plaintiff of which the defendant company had notice. Now, how is this case met? It is said, in the first place, that the transaction was *ultrâ vires* of the company. It was pointed out that the memorandum of association of the defendant company does not expressly authorize the lending of money, and this is quite true. But the memorandum does, however, among the objects of the company, include the doing of all such things as are incidental or conducive to the attainment of the other objects. And by the contemporaneous articles of association the directors are empowered, amongst other things—article 116 (*e*)—on behalf of the company to lend money and generally undertake such other financial operations as might in their opinion be incidental or useful to the general business of the company. Regard being had to the decisions in *Harrison* v. *Mexican Railway Co.*, L. R. 19 Eq. 358, and *In re South Durham Brewery Co.*, 34 W. R. 126, 31 Ch. D. 261, I think that the lending of £180 to a faithful and confidential servant of the company cannot be held to be beyond the powers of the company. It was said, however, that there was no evidence that the transaction had been sanctioned by the board of directors; but the transaction was carried out with the sanction of the managing director of the company, on whom the board of directors are authorized by article 98 to confer such powers, or any of them, as are possessed by the board themselves. No evidence was given by the defendants as to what limits (if any) had in fact been imposed on the managing director's powers. No evidence was given that the transaction had ever been repudiated by the board, and, on the contrary, the transaction itself is put forward by the company's solicitors on the 26th of October, 1903 (and, it must be assumed, with the sanction of the company), as one which justified the company in resisting the plaintiff's demand. In the total absence of any explanation whatever by the chairman of the board of directors, or any one else on behalf of the company, of what had actually taken place, I think that the transaction ought to be held to bind the company, and that the plaintiff is entitled to recover from the defendants the £90 received by means of Younie's cheque. Taking this view of this portion of the case, I think it is unnecessary to express any opinion on the important question decided by Farwell, J., as to the duties of a board of directors with reference to the registration of transfers. I cannot part with the case without referring to the third document signed by Casmey on the 29th of June, 1903. With great deference to the learned judge, I think that this document was admissible against the company. It

shows that Casmey stated in writing to Hampsheir, contrary to the declaration which I have already read, that he had given his friend his share certificate as security for a debt; and consequently that Keith had actual notice that the certificate was so held. I do not understand how two inconsistent documents came to be executed by Casmey on the same day, and how reliance came to be placed on that one of the two which proves to be inaccurate; and I regret that no explanation as to this was given on behalf of the company. But in the absence of such explanation I have proposed to rest my judgment on the documents put forward by the company's solicitors in their letter of the 26th of October, 1903, without taking the third document into account. I think that the appeal ought to be allowed.

Solicitors, *C. G. Cudby*, for *S. Brown*, Manchester; *Gadsden & Treherne.*

High Court of Justice.

Chan. Div. }
Farwell, J. } Nov. 21.

In re GOSSELIN.
GOSSELIN *v.* GOSSELIN. (*a.*)

Will—Conditional bequest—Hereditaments—Condition to resettle—Money upon trust for investment in land.

A testator gave a life interest in his estate to his son upon the condition that he should resettle the "hereditaments subject to the limitations" of the will of testator's father within a year of testator's death. The son was tenant in tail of lands under the will of testator's father, part of which had been sold and was represented by money held upon trust for investment in land.

Held, that these moneys were "hereditaments" which must be resettled in order to comply with the directions in the will of the testator.

Basset *v.* St. Levan, 43 *W. R.* 165, *discussed and followed.*

In re Duke of Cleveland's Settled Estates, [1893] 3 *Ch.* 244, *followed.*

Adjourned summons.

By his will Sir Martin Gosselin settled his mansion-house at Blakesware and all his real estate upon trusts, under which his widow was entitled to the rents and profits until some child or grandchild of the testator should attain twenty-five, and under which Alwyn Gosselin, his only son, and at the date of this summons in his twenty-third year, would, on attaining twenty-five, be tenant for life in possession. The testator's residuary personal estate was left to trustees upon trust to invest in land to be settled upon the trusts declared of the real estate.

There was, however, a proviso in the will of the testator that the estate for life so limited to A. Gosselin was conditional upon his, within twelve calendar months after (in the events which had happened) the testator's death, resettling the residue of the personal estate of the testator's father, M. H. Gosselin (which the testator by his will, in exercise of a special power of appointment, appointed to him), upon the trusts declared concerning the residuary personalty of the testator. He must also, in order to participate in the testator's estate, "resettle the hereditaments" of which he was tenant in tail under the will of the above-mentioned M. H. Gosselin, his grandfather.

(*a.*) Reported by C. H. CARDEN NOAD, Esq., Barrister-at-Law.

The testator died on the 26th of February, 1905, leaving residuary personalty and real estate estimated at £17,000. The real estate subject to the trusts of the will of the testator's father, M. H. Gosselin, of which A. Gosselin was tenant in tail, was of much greater amount, and the residuary personalty of that estate was worth about £70,000.

A difficulty arose in carrying out the testator's directions because considerable real estate of M. H. Gosselin had been sold during the life of Sir Martin Gosselin, the testator, and was now represented by securities worth £37,263, held upon trust for investment in land upon the trusts of the will of M. H. Gosselin. It was desired to ascertain whether it was necessary to settle these moneys as being "hereditaments subject to the limitations of that will."

The question asked by this summons was "whether in order to perform the condition contained in the said will of the said Sir Martin Gosselin that the plaintiff should within, in the events which have happened, twelve calendar months after the testator's death, both settle the residue of the personal estate of the above-named Martin Hadsley Gosselin, the testator's father, if and so far as the appointment in the testator's will might operate in the plaintiff's favour; and also should enlarge the estate in tail male or in tail to which he was entitled under the will of the said Martin Hadsley Gosselin in all the hereditaments devised by that will or then subject to the limitations thereof to which the plaintiff was entitled for that estate in tail male or in tail; and should resettle those hereditaments to the uses by the said will of Sir M. Gosselin limited of the hereditaments thereby devised; and whether it was necessary or proper that the plaintiff should enlarge the estate in tail male or in tail to which the plaintiff is entitled under the said will of the said M. H. Gosselin in the moneys, stocks, and securities which at the death of the said Sir M. Gosselin had arisen from the sale of hereditaments devised by the last-mentioned will, and were held under the provisions of such will upon trust for reinvestment in lands, and should resettle such moneys, stocks, and securities upon the trusts declared by the said will of Sir M. Gosselin concerning the net moneys to be produced by the sale and conversion of the personal estate of the said Sir M Gosselin or otherwise."

T. T. Methold, for A. Gosselin, the plaintiff in the summons, contended that the reasoning in *Chandler* v. *Pocock*, 28 W. R. 806, 15 Ch. D. 491, applied, and that the plaintiff being absolutely possessed of the moneys representing proceeds of real estate, subject to disentailing, they were not "hereditaments" and so not liable to resettlement under the testator's will.

G. W. Brabant, for the defendants other than the trustees of the will.

W. A. Russell, for the trustees.

FARWELL, J., stated the facts and continued: The question is whether the condition for resettlement in the will of Sir Martin Gosselin compels his son to settle moneys representing parts of the real estate sold in the lifetime of his father. That depends upon whether these moneys are properly described as "hereditaments." In my opinion, on the true construction of this will these moneys are properly so described and must be settled in order to comply with the condition in the will. I am bound to take the date of the testator's death and to see how the property then stood. Now the word in the will is "hereditaments," that is something to be inherited, and moneys like these, held in the hands of trustees upon trust to invest in land, are hereditaments, since they can be inherited. In forming this conclusion I am very much assisted by what was said by the Court

of Appeal in *In re The Duke of Cleveland's Settled Estates*, [1893] 3 Ch., at p. 250, "money which a testator has not got into his own hands, and which he has no right to have in his own hands, and which is held upon trust for investment in land, is, in our opinion, to be treated as real estate, although, if he has power to dispose of such money, he can dispose of it either as land or money, as he may think right." That seems to apply to this case, for here the money was not in the hands of the testator, and he had no right to have it in his hands as he had not disentailed. But, besides this, the present case is, in my opinion, not distinguishable from *Basset* v. *St. Levan*, 43 W. R. 165. The only doubt in that case arose from the difficulty of construing "hereditaments" in a larger than its supposed technical sense. Stirling, J., thought that in construing a will he was not bound to restrict the meaning of "hereditament" to something that could be inherited, as it was not used as a word of art in a technical sense. Moreover, in the present case the word "hereditament" is enlarged by the addition of the word "estates." But even without this, I am of opinion, as already said, that the word "hereditaments" is sufficiently large, construing it as I have done, to describe money held upon trust for investment in land where the testator, as here, has no power to dispose of it as money.

Solicitors, *Meynell & Pemberton*, for all parties.

K. B. Div.
(Lord Alverstone, L.C.J., and Wills and Darling, JJ.) Nov. 10.

MOORE *v.* LEWIS. (*a.*)

Inland Revenue — Carriage tax — "Constructed or adapted for use and is used solely for the conveyance of any goods"—Exemptions—Customs and Inland Revenue Act, 1888 (51 *&* 52 *Vict. c.* 8), *s.* 4, *sub-section* 3.

The respondent was summoned under section 4 *of the Customs and Inland Revenue Act,* 1888, *for keeping a carriage without a licence. The vehicle in question was known in the carriage trade as a governess cart, and was used solely by the respondent for the purpose of his business as a general broker and wardrobe dealer, and never for the purposes of pleasure. The justices held that the vehicle came within the exception in section* 4, *sub-section* 3, *as being "a vehicle which is constructed or adapted for use and is used solely for the conveyance of any goods or burdens in the course of trade or husbandry" and dismissed the summons.*

Held, that the word "solely" in the exception governed the words "constructed or adapted for use" as well as the words "and is used"; and therefore that the vehicle in question did not come within the exception, and that the respondent was liable to the tax.

The dictum *in* Hanworth *v.* Williams, 67 *J. P.* 315, 19 *Times L. R.* 384, *to the contrary effect, dissented from.*

Danby *v.* Hunter, 28 *W. R.* 228, 5 *Q. B. D.* 20, *doubted.*

Case stated by justices of Liverpool.

The respondent Richard Lewis was summoned under section 4 of the Customs and Inland Revenue Act, 1888, for keeping a carriage without a licence.

The vehicle in question was an ordinary governess cart with cushions in it, which was used by the defendant solely for the purposes of his business—that of a general broker and wardrobe dealer. He never used it to solicit orders or for collecting debts, and only drove it to private houses to call for and bring away goods after receiving orders. He had had the governess cart specially strengthened to go long distances, as his business called him to different parts of Lancashire and Cheshire. His name with the word "Liverpool" was painted on the shaft of the carriage in letters over an inch long.

The appellant contended that the vehicle did not come within the exception of "a wagon, cart, or other such vehicle constructed or adapted for use and used solely for the conveyance of any goods or burden in the course of trade or husbandry," and cited *Hanworth* v. *Williams*, 67 J. P. 315, 19 Times L. R. 384, in support of his argument. On the other hand the respondent's solicitor contended that such exception protected his client.

The magistrates were of opinion (*a*) that the vehicle was adapted for use for the conveyance of goods in the course of the respondent's trade; (*b*) that the vehicle was used solely in connection with the respondent's trade; (*c*) that the real use of the vehicle under ordinary circumstances was for the conveyance of goods in the course of the respondent's trade; (*d*) that it would be unduly straining the excepting words of the statute if their meaning precluded the vehicle being used at any time and under any circumstances for any other purpose than the conveyance of goods; (*e*) that a strictly literal construction of the words in the exception would forbid the vehicle being used at all when empty without a licence; and (*f*) that it was a question of fact for them to decide whether the vehicle in question came within the exception referred to; and they dismissed the information.

The informant appealed.

Sir R. B. Finlay, A.G., and *S. A. T. Rowlatt*, for the appellant.

No one appeared for the respondent.

Lord ALVERSTONE, L.C.J.—The argument that has just been addressed to the court shows that one cannot be too careful not to express opinions on points which are not absolutely necessary. In *Hanworth* v. *Williams* I think I was probably misled by the course of the argument into saying something which was not necessary and which I do not now think was right.

I think that the true construction of the words of the exception in section 4 of the Act is "constructed solely for the conveyance of goods," "fitted for use solely for the conveyance of goods," and "used solely for the conveyance of goods." I do not accept the view that the vehicle must be something *ejusden generis* with a waggon, meaning thereby a heavy vehicle, as was held in *Danby* v. *Hunter*, 28 W. R. 228, 5 Q. B. D. 20, referred to during the argument, because a cart may be either very heavy or very light. Neither do I think the question of taxation or non-taxation ought to depend upon the weight of the vehicle or the character of the vehicle in that sense if the other conditions are fulfilled. I think the Attorney-General is right in saying that the effect of the alteration in section 4 of the Act of 1888 of the words contained in the previous Act (Inland Revenue Act, 1869, s. 19, sub-section 6) is to impose a further limit upon the exemption. Therefore, taking it to be a vehicle which has to be either constructed or adapted and used solely for the conveyance of goods, I am clearly of opinion that on the facts found as to the use of this cart the justices have misdirected themselves on a point of law. In their finding of fact they say in clause (*b*) that "the vehicle was used solely in connection with

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

the respondent's trade." That is clearly not enough. That would cover the case of a man who went about soliciting orders in his own gig. In clause (c) they say that "the real use of the vehicle under ordinary circumstances was for the conveyance of goods." That again seems to me to overlook the condition of the statute, which only exempts a vehicle which is "constructed or adapted for use and is used solely for." When we look at the statement of the evidence upon which they have expressed their findings, it is obvious it included the case of user by the respondent going to a house and not knowing whether he would find any goods in it to take away. The magistrates therefore have not applied the proper construction of the statute and have not properly directed themselves in order to ascertain the proper question of fact. The argument of the Attorney-General must prevail, and this vehicle under the circumstances ought, upon the findings of fact, if properly directed, to be liable to taxation.

The case must therefore go back to the magistrates to convict.

WILLS, J.—I agree. I think the natural grammatical sense of the phraseology which has been used is that the word "solely" attaches itself to the three members of the preceding phrase, to which it can reasonably attach. If it was intended that "solely" should attach only to the part of the phrase which says "is used," I agree with the Attorney-General that the natural way of expressing that would be to say "is solely used," because that would prevent the argument which has been raised, and I think successfully raised, that it ought to apply to the whole three. Now, it is very true that the phraseology of Acts of Parliament is not always accurate, but I do not think that is a reason for construing the language of Parliament in an inaccurate manner; and, I think, unless there is some reason in the nature of things or some reason arising from the fact that to construe it naturally would create something unreasonable, we ought to follow the usual rule and treat Parliament as using grammatical language and as being reasonably correct in style, applying to it the same principle that we should to the use of language by any other intelligent body or person.

For these reasons I think it is quite clear that any expression of opinion which fell from the court in the case of *Hanworth* v. *Williams*, which might be deemed to conflict with this view, was an *obiter dictum*, and not at all necessary for the decision of that case, and therefore we are not bound by it when we come to a case where it is necessary to consider it.

DARLING, J.—I am of the same opinion. It is manifest that the words used in this Act of Parliament are not used very carefully, and that appears by the construction which was put upon it *obiter*, in one of the cases which the Attorney-General has cited. It seems to me that here upon the facts found it is apparent that this cart, or whatever it was—call it what you please—was not used solely for the conveyance of goods, and I think it appears that really it was not used mainly for the conveyance of goods. It is perfectly plain that this man, who was a wardrobe dealer, drove long distances about the country; he took a buyer with him; he did not know for certain that he was going to buy any goods, because if the price asked was too high it was obvious he would not buy. Therefore when it is said he used to call for and bring away goods after receiving orders, it does not mean orders for goods, but an order to call at a place. He called with the buyer. If the buyer and the seller agreed on the price, he put the goods into his trap and drove away. If there was no sale the goods would be left where they were, and he would go on to some other place for which he had an order. I think that is clear, and I therefore think that this is a kind of cart or trap, or whatever you choose to call it, which the Legislature intended to tax when it passed the Act of Parliament.

Appeal allowed.

Solicitor for the appellant, *Solicitor to the Inland Revenue.*

K. B. Div.
(Lord Alverstone, L.C.J., and Wills and Darling, JJ.) — Nov. 7, 8.

BROOKS v. BAKER. (a.)

Election law—Registration—Parliamentary franchise—County vote—Ownership claim—Qualifying property situate in borough — Servant of owner entered on Division II. of occupiers' list for same property—Representation of the People Act, 1832 (2 *Will.* 4, *c.* 45), *s.* 24—*Representation of the People Act,* 1884 (48 *Vict. c.* 3), *s.* 3.

Section 24 *of the Representation of the People Act,* 1832, *enacts that no person shall be entitled to a county vote in respect of his estate as a freeholder in any house "occupied" by himself, capable, as regards value, of conferring on him the right to vote in respect thereof for any borough.*

Section 3 *of the Representation of the People Act,* 1884, *enacts that "where a man inhabits any dwelling-house by virtue of any service, and the dwelling-house is not inhabited by any person under whom such man serves in such service, he shall be deemed, for the purposes of this Act and of the Representation of the People Acts, to be an inhabitant occupier of such dwelling-house as tenant."*

The fact that a servant of the freehold owner of a dwelling-house situate within a Parliamentary borough has been rightly entered in Division II. of the occupiers' list for the borough as an inhabitant occupier of the dwelling-house by virtue of his service, under section 3 *of the Act of* 1884, *does not oust the occupancy in respect of the dwelling-house of his employer the freeholder, and thereby enable the employer in respect of his ownership of the freehold to obtain a county vote to which he would not otherwise have been entitled, having regard to section* 24 *of the Act of* 1832.

Case stated by the Revising Barrister for the Tewkesbury Division of the County of Gloucester.

The case was as follows: "The present respondents duly claimed to have their names entered in the Parliamentary ownership list for the parish of Cheltenham. The qualification of the respondent William Baker, as stated in his claim, was in respect of a freehold house known as Weimar Cottage, Cheltenham, and the qualifications of the other respondents were of the same nature. Due notice of the intention to oppose all the said claims was given by the appellant Brooks. The following were the admitted facts in the case of the respondent, William Baker. The claimant is owner of Weimar House and grounds and of Weimar Cottage referred to in the fourth column of the claim. Weimar House and grounds are occupied by the claimant, and he is on the occupation list of voters for the Parliamentary borough of Cheltenham in respect of such occupation with the description 'dwelling-house' as his qualification. Weimar Cottage stands within the grounds of Weimar House, but apart from it. It is occupied by the claimant's gardener, Joseph Woore, who, by reason of his service, is entitled to occupy it.

(a.) Reported by ALAN HOGG, Esq., Barrister-at-Law.

Woore is on the occupiers' list, Division II. (Service) of the said list of voters in respect of such occupation, and it is admitted that he is properly so entered. It was contended on behalf of the objector that the occupation of Woore in respect of Weimar Cottage was the occupation of the claimant, and that by reason of section 24 of the Representation of the People Act, 1832, the claimant being so on the Parliamentary list of voters for the borough of Cheltenham, was not entitled to qualify as an ownership voter for the northern or Tewkesbury division of the county of Gloucester in respect of the said cottage. I was of opinion that Woore was an inhabitant occupier as tenant within the meaning of section 3 of the Representation of the People Act, 1884, therefore that the claimant was not the occupier of the cottage, and had a good qualification in respect of it as a freeholder, the value not being in question, and I allowed his claim. The other claimants were objected to upon the same grounds. It was admitted that in each of these cases the qualifying property described in the fourth column of the claim was a cottage or tenement in the occupation of the claimants' servant, which he was entitled to occupy by reason of his service; that the servant in each case was properly registered in Division II. in respect of such occupation; that the claimants were owners of the said cottages or tenements as well as of the principal residence in the grounds of which they were situate; and that the claimants were registered in respect of the occupation of their residences in the same manner as the respondent Baker. Upon these admissions and for the same reasons I allowed the claims. Due notice of appeal from my decisions was given by the objector. If the court be of opinion that my decisions were wrong, the register is to be amended by erasing the names of the respondents from the list of Parliamentary ownership voters for the said parish of Cheltenham."

Section 24 of the Representation of the People Act, 1832 (2 Will. 4, c. 45), enacts as follows: "No person shall be entitled to vote in the election of a knight of the shire . . . in respect of his estate as a freeholder in any house . . . occupied by himself . . . such house being of such value as would confer on him the right of voting for any city or borough, whether he shall or shall not have actually acquired the right to vote for such city or borough in respect thereof."

Section 3 of the Representation of the People Act, 1884 (48 Vict. c. 3), enacts as follows: "Where a man inhabits any dwelling-house by virtue of any . . . service, and the dwelling-house is not inhabited by any person under whom such man serves in such service, he shall be deemed, for the purposes of this Act and of the Representation of the People Acts, to be an inhabitant occupier of such dwelling-house as a tenant."

R. M. Montgomery, for the appellant, the objector.—Wiemar Cottage being situate within the borough of Cheltenham, if the claimant Baker be the "occupier" of Wiemar Cottage, as well as being the freehold owner of it, he cannot claim to have a Parliamentary vote for the county in respect of his freehold ownership of the cottage, having regard to section 24 of the Act of 1832. The revising barrister held that because under section 3 of the Act of 1884 the servant Woore is to be deemed an inhabitant occupier of the cottage by virtue of his service for the purposes of the franchise, the claimant Baker can no longer be considered to be the occupier of the cottage, and therefore that he is entitled to the county vote in respect of his freehold ownership of the cottage. But that is not the effect of section 3 of the Act of 1884. The object of that section was only to provide for the extension of the household franchise to persons inhabiting dwelling-houses by virtue of service, and the section only enacted that the servant should "be deemed" for the purposes of the franchise "to be an inhabitant occupier as tenant of such dwelling-house." The section does not purport to oust the occupancy of the owner, and was never intended to abrogate the restrictions imposed by section 24 of the Act of 1832, and to thereby confer a county vote on the owner in respect of his ownership of the freehold. Before the Act of 1884 a man inhabiting a dwelling-house by virtue of his service or employment was not entitled to vote, because he did not occupy "as tenant": *Dobson* v. *Jones*, 5 Morr. & Gr. 112. Section of the Act of 1884 confers the Parliamentary franchise in such a case, but not the municipal franchise: *M'Clean* v. *Pritchard*, 36 W. R. 508, 20 Q. B. D. 285.

W. H. Clay, for the respondents, the claimants.—By section 3 of the Act of 1884 the servant Woore must be deemed to be "the occupier as tenant" of Wiemar Cottage. For the purposes of the Registration Acts, therefore, the effect of that section is to oust the occupancy in fact of Baker in respect of the cottage, although no doubt Baker would still be the occupier in law. But for the purposes of the Registration Acts and for the purposes of section 24 of the Act of 1832 the occupancy of the freeholder must be an occupancy in fact as well as in law, and therefore section 24 no longer applies, and Baker is entitled to claim the county vote in respect of his ownership of the freehold.

Lord ALVERSTONE, L.C.J.—I am of opinion this appeal must be allowed and that the register must be amended by expunging the name of these persons from the Parliamentary ownership list. There is much to be said for the argument on behalf of the appellant, that we must look at the object of the Representation of the People Act, 1884, s. 3, with which we have to deal, a section which comes under the heading "Extension of Household and Lodger Franchise," and which does not purport to deal at all with freehold voters. I think section 3 was simply framed for the purpose of enabling a man who inhabits a dwelling-house by virtue of his service or employment to get his vote as if he were occupying the house as a tenant. The gardener Woore therefore is to be deemed an inhabitant occupier of Weimar Cottage for the purpose of the Representation of the People Acts and gets his vote accordingly. But the question we have to decide is whether his occupation of the cottage puts his employer out of occupation so as to enable the employer to claim a freehold vote for the county in respect of the same cottage. I do not think that there is anything in the Act to say that the gardener is made *the* inhabitant occupier; he is only to be deemed an inhabitant occupier for the purpose of the Representation of the People Acts. The section seems to me to have been passed with the sole intention of giving a vote to the man who occupies a house by virtue of his service, and we should, I think, be going much too far if we were to say that the occupation of the servant excludes the occupation of the master in such a way as to give the master a freehold vote.

I do not desire to express any opinion as to the right of an employer to claim an occupation qualification in respect of a house also occupied by a person who by virtue of his service has obtained an occupation vote under the service franchise.

WILLS, J.—I agree.

DARLING, J.—I am of the same opinion. The court is sometimes obliged to put an interpretation on a word which it does not ordinarily bear, when,

for instance, it has been enacted that something shall be deemed to be something else. Here I do not think there is that difficulty. Section 3 says that a person who inhabits a dwelling-house by virtue of any office, service, or employment is to "be deemed" an inhabitant occupier of that dwelling-house for the purpose of the Representation of the People Acts. It does not say that he becomes the only occupier, and I think the section means what it says, and gives such a man a vote as an inhabitant occupier, without excluding the occupation of the house by the employer. If the Legislature had intended to do this and to give the employer a freehold vote in respect of the dwelling-house, I think much stronger and more definite language would have been employed.

Appeal allowed.

Solicitors for the appellant, *Russell, Cooke, & Co.*

Solicitors for the respondent, *Ayrton, Biscoe, & Barclay.*

K. B. Div.
(Lord Alverstone, L.C.J., and Wills and Darling JJ.) Nov. 7.

GREEN *v.* WANKLYN. (*a.*)

Election law—Registration—Parliamentary franchise—Mistake—Incorrect entry of voter's name in list—Omission of second Christian name of voter—Objection taken to entry—Absence of declaration—Power of amendment—Parliamentary and Municipal Registration Act, 1878 (41 & 42 *Vict. c.* 26), *ss.* 24, 28 (1).

A voter's name was entered on the overseers' list as Herbert Green, and was duly objected to. The only ground of objection proved was that the right name of the voter was Herbert Ambrose Green. The voter had neither made a claim, nor a declaration under section 24 *of the Registration Act,* 1878, *to correct the misnomer; but upon the hearing of the objection a party agent, on behalf of the voter, requested the barrister to treat the omission of the second Christian name of the voter as a "mistake" and to correct the entry, under section* 28 (1) *of the Registration Act,* 1878. *The barrister held that the omission was not a mistake which he was bound to correct after objection had been taken to the entry, and declined to amend and struck the name off the list.*

Held, that the omission in the entry on the list of the second Christian name of the voter was a mistake which the barrister was bound to correct, under section 28 (1) *of the Registration Act,* 1878, *even after objection had been taken to the entry, and even although no declaration to correct the entry had been made under section* 24 *of the Act of* 1878.

Soutter *v.* Roderick, Barker's case, (1895) *Fox & Smith's Registration Cases, p.* 36, *approved.*

Case stated by the Revising Barrister for the Borough of Colchester.

"At a court holden for the borough of Colchester on the 11th of September, 1905, objection was duly made to the name of Herbert Green being retained on Division I. of the occupiers' list for the said borough in respect of a dwelling-house, 20, St. Peter's-street.

"The facts were as follows:

"(1) The name of the occupier of the said house appeared in the list as Herbert Green, and it was proved or admitted that the correct name of the occupier of the said house was Herbert Ambrose Green.

"(2) In a considerable number of cases the Christian names of the voters were omitted from, or misstated in, the list, and in many cases the said voters had made either a new claim or a declaration in order to correct such omission or misstatement.

"(3) Herbert Ambrose Green had not made a new claim or a declaration.

"(4) I was asked to treat the omission of the second Christian name as a 'mistake' in the list, within the meaning of section 28 (1) of the Parliamentary and Municipal Registration Act, 1878, and to correct it.

"(5) I held that the omission was not a 'mistake' which I was bound to correct after objecti n had been made, and I declined to make the correction, and struck the name of Herbert Green out of the list.

"(6) The names of ten other persons . . . were objected to under similar circumstances, and were by me struck out of the list.

"(7) Due notice of appeal from my decision was given in each case, and I directed the appeals to be consolidated."

The Registration Act, 1878, s. 24, enacts that "Any person who is entered on any list of voters . . . and whose name . . . is not correctly stated in such list . . . may, whether he has received a notice of objection or not, if he thinks fit, make and subscribe a declaration . . . " for the purpose of correcting the misdescription. And section 28 of the same Act enacts that "A revising barrister shall . . . perform the duties and have the powers following: (1) He shall correct any mistake which is proved to him to have been made in any list."

C. E. Jones, for the appellant.—The question here is whether the omission of the second Christian name is a "mistake" which the revising barrister should have corrected. There is no reported case in which it has been held that the revising barrister could not treat this as a mistake and put it right. It is submitted that under the express words of section 28, sub-section 1, of the Act of 1878 the revising barrister has here decided wrongly. If this omission is not a mistake it is difficult to see what is. [DARLING, J.—Is not the person whose name is Herbert Ambrose Green the same person as Herbert Green?] Yes; but by a mistake the list abbreviates his name. [He was stopped.]

Lewis Thomas, for the respondent.—The point is concluded by the findings in the revising barrister's case. No evidence was given to identify "Herbert Green" with "Herbert Ambrose Green." The person who was on the list as Herbert Green may have been a different person to Herbert Ambrose Green, and have been put on the list intentionally, although perhaps wrongly, by the overseers. Herbert Green may have been the son or the father of Herbert Ambrose Green. [WILLS, J.—The revising barrister treats this mistake in the name as "an omission," and not as a mistake raising a question of identity at all. If it was an omission something must have been omitted, and we hear that the only omission was the man's second Christian name "Ambrose."] If the mistake or omission can be put right in the way now contended for by the appellant, the object of objecting to a name on the list is rendered nugatory. I submit that a person who wants a mistake corrected, after objection, must either make a declaration under section 24 of the Act of 1878 or make a new claim: *Foskett* v. *Kaufman*, 34 W. R. 90, 16 Q. B. D. 279; *Hurcum* v. *Hilleary*, 42 W. R. 321, [1894] 1 Q. B. 579. What happened here was, that there being an objection to the name of "Green, Herbert" on the list, someone on behalf of the appellant said that

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

it ought to be "Green, Herbert Ambrose." The appellant himself did not appear before the revising barrister, or offer any evidence of his identity with Herbert Green, the name on the list. The barrister, as the name was objected to, properly struck it out of the list. [Lord ALVERSTONE, L.C.J.—Cannot it be put against you that section 24 is only an enabling section, to enable the person interested to make a declaration if he likes?] I submit that the statute would not provide a means of doing something that need not necessarily be done. The man Herbert Ambrose Green may rightfully be the occupier of 20, St. Peter's-street, and if he had duly claimed in respect of this qualification would have been entitled to have his name inserted on the list; but he did not choose either to do that or to make a declaration under section 24, and therefore, the entry on the list of Herbert Green being wrong, and having been objected to, must be struck out. This is not a mere quibble, for the Act of 1878 does not give the revising barrister power to correct a mistake the effect of which correction may be to substitute the name of one person for another upon the list. In *Moorhouse* v. *Linney*, 33 W. R. 704, 15 Q. B. D. 273, a nomination paper signed by a voter with his full name, Charles Arthur Burman, was held invalid because his name appeared on the register merely as Charles Burman. The question of power to correct mistakes was considered in *Plant* v. *Potts*, [1891] 1 Q. B. 256, 39 W. R. Dig. 142, where it was held that "leasehold" could not be corrected into freehold. [Lord ALVERSTONE, L.C.J.—If the revising barrister had found that this was an erroneous description and that there was no evidence before him beyond the fact that the occupier of these premises was not Herbert Green, but a Herbert Ambrose Green, I think I should have been much impressed by your argument that he could not have treated this as a "mistake" which he had power to correct; but he treats it as an "omission" merely of the second Christian name of the real occupier from the list. That is very different.] In *Kitchen* v. *Johnston*, 47 W. R. 110, [1899] 1 Q. B 95, a misdescription of the qualifying premises was corrected as a mistake, although the entry had been objected to, but in that case the barrister had evidence that the correction did not alter the identity of the qualifying premises; but in the present case there is no evidence that Herbert Ambrose Green is the same person as Herbert Green whose name is entered on the list. [Lord ALVERSTONE, L.C.J.—In *Soutter* v. *Roderick*, *Barker's case*, (1895) Fox & Smith's Reg. Cases, at p. 36, it was held that an incorrect entry of the voter's place of abode in the list, which had been objected to, was rightly amended by the revising barrister as being a mistake, although no new claim or declaration to correct had been made by the voter; that case seems very much in point.] That case only referred to the place of abode, and even before the Act of 1878 a revising barrister had power under section 40 of the Registration Act, 1843, to correct an incorrect description of the place of abode: *Luckett* v. *Knowles*, 2 C. B. 187.

Lord ALVERSTONE, L.C.J.—I am very glad that Mr. Thomas has argued this case, because if we had come to the conclusion that the meaning of section 24 was that a declaration was the only means or the only method whereby a person could set right a mistake of this kind, unless he came before the court himself, different considerations would have arisen. I quite agree if you look merely at the two sections (section 24 and section 28), without considering what I may call the general law applicable to such a matter, the fact that section 28 provides in a general way for mistakes being corrected, and that section 24 specifies a particular method for having such a misdescription as occurs here rectified, there might be some ground for saying, the particular matter being included in a particular section—namely, section 24—that the omission of part of a name was not a mistake within section 28. But in my judgment that would be too narrow a view. We have to remember here that a formal objection had been taken—that is to say, the person whose name appeared on the list as Herbert Green had been served with notice of objection; and therefore it is not a question of something which is done by the revising barrister of his own motion on some intimation made to him. Mr. Thomas suggested somebody jumped up in court and said: "That man's name is Ambrose." That is not the way in which it arises. There has been formal notice of objection given. Then it has been proved, or admitted, that the correct name of the occupier of the house was Herbert Ambrose Green. That being so, I think that it is, practically speaking, another illustration of the same kind of matter as that which was before the court in *Soutter* v. *Roderick*, *Barker's case*. In the present case there was no dispute as to who was the real occupier, no dispute as to who was the real tenant, but proof, or admission, which is the same as proof, merely that the second Christian name, "Ambrose," of the voter had not been put in the list; and that the revising barrister meant to raise that kind of point is to my mind clear, because he has treated it as one of eleven cases where similar omissions occurred. Therefore it cannot be suggested that he acted as he did because he was not satisfied that the appellant was the right man, or that there was not sufficient evidence that the right person had asked to have his name corrected. Under these circumstances it seems to me we ought not to cut down the power of the revising barrister to correct what is clearly a mistake in the ordinary sense of the word, because there is another section which enables the voter if he thinks fit to get the mistake corrected by another proceeding. Therefore I think we are really following out the line laid down in *Soutter* v. *Roderick*, *Barker's case*. It seems to me also most excellent good sense; and I think the revising barrister had power to make this correction, and ought to have made it. The appeal must be allowed and Herbert Ambrose Green's name will appear on the list and the other eleven names will follow in the same way.

WILLS, J.—I think section 24 applies to a considerable number of cases, in some of which the corrections to be made may be very important and may amount to a new claim, while in others the corrections are trivial or simply of the ordinary class of slips, clerical errors, and so on. If the person whose name is objected to deems it to be of sufficient importance or cares enough about it to take steps himself to have the error corrected, whatever it may be, then it seems perfectly reasonable that he should, if he does not want to attend himself, make a statutory declaration as provided by section 24 of what his qualification and name is, and what correction he desires to have made. If he sets the law in motion, so to speak, in that way, he must make the declaration. That certainly, to my mind, does not deprive the barrister of the power given him under section 28 to correct any mistake, and of course any mistake means anything which is either proved or admitted to be a mere slip and nothing else—which cannot be complicated with the suggestion made by Mr. Lewis Thomas that it might be the cover for a fraudulent claim and so forth. I think the revising barrister took too narrow a view of his powers, and I agree, therefore, that this appeal should be allowed.

DARLING, J.—I am of the same opinion. I also think it is quite plain from the case stated that the real qualified occupier was Herbert Ambrose Green, who had been described in the list as "Herbert Green." The amendment desired was merely, therefore to rectify an omission of something from his name. It was not a case where there was any possibility of substituting another person; it is no more to my mind a change of name than the altering of the spelling of the name of the real occupier would have been.

Appeal allowed with costs.

Solicitors for the appellant, *Doyle, Devonshire, & Co.*

Solicitors for the respondent, *Milner & Bickford.*

K. B. Div.
(Lord Alverstone, L.C.J., and Wills and Darling, JJ.) Nov. 1.

CHICHESTER CORPORATION *v.* FOSTER. (*a*)

Highway — Locomotive — Nuisance — Breaking water-mains—Excessive weight—Repair—Standard of maintenance—Locomotives Acts, 1861 (24 & 25 *Vict. c.* 70), *s.* 13; *and* 1865 (28 & 29 *Vict. c.* 83), *s.* 12.

The plaintiffs were the highway authority and the owners of the water system within their district.

Held, that the defendant, who was the owner of a heavy traction-engine, was liable to make good damage to a water-main laid under a road and broken by the weight of the engine passing over it, as there was no evidence that the water-main, which had been put down some years before, was not sufficiently strong and well laid to withstand the pressure of the ordinary traffic of the district; or of any negligence on the part of the plaintiffs, in reference to their duty to repair and maintain the road, that contributed to the fracture.

Appeal by the defendant from the judge of the Chichester County Court.

The plaintiff corporation were the owners of the waterworks at Chichester, and as such owned the water-mains under a road the subject of the action.

The facts found by the county court judge were substantially these: The mains were laid down some thirty years ago, and judged by the standard of to-day were not of the best construction, they were not laid on a cement bed and were only at a depth below the surface that left about twenty inches between the crown of the main and the crown of the road. The pipes, although they had been so long in the ground, were not corroded or decayed and were substantial, still fit to withstand pressure from ordinary traffic passing along the road. The mains in question were broken by the weight of a traction-engine belonging to and being at the time used by the defendant passing over the main at a spot where a supply pipe was connected with the main by a union —screwed into the main on its top side—the probable immediate cause of fracture being that the union became deflected under the pressure and so exerted a leverage on the pipe greater than the pipe could stand. There was no negligence or want of reasonable skill or care on the part of the owner of the engine or his servants as regards either the construction or the user of the engine, the mains being broken solely by its weight, which exceeded ten tons. Evidence was given to show that the mains were at the date when they were broken sufficiently strong and well laid to withstand the ordinary traffic of the district and that there was no negligence by the plaintiffs in their duty as the road authority.

On these facts the county court judge was of opinion that the defendant was *primâ facie* liable for the damage done by the engine to the pipes, on the principle that the engine was, under the circumstances, a dangerous thing, and that the defendant was liable for damage caused to the plaintiffs' property by the use of that dangerous thing upon the highway. The question whether a given machine when used on a highway was dangerous or not had to be considered in relation to the actual condition of things on or under or adjacent to the highway existing at the time of user, assuming that there was nothing in the condition of things of an unusual or exceptional character or arising from the illegal or negligent conduct of persons other than the person using the dangerous machine. If the water-pipes had been constructed of such strength or laid at such a depth or in such a protective bed of concrete or otherwise so as to withstand the pressure of ten or more tons passing over them, the defendant's engine would not have been dangerous in relation to those pipes, but under the existing circumstances the learned judge found that it was dangerous. He also found that the pipes were sufficient in strength and sufficiently well laid in relation to the ordinary and lawful traffic existing at the time when they were laid, and he did not think that there was any duty on those who laid the pipes, or on the plaintiff corporation, to take into account or to reconstruct their water system so as to withstand exceptional pressure arising from the use of these ponderous modern road engines which had only within recent years become at all common, and could not even now be considered ordinary traffic of the county. There was no default on the part of the plaintiffs contributing to the damage as there existed no duty, so far as he knew, on a local authority to strengthen or re-lay their pipes so as to enable them to withstand the increased pressure arising from the use of heavy traction-engines. He accordingly gave judgment for the plaintiffs for the damages claimed.

The defendant appealed.

E. B. Charles, for the defendant.—The Locomotives Acts of 1861 and 1865 legalize and regulate the use of locomotives on ordinary highways, and the defendant has in every way conformed to the requirements of those Acts. A locomotive must therefore be regarded as falling within the ordinary traffic of the district. Therefore no such considerations as arose in *Rylands* v. *Fletcher*, 3 H. L. 330, 17 W. R. Dig. 17, have to be considered here, because it cannot be said that an engine is a dangerous thing within the principle there laid down. The plaintiffs as the road authority are bound to keep the road up to the standard required for the ordinary traffic of the neigbourhood: *Attorney-General* v. *Scott*, [1905] 2 K. B. 160, 53 W. R. Dig. 63. The case of *Gas Light and Coke Co.* v. *St. Mary Abbotts Vestry*, 33 W. R. 892, 15 Q. B. D. 1, relied on by the plaintiffs and followed by the learned county court judge does not apply to the present case, because here there is an express finding by the judge that the defendant had not been guilty of negligence, and in the *St. Mary Abbotts case* there was a finding that there was negligence in the use of the steam-roller which caused the damage.

Hohler, for the plaintiffs.—The finding that the pipes were sufficiently strong and well laid to withstand pressure caused by the ordinary traffic of the district decides the question conclusively in favour of the plaintiffs. The damage was solely due to the excessive weight of the engine. The Locomotives Acts, 1861 and 1865, while imposing certain conditions

(*a*.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

and restrictions as to the tare, number of wagons, and so forth, which may be taken along the road, clearly show that every one using a locomotive on the road does so at his own risk if injury is thereby caused to others by such user where at common law he would be liable under the same circumstances. *Gas Light and Coke Co.* v. *St. Mary Abbotts Vestry* and *Jones* v. *Festiniog Railway Co.*, 3 Q. B. 733, 16 W. R. Dig. 75, lay down the principle that should govern the present case.

Lord ALVERSTONE, L.C.J.—It seems to me that the judgment of the county court judge in this case was perfectly right. Some stress was put on the fact that there was only one breakage, and it was attempted to show from this that but for some inherent defect in the pipe at this point no damage would have been done. That was only an incident in the case, and I do not think that a traction-engine is entitled to break a first pipe, as a dog is commonly said to be entitled to his first bite. It would have been perfectly open for the county court judge to have found that, notwithstanding the weight of the engine, the damage was caused by the pipe in its then position not being reasonably fit to bear what might be expected as the ordinary loads on the road, including traction-engines. If it could have been shown that the damage was occasioned by a breach of the plaintiffs' duty as the road authority to maintain the road up to the requisite standard, no doubt that would have been a defence to the action. This is not a case under the statutes, of extraordinary traffic. Therefore no such question as that raised in *Attorney-General* v. *Scott* has here to be considered. The fair result of that decision seems to be that a road authority, in the exercise of its duty, must keep the road up to date. But what are the facts here? The judge has found that the plaintiffs had not been negligent in their capacity of road authority, and that they were under no duty to provide against the excessive pressure of the defendant's engine. I think the principle of the decision in *Gas Light and Coke Co.* v. *St. Mary Abbotts Vestry* applies. No doubt it was convenient for the defendant to haul three trucks at a time and to use this heavy engine in doing so, but there was no suggestion put forward by his counsel that there was any necessity to use such a heavy engine. It is well established law that a person who exercises a right in a particular way in which damage might be caused to other people's property must show that the exercising of the right in the particular way was necessary to enable him to enjoy the right at all. There is no such evidence here. The defendant did not attempt to prove that he was compelled to use such a heavy engine as the one that caused the damage.

For these reasons I think the decision of the county court judge was right and that this appeal fails.

WILLS, J.—I have also come to the conclusion that the plaintiffs are entitled to judgment. If it could have been shown that the damage they suffered was due to a failure of duty on their part in their capacity of road authority I agree that such a finding would have been an answer to the action. But the county court judge's findings disposes of any such contention that Mr. Charles could put forward for the defendant; and in view of those findings of fact which, in my opinion, conclude the case, we cannot interfere.

DARLING, J.—I am of the same opinion, but as I do not altogether agree with the reasoning of the county court judge I prefer to express my view in my own way. Now the plaintiffs had the right and duty of maintaining the highway and the water-mains beneath. All persons, including the defendant, had the right to use the highway in the ordinary manner having regard to the kind of traffic which would usually pass along the roads in that district. Such a right of user must involve a duty on the plaintiffs as the highway authority to vary the construction of the road from time to time so as to adapt it to the traffic of locomotives which has become in course of time ordinary traffic of the district. That would be a duty no doubt the discharge of which might become more or less burdensome on the highway authority of a district according to the special circumstances of each case. The county court judge here has found that the defendant's engine was not of the sort to be considered on that road as part of the ordinary traffic. That alone would be sufficient, in my opinion, to make the defendant liable for the damage it did to the mains. It was not necessary to find, as the county court judge had done, that the engine was in itself a dangerous thing. Indeed, I very much doubt whether any thing could be called dangerous in itself, because whether a thing is dangerous depends on its environment. Water, which was the *causa causans* of the injury in *Rylands* v. *Fletcher*, could not be called in itself a dangerous thing; it only became dangerous under certain conditions. The expression "in itself dangerous" appears in the head-note to the report of that case in the Law Reports, but I have carefully looked through the judgments, and I do not find it so applied there. I do not myself consider it an appropriate expression except when used by Pope in regard to "a little learning." I, however, agree that the appeal fails.

Appeal dismissed.

Solicitors for the plaintiffs, *Palmer & Bull*, for *J. W. Loader-Cooper*, Town Clerk, Chichester.

Solicitors for the defendant, *Stow, Preston, & Lyttelton*, for *Raper, Freeland, & Tyacke*, Chichester.

C. C. R.
(Lord Alverstone, L.C.J., and Lawrance, Channell, Walton, and Sutton, JJ.) — Dec. 9.

REX *v.* PAYNE. (*a.*)

Criminal law—Wife stealing from husband—Receiving from wife—Felony—Misdemeanour—Sufficiency of averments in indictment—Larceny Act, 1861 (24 & 25 *Vict. c.* 96), *s.* 91—*Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *ss.* 12, 16.

An indictment will lie for a common law misdemeanour in respect to the receiving of property stolen by a wife from her husband. It is not necessary (*although better*, per Channell, J.) *in such an indictment to aver that the property was received from the wife.*

Rex *v.* James [1902] 1 *K. B.* 540, *discussed.*

Case for the consideration of the Court for Crown Cases Reserved.

William Payne was charged before the Common Serjeant at the November sessions of the Central Criminal Court on an indictment of which the following is a copy: "Central Criminal Court to wit: The jurors for our Lord the King upon their oath present that William Payne on the 6th day of August in the year of our Lord one thousand nine hundred and five at the parish of All Saints', Poplar, in the county of London and within the jurisdiction of the said court, certain money—to wit eighty-six pounds of the moneys

(*a.*) Reported by MAURICE N. DRUCQUER, Esq., Barrister-at-Law.

of John William Price before then feloniously stolen and taken and carried away—unlawfully did receive and have, he the said William Payne then well knowing the said moneys to have been feloniously stolen taken and carried away against the peace of our Lord the King his crown and dignity."

It was proved that the money was stolen by Caroline Price, and that she was the wife of John William Price. There was evidence that William Payne received the money so stolen knowing both that Caroline Price was the wife of John William Price and that she had stolen the money from him.

Before the trial of William Payne, Caroline Price pleaded guilty to stealing the money from her husband.

It was contended by counsel for the prisoner: (1) That the indictment was bad in law as alleging the receipt of money stolen by a common law larceny, which is by statute a felony, and charging such receiving as a misdemeanour; (2) that the facts proved did not support the indictment, as it did not state that the goods were stolen by a wife from her husband; (3) that the receipt of goods with knowledge that were stolen by a wife from her husband was not a misdemeanour.

The prisoner was found guilty.

The following questions were reserved for the consideration of the court: (1) Was the indictment bad after verdict? (2) did the facts support the indictment? (3) was the receipt of goods with knowledge that they had been stolen by the wife from her husband a misdemeanour?

Jenkins, for the prisoner.—In *Reg.* v. *Streeter*, [1900] 2 Q. B. 601, it was held that under section 91 of the Larceny Act, 1861, a person could not be indicted for a felony in respect to receiving goods stolen by a wife from her husband, inasmuch as section 91 says that the stealing must amount to a felony at common law or by virtue of that Act, whereas stealing by a wife from her husband was not a felony at all until the Married Women's Property Act, 1882, made it so. Wright, J., in his judgment in the case cited, said: "In future cases there might be an indictment for receiving at common law." Acting upon this suggestion this indictment was preferred for a common law misdemeanour. But although receiving was at common law a misdemeanour, still by an Act of William and Mary, which is now consolidated in the Larceny Act, 1861, a receiver was made an accessory after the fact in respect to the principal stealing, *i.e.*, receiving was henceforth a felony: *vide* Russell on Crimes, Bk. III., c. 28, p. 438 (6th ed.), and Chitty 951 (1816 ed.). Having been made a felony by statute, the common law offence of misdemeanour was gone: *Rex* v. *Cross*, 1 Raym. 711.

The prosecution was not represented.

Lord ALVERSTONE, L.C.J.—In my judgment this conviction must be affirmed. It has been contended that the offence which has been committed amounted to a felony, and that the prisoner could not therefore be indicted for a misdemeanour. If he could establish that under section 91 or any other section of the Larceny Act, or any other statute, the offence was made a felony, then it would be a good point. We cannot hold it to be a felony if our decision is to be consistent with the decisions of this court in *Reg.* v. *Smith*, L. R. 1 C. C. R. 266, and *Reg.* v. *Streeter*. In *Reg.* v. *Smith*, which was an indictment under section 91, it was held that it was not an offence under section 91 to receive stolen goods, if the stealing is not an offence at common law or under the Larceny Act, 1861. The considered judgment of the court, which is given at length, decides that there must be, in order to support an indictment, a stealing at common law or under the Larceny Act, 1861, the words of section 91 being "whosoever shall receive . . . property . . . the stealing . . . whereof shall amount to a felony either at common law or by virtue of this Act . . . shall be guilty of a felony." That being a decision of the year 1870, in the later case of *Reg.* v. *Streeter* a point involving the same considerations arose. There the property had been stolen, and there the fact that the Married Women's Property Act, 1882, had extended the law of larceny was the ground for contending that there was not a felony under section 91. There Mathew, J., referring to the case of *Reg.* v. *Smith* says: "*Reg.* v. *Smith* was a case in which partnership property had been stolen by a partner and received by the prisoner, the stealing being a criminal offence by virtue of the Larceny Act, 1868, and it was held that the prisoner could not be convicted of receiving under the Larceny Act, 1861, s. 91. Our decision must be to the same effect, that is, that the prisoner cannot be convicted of receiving property stolen by a wife from her husband." Wright, J., said: "But in future cases it seems to me that there might be an indictment for receiving at common law." Wright, J., seems to have intended an indictment for a misdemeanour at common law. It seems to me that, considering these two decisions which are based upon the express words of the section, we cannot give effect to the argument on behalf of the prisoner, unless we overrule these decisions, which decided that a charge of felony could not be maintained. If Mr. Jenkins could have pointed out any section which made the offence a felony, then the principle of *Rex* v. *Cross* would apply, which decided that when an offence by statute has been made a felony there can be no longer any offence of misdemeanour.

As for the second point, that the indictment only states that the money has been feloniously stolen from Price and received by Payne, it seems to me only another illustration of the same principle which we applied in *Rex* v. *James*, [1902] 1 K. B. 540, where we decided that it was not necessary to aver that the prisoner is the wife of the prosecutor. The contention is that in order to maintain the indictment it must appear on the face of the indictment that the stealing was not an offence at common law or under the Larceny Act, but by the Married Women's Property Act. It seems to me only repeating the argument to which we refused to give effect in *Rex* v. *James*. I think, therefore, on both grounds, the argument fails.

LAWRANCE, J.—I agree.

CHANNELL, J.—I think there is some little doubt about the second question as to whether the indictment should show that the principal stealing was otherwise felonious than by the Larceny Act, 1861, or common law, but I think the case of *Rex* v. *James* covers the point. I think it would be safer in the future to put the averment in the indictment.

WALTON and SUTTON, JJ., concurred.

Conviction affirmed.

Solicitor for the prisoner, *Cyril Renton*.

IN BANKRUPTCY.

K. B. Div.
(Bigham and Walton, JJ.) Nov. 20.

In re EALES.
Ex parte STEEL. (*a*.)

Bankruptcy — Property of bankrupt — Bill of sale— Apparent possession—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 44—*Bills of Sale Act*, 1878 (41 & 42 *Vict. c.* 31), *s.* 8.

The bankrupt being indebted to a friend, and having no property but her furniture, transferred the furniture in satisfaction of the loan, and carried out the transaction by documents which were found in fact to constitute an absolute bill of sale. Subsequently the sheriff seized the goods in execution, and was actually in possession when the bankrupt filed her own petition. The trustee in bankruptcy claimed the furniture, and sought to set aside the bill of sale as void for want of registration.

Held, following Ex parte Saffery, In re Bremner, 29 *W. R.* 749, 16 *Ch. D.* 669, *that the bill of sale could not be avoided, because at the date when the bankrupt filed her petition the goods were not in her possession or apparent possession, but in the possession of the sheriff.*

Appeal from a decision of his Honour Judge Ellicott in the county court of Gloucestershire, holden at Cheltenham.

The bankrupt was a lady who had carried on for many years a boarding-house attached to a ladies' college at Cheltenham.

The respondent to the appeal was a lady who had formerly been a pupil at the college and a boarder in the bankrupt's house. She had lent the bankrupt £563 in 1901 and £275 in 1903.

In February, 1904, the respondent, being about to marry, wanted to get her money back, but the bankrupt was heavily in debt to others, and had no property but the furniture in her house. They appear to have agreed the total amount of the loan and interest at £900, but no definite arrangement was come to between them until the 26th of February, when the bankrupt met the respondent and the respondent's solicitor in London, and the four following documents were executed:

1. A receipt with inventory attached, wherein the bankrupt acknowledged the receipt of £900, agreed purchase price of the furniture and effects set forth in the schedule attached thereto.

2. An agreement whereby the respondent purported to let, and the bankrupt to hire, the same furniture at a rental of £40 per annum, with a proviso that the respondent might at any time, upon giving six months' notice, put an end to the hiring and enter and remove the furniture. There was no proviso giving the bankrupt any power to determine the agreement.

3. An agreement releasing the previous loans, which recited that the loans and interest had been agreed at £900, recited the agreement for the sale of the bankrupt's furniture to the respondent for £900, and that the £900 loan had been set off against the purchase price, and also recited that the furniture had been delivered to the respondent.

4. The respondent signed a letter addressed to the bankrupt which referred to the hire agreement and went on to state that it was understood that the bankrupt was to have the right to repurchase the furniture at any time upon payment of £900.

On the same day (the 26th of February, 1904) the respondent wrote to the bankrupt's housekeeper at Cheltenham authorizing her to take possession of the furniture on her (the respondent's) behalf.

On the 29th of February the bankrupt handed the housekeeper a chair in the name of the whole of the furniture, and later in the day the housekeeper redelivered the chair to the bankrupt under the terms of the hiring agreement.

In March, 1905, the sheriff went into possession of the bankrupt's house, and was still in possession on the 17th of April, when she filed her own petition.

The trustee in bankruptcy claimed the furniture as property of the bankrupt divisible among her creditors, and moved in the county court for an order accordingly, seeking to set aside the four documents executed on the 26th of February, 1904, as void under the Statute of Elizabeth, or as forming a conditional bill of sale void for non-registration.

The county court judge found as a fact that there had been an oral sale of the furniture, and an oral hiring prior to the execution of the four documents, and that they were consequently not necessary to complete the title of the respondent, which was good apart from them.

The trustee appealed.

H. Maddocks, for the appellant.—There was no evidence before the county court on which the judge could find that there had been an oral sale or hiring of the furniture. [He was stopped by the court.]

Hansell, for the respondent.—The judge heard the evidence of the bankrupt, and was entitled to come to the conclusion which he did upon it. Apart, however, from the finding of fact, the documents in the case constituted not a conditional but an absolute bill of sale, for they entirely do away with the debt. The furniture is taken in satisfaction for the debt, not as a security for it. Being an absolute bill of sale, it could only be avoided for want of registration if the goods comprised therein were in the possession or apparent possession of the bankrupt at the date when she filed her petition: Bills of Sale Act, 1878, s. 8. At that date, however, the sheriff was in possession of the goods, and they were neither in the possession, nor the apparent possession, of the bankrupt: *Ex parte Saffery, In re Bremner*, 29 W. R. 749, 16 Ch. D. 669.

THE COURT (BIGHAM and WALTON, JJ.) intimated that they did not agree with the finding of fact, but considered the point as to the sheriff's possession a good one.

Maddocks.—If the bill of sale was absolute then the sheriff was wrongfully in possession, and wrongful possession by the sheriff does not take the goods out of the reputed ownership of the bankrupt: *Ex parte Cuthbertson, In re Edey*, 23 W. R. 519, L. R. 19 Eq. 264.

Hansell.—There can be no question of reputed ownership here, because the well-established custom of boarding-house keepers to hire furniture includes the reputation of ownership: *In re Chapman, Whiteley* v. *Haydon*, 1 Mans. 415.

BIGHAM, J.—In this case the learned county court judge has found as a fact that there was a complete sale effected before the execution of the documents, and that the latter do not constitute a bill of sale. I do not agree with this finding, and I think that the probabilities are all to the contrary. I think that the transactions all took place at the same time, when the solicitor was present, and I think that the parties consulted the solicitor in order that the whole transaction might be carried into effect by proper documents. The transaction was carried out by what amounted to a bill of sale, and would require registration under the Bills of Sale Act, 1878. That Act, however, only

(*a*.) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

avoids the bill of sale when the goods in question are still in the possession or apparent possession of the grantor at the time of filing the petition. In this case the goods were not in the possession or apparent possession of the grantor on the 17th of April, 1905, the date of the filing of the petition, because the sheriff had gone in and seized them on the 22nd of March, and was in fact in possession at the date of the receiving order, and only retired in favour of the trustee in bankruptcy. That act of the sheriff took the goods out of the apparent possession of the grantor, as is clear from the decision in *Ex parte Saffery, In re Bremner*, and therefore the Bills of Sale Act, 1878, does not assist the trustee.

We must, however, consider whether the transaction was merely intended to give security for a debt which continued to exist, as in that case the Bills of Sale Act, 1882, would apply. That is a question of fact, and was found against the trustee by the county court judge, who considered that there had been an out-and-out sale. There are circumstances which might lead to a contrary view, but I do not disagree with the finding.

It has also been urged that apart from the Bills of Sale Acts the goods were in the order and disposition of the bankrupt, but that point is not good because of the recognized custom of boarding-house keepers to hire furniture.

WALTON, J.—I agree. The furniture in this case was not taken as security for the loan, but in payment off the loan, and the documents by which the transaction was carried out put an end to the debt altogether.

Appeal dismissed.

Solicitor for the appellant, *R. E. Steel*, Cheltenham.

Solicitors for the respondent, *W. B. Blair & Girling.*

K. B. Div. (Bigham, J.) — Aug. 10, 1905.

In re HARRISON & INGRAM.
Ex parte WHINNEY. (*a.*)

Bankruptcy—Practice—Pledge of share certificates with bankrupt—Disappearance of pledgor—Power of sale by trustee in bankruptcy—Directions as to advertisement.

Where certain share certificates had been pledged with a firm which afterwards became bankrupt, and the pledgor had disappeared without repaying the loan, the trustee in bankruptcy was given permission to sell the shares after advertising for the pledgor as directed by the court.

Application for directions by the trustee in the bankruptcy.

In 1874 a Mlle. Ninet had pledged with the bankrupt firm three bonds of 400 francs each in the Turkish Lottery Loan and six Ottoman Railway shares of £20 each as security for a loan of £85.

In 1883 the pledgor returned to France without having repaid the loan. On the subsequent bankruptcy of the firm, the loan being still unpaid, the bonds and shares came into the possession of the trustee in the bankruptcy. The amount of the loan with interest came to more than the value of the bonds and shares. The shares were saleable in London, but the bonds being lottery bonds were only saleable on the continent. The trustee had made inquiries, but had not succeeded in finding the address of the pledgor, and was consequently unable to serve her with a notice to pay off as was required in the case of *Deverges* v. *Sandeman, Clarke, & Co.*, 50 W. R. 404, [1902] 1 Ch. 579, so as to put himself in a position to sell the bonds and shares. Under these circumstances the trustee applied to the court for directions.

BIGHAM, J., directed the trustee to advertise in one French and one English newspaper that the shares would be sold unless the pledgor redeemed them within one month, and ordered that after the expiration of that month, if no claim to redeem was made by the pledgor, the trustee should sell the shares and apply the proceeds to the payment of the loan and interest, the costs of the advertisement and of the application to the court. No order was made as to the lottery bonds.

Solicitors, *Black & Garnett.*

(*a.*) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

Prob. Div. & Adm. Div. Admiralty. (Bargrave Deane, J.) — April 16, 18, 19; May 2; July 14; Dec. 10, 1904; July 7, 8, 14, 1905.

"THE ASSAYE." (*a.*)

Ship — Compulsory pilotage — Collision — Southampton Water—57 & 58 Vict. c. 60, s. 605 — "District," meaning of.

For the purposes of compulsory pilotage, the waterway between Southampton and the sea by way of the Solent is one "district" only within the meaning of section 605 of the Merchant Shipping Act, 1894.

The plaintiffs were the owners of the steamship *New York* and the defendants the owners of the steamship *Assaye.*

A collision occurred between the plaintiffs' and the defendants' vessels on the 20th of March, 1904, in the Solent.

The court found that the collision was caused by the negligence of the pilots in charge of the vessels and also found that both vessels were at the time of the collision under compulsory pilotage.

The main question for the court's consideration turned on the meaning of the word district as used in section 605 of the Merchant Shipping Act, 1894.

Pickford, K.C., Butler Aspinall, K.C., and *Glynn*, for the plaintiffs.

Scrutton, K.C., and *Lauriston Batten*, for the defendants.

BARGRAVE DEANE, J., in giving judgment, said: This is a question of considerable importance, as to whether at the time of the collision which occurred between these two large steamers in the Solent, off Sconce Point, at about 1.30 on the 20th of March in last year, either or both ships were subject to compulsory pilotage. *The New York*, a steamship of 10,799 tons gross, was on a voyage from Cherbourg, in France, to Southampton, and was in charge of a Trinity House pilot. *The Assaye*, a steamship of 7,377 tons gross, was on a voyage from Southampton to Queenstown, in Ireland. She also was in charge of a Trinity House pilot. The collision action for damage was tried before the late President some time ago, and he found both vessels to blame, the blame in each case being attachable to the pilot in charge of each ship. The question now raised is whether the pilotage was in either case compulsory pilotage, so as to absolve the owners of the ship from liability for

(*a.*) Reported by GWYNNE HALL, Esq., Barrister-at-Law.

the damage which has been found to be caused to both ships.

It is necessary that I should go back some little way into the history of compulsory pilotage as far as it concerns this case. The first Act of Parliament referred to was the Act of 1808, 48 Geo. 3, c. 104, by section 20 of which the Corporation of the Trinity House of Deptford Strond, known as the Trinity House, had power given it to appoint sub-commissioners to examine and report to the Trinity House as to the capacity of certain people who sought pilotage licences. That Act, it was provided by section 77, was only to be in force for four years. One of the difficulties in this case arises from the use of the word "district" in the various Acts of Parliament. Section 20 of the Act of 1808 says that it shall be lawful for the said corporation of the Trinity House of Deptford Strond to appoint from time to time at such ports or places in England as they may think requisite (except within certain other districts which are excepted) proper and competent persons, not to exceed five or be less than three, at each port or place for which any such appointment shall be made, the persons so to be appointed to be called sub-commissioners of pilotage. The words there are "ports or places." The Act goes no further. Upon that the authorities of the Trinity House did appoint a certain number of persons, and in 1809 published in the *London Gazette*, on the 19th of January of that year, the following notice: "Pursuant to the directions of an Act passed in the forty-eighth year of the reign of his present Majesty, intituled 'An Act for the better regulation of pilots and of the pilotage of ships and vessels navigating the British seas,' the corporation of Trinity House of Deptford Strond have appointed and licensed pilots at Portsmouth and Cowes, and the Isle of Wight, for the harbours, channels, and coasts within that district." The word is singular, "district," and therefore the original district which was made at the time by the Trinity House authorities was the district of "Portsmouth and Cowes in the Isle of Wight, and for the harbours, channels, and coasts within that district." Then, in the *Gazette*, they also published the names of the pilots appointed at Portsmouth, and the notice says they are "licensed to take charge of ships to and from the Owers, eastward, without the Isle of Wight, to Peverell, westward, to and from those limits to all places and ports within the Isle of Wight and in and out of St. Helen's, Spithead, Portsmouth Harbour, Stokes Bay, Motherbank, Southampton Water, Cowes Roads and Harbour, Yarmouth, Lymington, the Needles and Christchurch, and to and from each of these ports and places." So that you there have a district created known as the Portsmouth and Isle of Wight district, which includes all the ports and harbours, for the purpose of this case, between Peverell, westward, and the Owers Lightship, eastward. I need not trouble to read the specific licences granted to other persons of less jurisdiction than that which I have read. They are appointed for limited districts within that one big district. That was the state of things in 1809, but it is also right that I should read the notice as it refers to Cowes. The notice says: "The names of the pilots appointed at Cowes are as follows." Then follow the names of the pilots, and they are "licensed to take charge of ships to and from the Owers, eastward, without the Isle of Wight, to Peverell, westward, to and from those limits to all places and ports within the Isle of Wight and in and out of St. Helen's, Spithead, Portsmouth Harbour, Stokes Bay, Motherbank, Southampton Water, Cowes Road and Harbour, Yarmouth, Lymington, the Needles and Christchurch." So that you here have a district created with two sets, apparently, of sub-commissioners, who shall examine and issue certificates to pilots for the purpose of their being licensed by the Trinity House within that big district; and it is important to see that although sub-commissioners are appointed at two places—namely, at Portsmouth and Cowes—the district is one, with two divisions in which sub-commissioners are appointed for the purpose only of the examination of pilots.

The next point which I have to make is this, that at that time, apparently, a book was started by the Trinity House authorities, which has been put in, and which is of use. On p. 5 of the book there are the names of the sub-commissioners appointed for Cowes, and at the top is put "Definition of limits"; that is to say, the definition within which the examination by the sub-commissioners is to be limited. That is practically in the same words as I have just read from the notice in the *Gazette*. I ought to say that on p. 5 the appointments filling up vacancies go down to September, 1860. It may be important to notice that. Then on pp. 53 and 54 you get a similar entry under the head of "Portsmouth: Definition of limits." The limits are exactly the same as the Cowes limits. Then you get the names of fifteen gentlemen appointed, and of those appointed subsequently, and the record goes down to the 24th of May, 1866. Those are the last dates on which appointments were made. I shall have to refer to this book later, but apparently there were consecutive appointments to those two places, Cowes and Portsmouth, down to 1860 in the one case and 1866 in the other. Therefore you have in the Trinity House records continuous appointments of sub-commissioners at those two places for the purpose of the examination of persons who wished to be licensed as pilots by the Trinity House.

In 1812 the Act of 52 Geo. 3, c 39, by section 20 re-enacted section 20 of the original Act which I have just read, in identical words. Section 23 of that Act makes pilotage compulsory within those limits, and section 32 introduced for the first time the word "districts" into the Act of Parliament. Section 32 says: "Nothing in this Act shall extend or be construed to extend to the taking away, abridging, defeating, impeaching, or interrupting of any grants, liberties, franchises, or privileges heretofore granted by any charters or Acts of Parliament to the pilots of the Trinity House of the town of Kingston-upon-Hull, or the Trinity House of Newcastle-upon-Tyne, or to give any authority to the Corporation of the Trinity House of Deptford Strond, within any ports or districts having separate jurisdiction in matters of pilotage." One of the difficulties in this case, as I have said, is the use of the word "districts." I think, in that particular section, the word "districts" applies not to the district within which pilotage is made compulsory, or is in operation, but to the districts of those three sets of persons—the Trinity House of the town of Kingston-upon-Hull, the Trinity House of Newcastle-upon-Tyne, and the Trinity House of Deptford Strond. It seems to me that the word districts there is not the same as the district which we are inquiring into. I think district means in that section the district of the pilotage authority; that is to say, in this case the Trinity House, and not the port for which sub-commissioners are appointed, under the Act. Then comes the Act of 1825 (6 Geo. 4, c. 125). It repeals and re-enacts portions of the Act 52 Geo. 3. Section 5 of the Act repeats in identical words section 20 of the previous Act, to which I have referred. So things went on down to 1843, and on the 5th of December, 1843, apparently the people of Southampton, which was a growing port, thought that it was advisable that their young men should be able to be examined before sub-commissioners

at Southampton for the purpose of obtaining pilotage licences. Accordingly a visit was paid to Southampton by a committee of the Trinity House, and this is the document which has been put in with reference to that: "Extract from report of visit to Portsmouth, Cowes and Southampton, dated the 5th of December, 1843." The committee proceeded to visit Portsmouth, Cowes and Southampton on business connected with the pilotage establishments at those ports. "The committee were here (Southampton) waited upon by the Sub-Commissioners of Pilotage, namely, Mr. Estwick, Captain Harington, and Mr. Spain, with whom the subject of a separate sub-commission for the port of Southampton was discussed at considerable length." Then the report speaks of the complaints that had been made, and the committee considered that the rare occurrence of complaints was "attributable rather to the inconvenience to which parties having cause for dissatisfaction are at present subject from the absence of all proximate authority, than to the uniform good conduct of the pilots." The report concluded: "Your committee are induced to recommend to the court that a sub-commission of pilotage should be established at Southampton, and such regulations framed for the conduct of the service thereat as may be deemed necessary." Accordingly, we find that on the 23rd of April, 1844, there is published in the *London Gazette* by the authorities of the Trinity House in London a notice similar to that which I have already read as having been published in 1809. It was in these terms: "Pursuant to Act of Parliament passed in the 48th year of the reign of his late Majesty King George III., intituled 'An Act for the better regulation of pilots, and of the pilotage of ships and vessels navigating the British seas,' the Corporation of Trinity House of Deptford Strond, shortly after the passing of the said Act, licensed pilots for Portsmouth, and for Cowes in the Isle of Wight, and the harbours, channels, and coasts within the district called 'the Portsmouth and Cowes district,' the limits of which were described and the names of the pilots so licensed were set forth in the notice of such licences thereupon published as directed by the said Act; and other pilots having been licensed by the said corporation for the said district, as vacancies have occurred or occasion required'—the word district' is singular throughout—the names of the pilots now licensed for such district, and the limits within which they are respectively licensed to act, are hereinafter set forth; and pursuant to an Act passed in the 6th year of the reign of his late Majesty King George IV., intituled 'An Act for the amendment of the law respecting pilots and pilotage and also for the better preservation of floating lights, buoys and beacons,' the said Corporation of Trinity House have lately licensed pilots for the port of Southampton and the coasts near thereto." Then it goes on to give the names of the Portsmouth pilots and their district, and the word "limits" is used—"limits of their licences." The limits are "to and from the Owers, eastward, without the Isle of Wight, to Peverell, westward, to and from those limits to all places and ports within the Isle of Wight (excepting the harbours of Chichester and Langstone) and into and out of St. Helen's, Spithead, Portsmouth Harbour, Stokes Bay, the Motherbank, the Southampton Water (subject to the regulations hereinafter mentioned), Cowes Road and Harbour, Yarmouth, Lymington, and the Needles, and to and from each of those ports and places." Then there are other people mentioned whose jurisdiction is more limited, and the notice proceeds: "The names of the Cowes pilots and the limit of their licences are as follows . . . to and from the Owers, eastward, without the Isle of Wight, to Peverell, westward, to and from those limits to all places and ports within the Isle of Wight, and into and out of St. Helen's, Spithead, Portsmouth Harbour, Stokes Bay, the Motherbank, the Southampton Water (subject to regulations hereinafter mentioned), Cowes Road and Harbour, Yarmouth, Lymington, the Needles, Christchurch, and to and from each of those ports and places." Then comes "the names of the Southampton pilots and the limits of their licences are as follows . . . from Cowes Road, Stokes Bay, Motherbank or St. Helen's to Southampton, and from Southampton through the several channels and passages to sea." Then come the regulations to which I have referred: "Portsmouth and Cowes pilots respectively are not to take charge of any vessels from Southampton, or any port of the Southampton Water to sea unless there shall not be any Southampton pilots ready to take charge of her. Southampton pilots may supersede in the charge of any vessel bound to Southampton any Portsmouth pilot or Cowes pilot, when such vessel shall arrive at a line to be drawn from Eaglehurst to the North-West Bramble Buoy, but after she has passed such line the Portsmouth or Cowes pilot having her in charge shall not be supersedable but may conduct her to her moorings." That shows that it was thought advisable that this district should have a third set of sub-commissioners at Southampton, and that the persons examined by the sub-commissioners at Southampton and to whom licences were granted by the Trinity House had a privilege. They had this privilege, that they might conduct any vessel from Southampton to sea, but they might not conduct any vessel into Southampton except from a line drawn from Eaglehurst to the North-West Bramble Buoy; but if there was not a Southampton pilot available at the line drawn between those two points, then the pilot who had brought her up to that point was at liberty to conduct her into Southampton Water. That was the state of things in 1844. In May, 1853, there was in contemplation a new Merchant Shipping Act—the Act of 1854—and with a view to the preparation of that Act a return was called for from the Trinity House by the House of Commons. A return was made on the 9th of May, 1853, by the Trinity House to the House of Commons. On p. 14 of that return, at the bottom of the page, you will find "Cowes and Portsmouth districts"—in the plural—"Definition of limits: From the Owers, within and without the Isle of Wight, to Peverell, and *vice versâ*, and to and from, and into and out of, all ports and places within those limits." Then follows a note which is not important. On p. 16, under the same heading, there appears this: "Portsmouth and Cowes pilots respectively are not to take charge of any vessel from Southampton or any part of the Southampton Water, to sea, unless there shall not be any Southampton pilot ready to take charge of her. Southampton pilots may supersede in the charge of any vessel bound to Southampton any Portsmouth pilot or Cowes pilot when such vessel shall arrive at a line to be drawn from Eaglehurst to the North-West Bramble Buoy, but after she has passed that line the Portsmouth or Cowes pilot having her in charge shall not be supersedable, but may conduct her to her moorings." Therefore a Cowes or Portsmouth pilot may take a vessel into Southampton if there is no Southampton pilot at the line from Eaglehurst to the North-West Bramble Buoy. Then there is this further provision: "Any Portsmouth or Cowes pilot who shall take charge of a vessel at any of the anchorages within the Isle of Wight, for the purpose of conducting her to Southampton, such pilot not having brought her in from sea, shall be entitled to one-third of the Southampton

rate of pilotage if superseded by a Southampton pilot." Then I also find for the first time, on p. 38, "Southampton district: Definition of limits: From Cowes Roads, Stokes Bay, the Motherbank, and Spithead, to all ports and places within the Southampton Water and from all ports and places within the Southampton Water to sea." Then, again, follow the regulations I have already read. That was the state of things in 1853, before the Merchant Shipping Act of 1854 was passed. Now we come to the Merchant Shipping Act of 1854, which is 17 & 18 Vict. c. 104. Section 331 says: "Every pilotage authority"—in this case the Corporation of the Trinity House of Deptford Strond—"shall retain all powers and jurisdiction which it now lawfully possesses, so far as the same are consistent with the provisions of this Act." Section 337 says: "Every pilotage authority shall deliver periodically to the Board of Trade, in such form and at such times as such board requires, returns of the following particulars with regard to pilotage within the port or district under the jurisdiction of such authority." That word "district" clearly applies in that section to the whole district under the Corporation of the Trinity House of Deptford Strond. The particulars to be given are as to the regulations in force, the names and ages of all pilots or apprentices, the service for which each pilot, &c., is licensed, the rates of pilotage, the total amount received for pilotage, and the receipts and expenditure. Section 340 gives power to the Corporation of Trinity House to issue pilotage certificates to masters and mates within their district. Section 349 is of importance because it uses the word "limits" as apart from "district." It reads: "Every qualified pilot shall receive on his appointment a licence containing his name and usual place of abode, together with a description of his person, and a specification of the limits within which he is qualified to act," &c. Section 353 reads: "Subject to any alteration to be made by any pilotage authority in pursuance of the power hereinbefore in that behalf given, the employment of pilots shall continue to be compulsory in all districts in which the same was by law compulsory immediately before the time when this Act comes into operation; and all exemptions from compulsory pilotage then existing within such districts shall also continue in force." The section simply continues compulsory pilotage. Section 368 says: "The Trinity House may, in exercise of the general power hereinbefore given to all pilotage authorities, of doing certain things in relation to pilotage matters, alter such of the provisions hereinafter contained as are expressed to be subject to alteration by them in the same manner and to the same extent as they might have altered the same if such provisions had been contained in any previous Act of Parliament instead of in this Act." Section 369 says: "The Trinity House shall continue to appoint sub-commissioners, not being more than five nor less than three in number, for the purpose of examining pilots in all districts in which they have been used to make such appointments"—that must refer to the smaller districts—the special district in which they are dealing in respect of this particular provision — "and may, with the consent of Her Majesty in Council, but not otherwise, appoint like sub-commissioners for any other district in which no particular provision is made by any Act of Parliament or charter for the appointment of pilots; but no pilotage district already under the authority of any sub-commissioners appointed by the Trinity House shall be extended, except with such consent as aforesaid, and no sub-commissioners so appointed shall be deemed to be pilotage authorities within the meaning of this Act." That is a very complicated section, because you find in it the word "district" used in two senses. "District" in one part of the section refers to the whole district of the Trinity House of Deptford Strond, and the other is the district of the sub-commissioners. The district of the sub-commissioners, as we know, has nothing to do with licences, but only with examination; and therefore, as far as I am able to read that section, it does not affect the question of the pilotage district. It only has to deal with sub-commissioners' districts for the purpose of examination. Section 370 speaks of what the pilotage authority's districts are. It speaks of the Trinity House having outport districts. That with which we are dealing is one, or more, as the case may be. Section 376 is the compulsory pilotage section: "Subject to any alteration to be made by the Trinity House, and to the exemptions hereinafter contained, the pilotage districts of the Trinity House within which the employment of pilots is compulsory are the London district and the Trinity House outport districts," &c. Section 379, sub-section 6, is as follows: "Ships passing through the limits of any pilotage district on their voyages between two places both situate out of such limits, and not being bound to any place within such limits nor anchoring therein," shall be exempted from compulsory pilotage in the Trinity House outport districts That is the first instance of this provision of exemption that I have been able to discover, but which is very strongly relied upon by those who suggest that in the case of *The New York* there was no compulsory pilotage. On the 11th of August, 1855, a return was made pursuant to the Act of 16 & 17 Vict. c. 129. That return, at pp. 30-32, under the heading of "Cowes and Portsmouth districts"—the word is plural—repeats the regulations I have already read, and gives the names of a long list of pilots and also the limits of their licences. The words are not "limits of district" but "limits of licence." Then, on p. 73 of the same return, you have got "Southampton district: Definition of limits," and the same particulars and regulations. So you get here, after the Act of 1854, a return showing that the same regulations were applicable as had been applicable before that Act was passed. On the 21st of April, 1868, I find this: "Extract from the Warden's (of the Trinity House) minutes.—A reference from the board was considered upon the subject of the proposed consolidation of the pilotage districts of Cowes, Portsmouth, and Southampton into one district. It was, after deliberation, resolved to recommend to the court that the sub-commissioners at Cowes and Portsmouth be abolished, and that one sub-commission of five members be formed at Southampton, of which the collectors at Cowes, Portsmouth, and Southampton shall be members for the management of the three districts, with the ultimate view of amalgamating the whole into one district." That was confirmed on the 5th of May, 1868. Therefore you see that the Trinity House at that time, having started with a district at Cowes and Portsmouth, and having subsequently made a sub-division of that one district and Southampton, found it advisable that that should be altered, and that there should be only one district, which we find was called the Isle of Wight district. That was carried out by the Trinity House by having a fresh page in their sub-commissioners' book, to which I have already referred. On p. 27 of that book you get a new entry, "Isle of Wight district." That page begins with the 23rd of July, 1868, and goes down to the 13th of June, 1873. So that the regulation of 1868 was carried into effect and the pilots had jurisdiction apparently over the whole of that district as one district. On the 12th of February, 1875, a further alteration

was made: "Extract from the Warden's minutes, dated the 12th of February, 1875. The report of the Visiting Committee to the Isle of Wight district was read and the recommendation therein having been discussed, it was agreed to recommend to the board: That the Isle of Wight district be for the future divided into two—one to be called the 'Southampton' and the other the 'Isle of Wight' district; that the limits of Southampton district be from a line drawn from the Lepe Buoy to Lee Point into Southampton, and from Southampton to the sea; that the limits of Isle of Wight district be from Peverell to the Owers, excepting within the Poole and Southampton districts." That was confirmed by a minute of the 2nd of March, 1875; and we find a new page entered in the sub-commissioners' book. On p. 11 we find "Isle of Wight district, Cowes and Portsmouth: Definition of limits: From Peverell to the Owers (excepting within the Poole and Southampton districts)." The last entry is in 1903. On p. 12 we have: "Southampton: Definition of limits: From a line drawn from Lepe Buoy to Lee Point, in to Southampton, and from Southampton to sea." The first entry is on the 24th of February, 1875, and the last on the 27th of June, 1904. So things have continued with that alteration from that date, and the question that is raised before me is this: *The Assaye*, the outward bound vessel, started from Southampton, and she was bound out to sea, and therefore undoubtedly she was in charge of a pilot who had a licence to take that vessel from Southampton to sea, and she was under compulsory pilotage. *The New York* was a vessel which had come in from America, touching at Cherbourg, and was on her way from that port to Southampton. She was boarded by a pilot who was licensed to take charge of vessels from Peverell to the Owers, excepting within the Poole and Southampton districts. He was licensed for the spot at which the collision took place. Therefore the position was this: That the pilot was licensed to take that vessel as far as where the Southampton district begins—that is, to a line drawn from Lepe Buoy to Lee Point. That was within the original district of the Trinity House of Deptford Strond, from the original date I have given, 1809 Now, the question is whether *The New York* comes within the words of section 605 of the Merchant Shipping Act, 1894. The words of that section are as follows: "The master and owner of any ship passing through any pilotage district in the United Kingdom on a voyage between two places both situate out of that district shall be exempted from any obligation to employ a pilot in that district or to pay pilotage rates when not employing a pilot within that district." Now the word "district" is the whole point. Has that district which was originally started in 1809 ceased to be the district within the meaning of this section? As I read the sections and the regulations and the various reports, the Trinity House have never altered the district—this district from Peverell to the Owers. What they have altered is the limits of the pilots' licences. They have varied from time to time the limits within which various pilots shall have power to navigate ships under their compulsory power, and there is a section in one of the Acts—I think it is section 369 of the Act of 1854—which says that so far as the sub-commissioners are concerned they shall not be given extended jurisdiction except by Order in Council. It is very puzzling to know exactly what that means, but my view is this, that the Trinity House of Deptford Strond, having originally got this one district, the Cowes and Portsmouth district, which included Southampton Water, have never altered that district. They have made sub-districts in it, but the one district has never been altered; that is, the district from the Owers Lightship, eastward, to Peverell, westward. Although for convenience they have made regulations from time to time varying the jurisdiction of the sub-commissioners who are to examine pilots, and although they have made different arrangements for the licences, that is to say, the extent to which any particular person may hold a licence, still one district remains as the pilotage district in that particular part of England under the authority of the Trinity House of Deptford Strond. Therefore I do not think that this particular exemption section renders a vessel free from compulsory pilotage if she is coming from a port outside that district into Southampton. I think she is still within the district of the Isle of Wight, as originally constituted, and she was under compulsory pilotage in the Solent, as being part of the original district which has never really been altered. For these reasons I think *The New York* was also subject to the law of compulsory pilotage, and the judgment of the President saying that these two pilots were the people who were to blame is to be read as meaning that the vessels were exempted in consequence of their being under compulsory pilotage.

No costs on either side.

Solicitors for the plaintiffs, *Thomas Cooper & Co.*, for *Hill, Dickinson, Dickinson, Hill, & Roberts*, Liverpool.

Solicitors for the defendants, *Freshfields*.

Court of Appeal.

From K. B. D. (Collins, M.R., and Barnes, P.) — Dec. 18.

MUTZENBECHER v. LA ASEGURADORA ESPANOLA. (a.)

Practice—Writ—Service out of the jurisdiction—Contract to be performed within the jurisdiction—Breach within the jurisdiction—Contract of agency for England—Wrongful termination of agency—R. S. C., 1883, *ord.* 11, *r.* 1 (e).

By a contract made abroad the defendants, a foreign insurance company, appointed the plaintiffs, a firm carrying on business in London, to be their agents for the United Kingdom and certain other countries for a period of five years. Before the expiration of the term the plaintiffs received a letter from a representative of the defendants, written in London, putting an end to the agency. The plaintiffs obtained leave under ord. 11, *r.* 1 (e), *to serve on the defendants out of the jurisdiction a writ of summons in an action for breach of the contract of agency.*

Held, that the order for service out of the jurisdiction was rightly made; for the breach alleged by the plaintiffs was a breach within the jurisdiction of a contract to be performed by the defendants within the jurisdiction.

Appeal by the defendants from the refusal of Phillimore, J., to set aside an order for service of a writ of summons out of the jurisdiction.

The plaintiffs, Franz Ferdinand Mutzenbecher, Carl Christien Stahl, Claus Heinrich Ernst Sonksen, and James Gold, carried on business together as insurance agents in the City of London under a firm name.

The defendants were a Spanish insurance company domiciled in Santa Cruz de Teneriffe, in the Canary Islands.

On the 7th of October, 1903, an agreement of

(a.) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

agency in writing in the Spanish language was entered into at Teneriffe between the defendants and the plaintiffs.

By the agreement the parties were thus described: "La Aseguradora Espanola, a Spanish insurance company domiciled in Santa Cruz de Teneriffe, represented by its general manager, Mr. Candido Alarco, and hereinafter called 'the company,' of the one part, and Messrs. F. Mutzenbecher, Stahl Sonksen, and Gold, residing in the City of London, No. 13 and 14, Cornhill, represented by Mr. C. H. E. Sonksen and Mr. James Gold, hereinafter called 'the agents,' of the other part.

The agreement contained, *inter alia*, the following clauses:

Clause 1.—"The company appoints the agents their exclusive representatives for the United Kingdom of Great Britain and Ireland and her colonies and dominions across the seas, for the Continent of Europe with the exception of Spain, Portugal, and Turkey, and for the United States of North America."

Clause 2.—"The business which the agents have to transact for the company consists of the following: Reinsurances against fire and maritime insurances and (or) maritime reinsurances, and in the United States of North America insurance against fire generally known under the designation of 'surplus' or 'affidavit' business."

Clause 3.—"The company binds itself not to undertake any business which comes within the jurisdiction of this agreement without the intervention of the agents, but may accept any business offered by Spanish companies. Of all contracts offered by the intermediation of any other party or person a copy shall be given to the agents in order that the same may decide on its acceptance or rejection."

Clause 4 provided for the giving by the company to the agents of a power of attorney.

Clauses 5 and 6 dealt with the duties of the agents.

Clause 7 dealt with the remuneration of the agents.

Clause 8 dealt with weekly reports to be made by the agents of the company.

Clause 9.—"The agents shall render accounts to the company in the following manner—namely: (*a*) Fire and maritime reinsurance business under convention and optional fire insurance business. The agents shall send accounts to the company as soon as they receive such after having examined the same and found them correct. (*b*) Maritime insurance optional maritime reinsurance business and surplus business of the United States. Within three weeks from the end of every three months the agents shall render account to the company, crediting same with the gross premiums of all the policies issued during the three months, less the returns and the money received from the company or drawn against the banking account of the company in London for the payment of losses, &c., and debiting the company with all the losses settled and paid during the said period and with the money paid to the company or into the banking account of the company in London for premiums received during the said three months. It is understood that all the balances of account shall be debited to the company only after they have been actually received by the agents."

Clauses 10 and 11 dealt with the form of the accounts.

Clause 12.—"The accounts current which are to be rendered by the agents in virtue of clause 10 of this agreement must, besides, be accompanied by a banking account showing the receipts and payments of the company in London during the three months, and also by the vouchers for the items to the debit or to the credit of the company."

Clause 15.—"As a guarantee for the fulfilment of their obligations and in the interest of a continuous development of their business, the company undertakes to open at a bank or a banking firm in London, for the exclusive use of the business obtained by the agents, banking credits up to the amount of £10,000 in the following manner: (*a*) A banking credit of £5,000 for the maritime sections. . . . (*b*) A banking credit of £5,000 for the fire section. . . . The company moreover undertakes to deposit in account current in the name of the agents in a bank or a banking firm in London the sum of £1,500, which shall be placed entirely or in partial sums in deposit account or shall remain in the current account as the agents may think advisable, but always in accordance with the requirements of the business."

By clause 19 the agreement was made for a period of five years from the 7th of October, 1903.

The business of the agency, as contemplated by the agreement, was carried on at the plaintiffs' offices for a little more than a year.

On the 27th of October, 1904, the plaintiffs received a letter from Mr. Zacario Alarco, the agent-general of the defendant company, who was then in London, declaring the agreement of agency void from that date. The plaintiffs were subsequently served with a copy of a deed of revocation of the agreement by the company, ratifying what had been done by their agent-general.

The plaintiffs applied for and obtained an order, under ord. 11, r. 1 (*e*), giving them leave to serve out of the jurisdiction a writ of summons in an action against defendants to recover damages for breach of the agreement of agency. That rule is as follows: "Service out of the jurisdiction of a writ of summons or notice of a writ of summons may be allowed by the court or a judge whenever . . . the action is founded on any breach or alleged breach within the jurisdiction of any contract, wherever made, which, according to the terms thereof, ought to be performed within the jurisdiction, unless the defendant is domiciled or ordinarily resident in Scotland or Ireland."

The defendants took out a summons to have the order giving leave to serve the writ out of the jurisdiction set aside. Phillimore, J., dismissed the summons, and the defendants appealed.

Emery, for the defendants.—This case does not come within ord. 11, r. 1 (*e*). In order that a plaintiff may be entitled to leave to serve a writ out of the jurisdiction under that rule, he must show two things—first, a contract which, according to the terms thereof, ought to be performed within the jurisdiction; and secondly, a breach within the jurisdiction. But with regard to the first of those conditions, it is not enough for the plaintiff to show that some part of the contract was to be performed within the jurisdiction; he must show that that part of the contract which he alleges to have been broken was to be performed within the jurisdiction. In *Rein* v. *Stein*, [1892] 1 Q. B. 753, 40 W. R. Dig. 192, Lindley, L.J., said: "I do not understand that it is the whole of the contract that has to be performed within the jurisdiction. It is sufficient if some part of it is to be performed within the jurisdiction, and if there is a breach of that part of it within the jurisdiction": see *Comber* v. *Leyland*, [1898] A. C. 524, 47 W. R. Dig. 159. Here the plaintiffs do not allege a breach by the defendants of anything which, according to the terms of the contract, was to be performed by them within the jurisdiction. The only alleged breach for which the plaintiffs claim damages is in substance a dismissal, a termination of the contract of agency before the term had expired. The

defendants are an insurance company domiciled in the island of Teneriffe, and they have no office outside the dominions of Spain. All that had to be performed by them under the contract had to be performed by them where they reside—viz., outside the jurisdiction. The mere fact that the plaintiffs had under the contract to do certain things in this country does not make the contract, as against the defendants, one which had to be performed here within the meaning of the rule. Further, the alleged breach itself did not take place within the jurisdiction. The actual notice of dismissal was written by another agent in this country. But he acted on instructions given by the defendants in Teneriffe: see *Holland* v. *Bennett*, 50 W. R. 401, [1902] 1 K. B. 867; *Cherry* v. *Thompson*, 20 W. R. 1029, L. R. 7 Q. B. 573.

Scrutton, K.C., and *Arthur Pritchard*, for the plaintiffs.—The case comes within the rule. From the terms of the agreement it is manifest that the contract is one which was to be performed in this country. The obligation imposed by the contract on the defendants, of which the plaintiffs allege that there has been a breach, is an obligation arising from two implied covenants. These covenants are—first, a negative covenant, not to do anything which would interfere with the carrying on by the plaintiffs of the business of the agency for five years; and, second, a positive covenant, to do whatever might be necessary to assist the plaintiffs in carrying on the business of the agency for five years. The obligation, whether it arose from the negative covenant or the positive covenant, was equally an obligation which was to be performed in this country. The breach also took place in this country. This case is outside the decision in *Holland* v. *Bennett*. There the court thought that the breach occurred out of the jurisdiction. Here the dismissal of the plaintiffs by the agent-general of the defendants clearly took place in England.

They also cited *Duval & Co. (Limited)* v. *Gans*, 53 W. R. 106, [1904] 2 K. B. 685.

COLLINS, M.R.—This case undoubtedly raises a nice question. The application which originated the discussion was one for leave to serve a writ out of the jurisdiction in an action by a firm of London agents, against a Spanish company by whom the firm had been employed to act as their agents of England upon the terms of an agreement to which I will refer. The plaintiff firm were summarily dismissed from the agency, after acting for about a year, by a representative of the Spanish company, who came to England charged, as we are given to understand, with the duty of considering the position of the agents and having full discretion to determine what steps should be taken in regard to them. The representative exercised his discretion by writing in London a letter of summary dismissal to the agents. The agents thereupon applied for leave to serve a writ of summons out of the jurisdiction, and the rule under which they applied is ord. 11, r. 1 (*e*). That rule allows service out of the jurisdiction whenever "the action is founded on any breach or alleged breach within the jurisdiction of any contract, wherever made, which, according to the terms thereof, ought to be performed within the jurisdiction." Undoubtedly this contract, so far as the agents were concerned, was to be performed within the jurisdiction, but the question is whether equally, within the words of the rule, the contract was not one which ought to be performed by the defendants, the principals, within the jurisdiction. First of all, with regard to the nature of this contract of agency, the material words of the agreement are these: [His lordship read clause 2 of the agreement.] Clause 1 defines the extent of the agency. [His lordship read clause 1.] It is perfectly clear that the contract does embrace the United Kingdom, and apparently makes it the principal place where the work was to be carried on by the agents. That is shown by the reference in the contract to the parties, who were described as being the company domiciled in Teneriffe represented by its general manager of the one part and the plaintiffs residing in the City of London of the other part. Then follow a number of clauses defining the course of business, the duties of the agents, and their remuneration, and further what things were to be done by the employers, which include their putting the agents in credit at a particular bank up to a certain amount.

The point taken before us is that the contract, to be brought within ord. 11, r. 1 (*e*), must be one which ought to be performed within the jurisdiction, and that the breach must also be within the jurisdiction. I do not think there is any doubt but that the breach was within the jurisdiction. No difficulty arises in the present case of the kind which arose in *Cherry* v. *Thompson*, where a letter was sent from abroad. Here, if there was a breach, it was committed in England by a representative who came to this country from Spanish territory. The agency could not be determined till that representative had inquired into the agency. The breaking of the contract was an act of that representative acting for his principals; therefore it was a breach by the principals committed in England.

Then comes the point, which undoubtedly raises a question of more difficulty, whether the contract is one of which it can be said that it ought to be performed within the jurisdiction. So far as concerns that part of the contract which had to be performed by the agents, it appears to be a contract which comes within the words of the rule; because, though it involves the doing by the agents of things elsewhere, it certainly involves, I think, that the principal part of their duties was to be performed in this country. But it is contended that that is not enough, that it is necessary to show that the contract is one which had to be performed within the jurisdiction by the person who is sought to be sued. That may be true, and I will try this case by that test. Is this a contract which, according to its terms, ought to be performed by the defendants within the jurisdiction? I think it is. There are in the contract reciprocal obligations, one on the principals to employ the agents in England, the other on the agents to carry on in England a part of the principals' business. If any person unvexed by the study of decisions were asked where this contract was to be performed by the defendants, he would probably answer, Where the work of the agency was to be done—that is to say, in London. The defendants were under a double obligation — they were bound both to refrain from interfering with the agents in the fulfilment of their duties, and also to assist them in the fulfilment of those duties by doing in this country anything that might be necessary for that purpose. In my opinion, there was an obligation on them fettering their acts so as to make it just as much a breach in this country if they did an act which they were bound to refrain from doing, as if they made default in doing anything that they were under an active obligation to do. There was an obligation equally in either case; only in the one case it was to be performed by abstention, and in the other case by execution. It seems to me that the breach alleged in this case is a breach of the obligation on the defendants to abstain from doing in England that which they did in England. I therefore think that the plaintiffs have sufficiently alleged a breach by the defendants within the jurisdiction of a contract to be performed by them within the jurisdiction.

Phillimore, J., was, in my opinion, right in refusing to set aside the order, and the appeal must be dismissed.

BARNES, P., concurred.

Appeal dismissed.

Solicitors for the plaintiffs, *Pritchard & Sons.*

Solicitors for the defendants, *Stanley Kent, Henderson, & Welch.*

High Court of Justice.

Chan. Div.
Kekewich, J. } Dec. 7, 8, 9.

In re GEORGE PARDOE, DECEASED.
MACLAUGHLIN *v.* PENNY. (*a.*)

Limitations, Statute of—Share of an intestate's estate—Administration—Law of Property Amendment Act, 1860 (23 & 24 *Vict. c.* 38), *s.* 13.

Under a power of appointment conferred by a marriage settlement M. C. appointed a sum of £5,000, which her father had covenanted to bring into the settlement, to her son, J. F. C. He died a bachelor and intestate, whereupon his mother, M. C., and sister, E. M. P., became entitled to his estate in equal shares. The mother died in 1862, *having appointed her daughter, E. M. P., her son-in-law, G. P., and J. C. C. to be her executors, and she gave to her daughter, E. M. P., a life interest in her share of J. F. C.'s estate. The sum of £5,000 was paid to E. M. P. and G. P. in* 1864, *and was treated by G. P. as his absolute property. G. P. died in* 1884, *and gave his wife, E. M. P., a life interest in his property, and appointed F. P. to be his residuary legatee. E. M. P. died in* 1903. *In an action brought by the administrator of J. F. C. against the executors of G. P. and legal personal representatives of F. P.,*

Held, that the estate of G. P. was liable to the estate of M. C. for a moiety of the sum of £5,000, and that the Statute of Limitations did not run, because there had not been anyone in existence with a present right of receiving the share of the intestate's estate and capable of giving a discharge for the same, inasmuch as J. C. C., the co-executor with G. P. and E. M. P., although capable of giving a good discharge for the share, could not have recovered M. C.'s share in any proceedings which he might have taken against G. P. and E. M. P.

Witness action.

This was an administration action in which the plaintiff asked for a declaration that the deceased's estate was liable to replace certain trust moneys which the deceased had received and treated as his own.

By an indenture of settlement dated the 4th of March, 1825, and made in contemplation of the marriage of James Fielder Croome the elder and Mary Byrch, John Maisey Byrch, the father of Mary Byrch, covenanted with the trustees that his executors should pay, within one calendar month next after the death of the survivor of himself and Mary his wife, to the trustees or to the trustees for the time being of another sum of £3,000 (which he had also covenanted to pay), the sum of £5,000 with interest, and it was declared that the trustees should stand possessed of the said sum of £5,000 upon the like trusts, and subject to the like powers, provisions, and declarations as were in and by the said indenture of settlement declared or expressed of and concerning the said sum of £3,000. And it was declared that the trustees should stand possessed of the said sum of £3,000 upon trust to pay the income to J. F. Croome the elder during his life, and after his death to Mary Byrch his wife during her life, and from and after the death of such survivor upon trust to pay the said sum of £3,000 unto the only child of the intended marriage if there should be but one, but if there should be more than one then unto and amongst all and every or any one or more of the children of the intended marriage in such shares as J. F. Croome the elder and Mary his wife should by deed jointly appoint or in default of and subject to every such joint appointment as the survivor of them should by deed or will appoint and in default of any and subject to every such appointment unto and amongst the children equally, to sons upon attaining the age of twenty-one, to daughters upon attaining that age or marriage.

J. F. Croome the elder died on the 2nd of July, 1836, leaving his wife Mary Croome and two children, James Fielder Croome the younger and Elizabeth Mary Croome, surviving, and without having exercised the power of appointment.

John Maisey Byrch died on the 5th of January, 1845.

Elizabeth Mary Croome married George Pardoe on the 22nd of January, 1850.

By deed-poll dated the 25th of January, 1850, Mary Croome appointed the sums of £3,000 and £5,000 settled by the marriage settlement of the 4th of March 1825, unto her son J. F. Croome the younger, subject to the interest for life which she had therein.

J. F. Croome the younger attained the age of twenty-one and died on the 3rd of February, 1852, a bachelor and intestate, leaving his mother Mary Croome and his sister Elizabeth Mary Pardoe the only persons entitled to his personal estate according to the Statutes of Distributions.

Letters of administration to his personal estate were granted to his mother Mary Croome on the 6th of February, 1854, but the residuary accounts did not include the reversionary interests to which he was entitled.

Mary Byrch, the wife of John Maisey Byrch, died on the 29th of March, 1856, whereupon the sum of £5,000 became payable within one calendar month from the estate of John Maisey Byrch to the trustees of the marriage settlement of the 4th of March, 1825.

Mary Croome died on the 11th of November, 1862, having by her will appointed her daughter Elizabeth Mary Pardoe, her daughter's husband George Pardoe, and James Capel Croome to be her executors. She bequeathed the share to which she was entitled according to the Statute of Distributions in the personal estate of James Fielder Croome the younger, to her executors upon trust to pay her debts and the legacies thereby bequeathed, and to invest the residue and to pay the income thereof to Elizabeth Mary Pardoe during her life without power of anticipation, and after her death upon certain trusts.

James Capel Croome died on the 12th of February, 1886.

On the 28th of December, 1863, letters of administration *de bonis non* of the personal estate of J. F. Croome the younger were granted to Elizabeth Mary Pardoe.

In 1864 two sums of £2,000 and £3,000, making together the £5,000 covenanted to be paid by J. M. Byrch to the trustees of the marriage settlement were paid by the trustees of the settlement to Elizabeth Mary Pardoe as administratrix of the personal estate of J. F. Croome, the younger. These sums were paid into the private account of George Pardoe, the

(*a.*) Reported by R. FRANKLIN STUBBING, Esq., Barrister-at-Law.

husband of Elizabeth Mary Pardoe, and the subsequent investment of the money was made by George Pardoe in his own name.

George Pardoe died on the 29th of November, 1884, having by his will appointed his wife Elizabeth Mary Pardoe to be the sole executrix. He gave all his real and personal estate to his wife Elizabeth Mary Pardoe for her life and after her death to his brother Frederick Pardoe.

Frederick Pardoe died on the 20th of December, 1892, having by his will appointed two executors, of whom the defendant Arthur Penny is the survivor.

Elizabeth Mary Pardoe died on the 15th of July, 1903, and her will dated the 11th of May, 1901, was duly proved by the plaintiff and the defendant James Samuel Penny, the executors therein named, who thereupon became executors by representation of George Pardoe.

On the 24th of October, 1904, letters of administration *de bonis non* of the personal estate of J. F. Croome the younger were granted to the plaintiff.

The plaintiff brought this action as administrator *de bonis non* of J. F. Croome the younger, and alleged that the two sums of £2,000 and £3,000 were received by George Pardoe with the knowledge that they formed part of the estate of J. F. Croome the younger, and that he was a trustee thereof for the estate, and he asked for a declaration that the estate of George Pardoe was liable to repay to the estate of James Fielder Croome the younger the two sums of £2,000 and £3,000 which were received by George Pardoe in 1864 from the trustees of the marriage settlement dated the 4th of March, 1825, together with interest as from the death of Elizabeth Mary Pardoe.

The defendant Arthur Penny, who was the executor of Frederick Pardoe, the residuary legatee of George Pardoe, pleaded that Elizabeth Mary Pardoe appropriated the two sums of £2,000 and £3,000, less certain sums paid on account of the estate of James Fielder Croome the younger, towards satisfaction of her moiety of the personal estate of James Fielder Croome the younger. And the sums so appropriated were paid by Elizabeth Mary Pardoe to her husband George Pardoe and became his absolute property.

The Statute of Limitations was also relied upon as a defence to the plaintiff's claim.

KEKEWICH, J., held on the facts that there had been no appropriation of the two sums of £2,000 and £3,000 by Elizabeth Mary Pardoe, but that they were received by her husband George Pardoe as representing his wife in the character of administrator of James Fielder Croome the younger, inasmuch as according to the law as it then was he was entitled to administer. As his wife was entitled to one half of the fund, he must be held to have reduced that moiety into possession, and therefore that George Pardoe's estate was liable to J. F. Croome's estate for the other half.

The question arising on the Statute of Limitations was then argued.

23 & 24 Vict. c. 38, s 13, provides "That after the 31st of December, 1860, no suit or other proceeding shall be brought to recover the personal estate or any share of the personal estate of any person dying intestate possessed by the legal personal representative of such intestate, but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of such estate or share or some interest in respect thereof shall have been accounted for or paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person accountable for the same or his agent, to the person entitled thereto or his agent; and in such case no such action or suit shall be brought but within twenty years after such accounting, payment, or acknowledgment, or the last of such accountings, payments, or acknowledgments if more than one was made or given."

Ingpen, K.C., and *P. M. Walters*, for the defendant Arthur Penny.—The present case fell exactly within the words of the statute. In 1864 there were persons who had a present right to receive the £5,000, and who were also capable of giving a discharge for the same—viz., the three executors of Mrs. Croome. It had been held that this section applied to debts contracted before the Act was passed and also to estates that had fallen in. But it did not apply to a debt until it was got in, because until then there was no person capable of giving a discharge. It applied to any part of an estate as and when it falls in. The husband was not in the same position as regards discharging himself as his wife, and for this purpose he must plead the statute.

Stewart Smith, K.C., and *W. M. Cann*, for the plaintiff.—There never was anyone in existence who could give a discharge except the executors of Mrs. Croome, and they could not have maintained an action at law. The Pardoes occupied the position of being entitled to receive the legacy besides being liable to pay it, and therefore the case was governed by the decision in *Binns* v. *Nichols*, 14 W. R. 727, L. R. 2 Eq. 256, where Sir W. Page Wood, V.C., held that where the person liable for the payment of a legacy was the same as the person who was entitled to receive it, no question of limitation under the statute could arise, because he could not have sued himself. [KEKEWICH, J.—There was no independent executor in that case, which somewhat distinguishes it from the present one.] The point was that J. Capel Croome, the independent executor, could not have maintained an action at law without joining the Pardoes, and he could not have joined them in an action at law because they were proper defendants.

Lawrence, K.C., and *E. A. Jennings*, for other parties interested, adopted this argument.

Cruickshank, for the other defendant, J. S. Penny, took no part in the argument.

Ingpen, K.C., in reply.—The executors, after the debts were paid, were bound to distribute the assets among the next-of-kin, who could bring an action for their distributive shares. The argument that Mr. and Mrs. Pardoe were entitled to retain the sums in their hands from 1864 down to the present time was absurd. It was the duty of J. Capel Croome to see that his co-executors not only did not retain this money in their hands, but also that they secured it. Mr. and Mrs. Pardoe could not have the right to retain this money in their hands for an indefinite period as against J. Capel Croome. The case fell exactly within the words of the statute. *Binns* v. *Nichols* did not apply, because in that case there was only one person who was entitled to maintain the action for the legacy, and he was the same person as was liable for the payment of the legacy, whereas in the present case there was an independent executor who could have maintained an action.

KEKEWICH, J.—This is a small but interesting point, and it is strange that counsel have not been able to find any decision directly bearing upon it. The statute begins to run from the moment when a present right to receive a legacy, which, of course, includes a share of residue, shall have accrued to some person capable of giving a discharge for or release of the same. One has to ascertain that

moment. It is not suggested that any moment can be substituted for the actual day in 1864 when the sum of £5,000 was paid over to Mr. and Mrs. Pardoe in their character of representatives of James Fielder Croome. I do not forget that Mr. Pardoe was one of the executors of Mrs. Croome. I do not forget that he was the husband of Elizabeth Mary Croome, and that according to the law as it was then he had rights by virtue of that relationship; but to avoid complication I will drop her out altogether and consider him as being the administrator of James Fielder Croome, and also one of the executors of Mrs. Mary Croome. It will not make the slightest difference. All I have to say will be equally sound or unsound when Mrs. Pardoe is added to her husband. The money, therefore, was paid to him in 1864. Part of that money in due course of administration, or a share of it, belonged to Mrs. Croome's estate, and the executors of Mrs. Croome were then entitled to sue for it if they could. Now how was that to be? Mrs. Croome's executors were Mr. Pardoe and James Capel Croome. Mr. Pardoe himself was the administrator of James Fielder Croome, out of whose estate the money was to come. James Capel Croome and Mr. Pardoe of course could not sue Mr. Pardoe at law, but it would have been easy to have framed a suit in equity, with James Capel Croome as plaintiff suing Mr. Pardoe as the administrator of James Fielder Croome. It could have asked for administration of James Fielder Croome's estate and that the money due to Mrs. Croome's estate might be secured. There would be no difficulty about that. Does that carry us far enough? What is said is that the twenty years run after a present right to receive the same shall have accrued to some person capable of giving a discharge. Now, James Capel Croome, one of the executors of Mrs. Croome, could have given a discharge for a share of the residue—a legal discharge to any person who paid it over to one executor. Therefore so far James Capel Croome is a person within the section, but the section is not limited to the capability of giving a discharge, but it extends to the right to receive the same. It seems that the right to receive the same means a right to recover by legal proceedings. A right to receive the same does not mean this, that if the receipt is given it will hold good against all the world. It means that the person who is to give the receipt can maintain legal proceedings in order to establish the right. I cannot conceive that the words can mean anything different from that myself; and that is supported by *Binns* v. *Nichols*. Mr. Ingpen suggests that *Binns* v. *Nichols* is not law now, but I venture to think that in the absence of anything said to the contrary it would be rather strengthened than weakened by subsequent cases. The head-note to *Binns* v. *Nichols* says this: "Where the person liable for the payment of a legacy and the person entitled to receive it are the same no question of limitation under the statute can arise." "Entitled to receive the same" is what the statute calls "the present right to receive the same"—a right, I repeat, which could be established by proceedings at law. Now, James Capel Croome could do what I have said in equity, but when he had recovered judgment, or a decree we should call it in those days, and worked out in the administration the accounts and inquiries, and ascertained what Mrs. Croome's share in James Fielder Croome's estate was, the case would come on for further consideration, and what would have happened? James Capel Croome would have asked for payment to him, and of course Mr. Pardoe would have resisted that, and it would have been such a plain case that it would not have been arguable. James Capel Croome would have no right to recover that as against Mr. Pardoe. They were both executors of Mrs. Croome. James Capel Croome could not have insisted on receiving it himself as against his co-executor; therefore at that time, though he could have done a good deal in the way I have pointed out, he had no present right to receive the legacy in the sense of having a right to recover it by action at law into his own hands. It seems to me, therefore, that the statute did not begin to run in 1864. It is not suggested that it began to run at any other time, and therefore it does not run now.

Solicitors, *C. Sawbridge & Son; Walters & Co.; Peacock & Goddard*, for *Mullings, Ellett & Co.*, Cirencester.

Chan. Div. }
Joyce, J. } Nov. 7, 8; Dec. 6.

ATTORNEY-GENERAL v. NORTH-EASTERN RAILWAY CO. (a.)

Railway company — Amalgamation of undertaking — Water supply—Ultrà vires—*North-Eastern Railway (Hull Docks) Act*, 1893 (56 & 57 *Vict. c. cxcviii.*).

A railway company, its undertaking having been amalgamated with that of a dock company, supplied water to a dock, formerly the property of the dock company, from land acquired by the railway company in respect of its railway undertaking. The amalgamating Act provided that none of the powers relating exclusively to the dock company should apply to any part of the amalgamated undertaking other than the docks, and that none of the powers relating exclusively to the railway company should apply to the dock or to the company in respect thereof.

Held, that the company's action in so supplying water was intrà vires.

This was an action by the Attorney-General at the relation of the Mayor and Corporation of Kingston-upon-Hull, asking for a declaration that it was *ultrà vires* for the defendant company to supply a certain dock at Kingston-upon-Hull with water pumped or otherwise obtained from their land at Hessle, forming part of their railway undertaking, for any purpose connected with the dock, or to sell or supply water so obtained to any tenant of the defendants occupying premises within the dock, or to any ship using the dock, or otherwise to carry on the business of a water company.

Prior to the year 1893 the corporation of Kingston-upon-Hull, who were the owners of waterworks, supplied water to the Hull Docks Co., and in particular to the dock in question, St. Andrew's Dock.

In the year 1893, under the provisions of the North-Eastern Railway (Hull Docks) Act, 1893, the undertaking of the dock company was amalgamated with the defendants' railway undertaking. The defendants thereupon discontinued the supply of water from the corporation waterworks to St. Andrew's Dock and supplied the dock from their pumping station at Hessle.

The facts are fully stated in the considered judgment.

Danckwerts, K.C., and *Parker*, for the plaintiff.—The railway company acquired the land at Hessle for a pumping station to be used for railway purposes. It cannot use it for any other purpose without statutory authority, and there is no such authority. By the amalgamating Act the undertakings of the dock

(a.) Reported by H. WOLCOTT WARNER, Esq., Barrister-at-Law.

company and the railway company are both kept separate. They are in separate compartments and there is no intercommunication so far as powers are concerned: *Attorney-General* v. *Pontypridd Urban District Council*, *ante*, p. 61, [1905] 2 Ch. 441. The supplying of water to the dock is not incidental to or consequent upon the railway undertaking and is *ultrà vires*: *Mulliner* v. *Midland Railway*, 27 W. R. 330, 11 Ch. D. 611; *Attorney-General* v. *Great Eastern Railway*, 28 W. R. 769, 5 A. C. 473; *Attorney-General* v. *London County Council*, [1902] A. C. 165.

Neville, K.C., *Hughes, K.C.*, and *Gutch*, for the defendant company.—A company has power to do whatever is incidental to or consequent upon its undertaking: *Attorney-General* v. *Great Eastern Railway*. Here the powers have been enlarged because the undertaking has been enlarged. What has been done may reasonably be regarded as incidental to or consequent upon the undertaking of the company as it has been enlarged. After amalgamation there is only one undertaking; it is now impossible to treat the undertakings of the dock company and the railway as being separate undertakings.

Danckwerts, K.C., replied.

Cur. adv. vult.

JOYCE, J., read the following judgment: The defendants, the North-Eastern Railway Co., work and maintain lines of railway running from the east along the north bank of the River Humber into the town of Kingston-upon-Hull, where they have stations for passengers and goods respectively. They also own and work various docks, in particular St. Andrew's Dock, which is adjacent to these lines of railway, lying between them and the river. By the side of their lines of railway at Hessle, about a mile to the east of this dock, the defendants have wells and a pumping station, from which they or the railway companies to which they have succeeded have for many years past obtained water for the various purposes of and connected with their railway undertaking. There are and were before the year 1893, the date of the amalgamation Act, to the provisions of which I shall have more particularly to refer hereafter, certain lines of railway within the docks running along the quays and joining the defendant company's railway just outside the dock. Thus the goods (principally fish) landed at the dock, and there loaded upon railway trucks or vans, were carried direct by railway to the various stations more or less distant for which they were destined. The docks before the amalgamation Act were a separate undertaking and belonged to a separate company—namely, the Hull Docks Co. Before the amalgamation the carriage and haulage of goods within the docks, under some arrangement with the docks company, were performed by the railway company in its own trucks by its own locomotives, and it has never been suggested, nor do I think it could be made out, that there was anything *ultrà vires* or improper in this. By the North-Eastern Railway (Hull Docks) Act, 1893, the undertaking of the dock company was amalgamated with the undertaking of the railway company, and it was provided that thenceforward the two undertakings so amalgamated should constitute one undertaking, which should be the undertaking of the North-Eastern Railway Co.—that is, of the defendants—and both undertakings, therefore, subject to the provisions of the Act, may be, and they in fact are, worked as one undertaking. The defendants by means of a pipe or main underneath or along their lines of railway take and convey water from their wells at Hessle to their stations in Hull, and also by a branch pipe from their main, into the dock for all necessary purposes there in connection with the working both of the railway and the dock. A considerable quantity of fresh water is required in the dock for the supply of the hydraulic power for working the dock gates, working the dock bridges, the capstans, and the cranes. It is also used for supplying the boilers operating the steam engines which produce the hydraulic power, and also for the steam cranes, and for the locomotives on the docks, and for heating the fish stage, stores, and offices; there is also a very large quantity of water required for washing down the fish stage and the fish boxes after they are returned, these all being washed before fresh fish is put into them to be sent away, and it is also mentioned that with regard to extinguishing fires they must always be supplied for that purpose and at sufficient pressure.

Now, this is an information by the Attorney-General at and by the relation of the Corporation of Kingston-upon-Hull, who are thereby seeking to compel the defendants to buy from them all the water required at the docks, although the relators are not bound and would not undertake to supply such water, and, indeed, could not be absolutely depended upon to supply as much as may be necessary. The statement of claim asks for "(1) A declaration that it is *ultrà vires* and illegal for the defendants to supply the said dock with water pumped or otherwise obtained from the said land at Hessle forming part of their railway undertaking or to sell or supply water pumped or obtained as aforesaid to any tenants of the defendants occupying premises within the said dock or to any ship using the said dock or otherwise to carry on the business of a water company." As to what I call the second part of the declaration claimed—namely, all included within the words "to carry on the business of a water company"—without going into details, I have come to the conclusion upon the evidence that the defendants are not carrying on the business of a water company or supplying water to any person or for any purpose to or for which the dock company would not, if it still existed, be legally entitled to supply water as the defendant company is now doing. In other words, the claim to what I have called the second part of the declaration asked for cannot, in my opinion, be sustained.

The real question in the action is whether the defendants are entitled to supply their dock with water obtained from their wells at Hessle, which were the property of the North-Eastern Railway Co. before the acquisition by them of the docks and the amalgamation of the two undertakings. But of the water used in the dock some, as I have already mentioned, is required for railway purposes strictly so-called, and obviously, in a sense, all the water that is there supplied and used is required and used at least indirectly for the benefit and increase of the railway traffic and for the public convenience in connection with such traffic, so far at all events as such traffic is from or to the docks—in other words, the fish traffic on the defendants' railway. But on behalf of the Attorney-General it is contended that, although the defendant company may be entitled to purchase from the corporation—or indeed, I suppose, from any other person who has it to sell—all such water as may be required for use in the dock, the defendants are not entitled and it is *ultrà vires* for them to take water from properties originally acquired for their railway and to convey such water by a pipe, or, I suppose, in any other manner, into the dock for use there. The defendants, says the Attorney-General, are not entitled to use any part of their railway property in any manner whatsoever for any purpose of the docks,

such user being altogether *ultrà vires* and illegal. If this be correct, it would logically follow that, if the defendants were to purchase water or electric energy from anyone who might be able and willing to supply it to them at Hessle or anywhere else on their line of railway, it would be illegal and *ultrà vires* to convey or transmit the water or electric energy so purchased by any pipe or wire along or even across their railways into the dock for use there, inasmuch as thereby the defendants would be using for dock purposes a portion of the site of the railway, which no doubt was originally acquired for the purpose of the railway undertaking. This appears to me a somewhat startling contention, having regard to the fact of the amalgamation of the two undertakings. *Primâ facie* I should have thought that the defendants, at their engineering works and at the expense of their united undertaking, might manufacture and repair all machinery and other appliances requisite for the working of the docks, as well as the locomotives and other things used for their railway, and might get electric light for the dock as well as their railway from the same generating station, even though it be the fact that such engineering works or generating station stand upon ground which was formerly the property of the railway company before the amalgamation. Might not the defendants light their railway as well as the dock from the generating station situate together upon land which before the amalgamation was the property of the dock company? Must there now and always be separate sets of engineering works and two generating stations—one to be used exclusively for the railway and the other exclusively for the dock? The dock company, being authorized to make and maintain the dock, might before the amalgamation have used any surface or underground water supply on its property for the necessary purposes of the docks. It might have purchased water anywhere from anyone having it for sale, and had such water conveyed by the railway company to the dock for whatever use a supply of water might be required in the working of the dock undertaking. For whatever may fairly be regarded as incidental to or consequential upon those things which the Legislature has authorized ought not, unless expressly prohibited, to be *ultrà vires*. Moreover, any mode of enjoying a company's own land is impliedly permitted if it be not inconsistent with the provisions of the company's Acts and is not an infringement of the rights of other persons. There is no suggestion that the defendants are by what they are doing infringing the rights of anyone. Are they transgressing any statutory prohibition? If they are it is some prohibition contained in the North-Eastern Railway (Hull Docks) Act, 1893. That is an Act whereby, after reciting that the dock company are the owners of an extensive system of docks, basins, wharves, sheds, railways or tramways, warehouses, offices and other buildings, works, and appliances, and of a considerable quantity of land and other property at and near to Hull, and whereas the North-Eastern Railway Co.—that is, the defendants—are owners of the railway by means whereof railway access is afforded to and from the estate of the dock company, and whereas it is expedient—which I understand to mean expedient in the public interest—that the undertakings of the railway company and the dock company should be united and that those companies should be amalgamated upon the terms and conditions in this Act contained, then section 4 provides: "As on and from the 1st of July, 1893, and subject to the provisions of this Act, the dock company shall be and is hereby dissolved, and the undertaking of the dock company is hereby as from the date of the amalgamation amalgamated with the undertaking of the railway company, and thenceforward all undertakings so amalgamated shall constitute one undertaking, which shall be the undertaking of the company." In my opinion, it follows that the one undertaking may and shall be worked as such, subject, of course, to the provisions of the Act. But counsel for the Attorney-General rely upon the seventh section of this Act and the first and fourth sub-sections of such section, which provide as follows: "(i.) Notwithstanding the amalgamation, none of the provisions of the Acts relating to the dock company which, if the amalgamation had not taken place, would have applied exclusively to the undertaking of the dock company or to the dock company in respect thereof shall apply to any portion of the undertaking of the railway company other than the dock undertaking or to the railway company in respect thereof"; and "(iv.) None of the provisions relating to the railway company which, if the amalgamation had not taken place, would have applied exclusively to the railway undertaking shall apply to the dock or the company in respect thereof."

Now in the case of each of these companies there is a very large volume of Acts of Parliament, and I do not pretend to be able to explain and define completely the meaning of these sub-sections 1 and 4 of section 7, but at all events it has not been pointed out to me, and I have not been able to discover, how the defendants are precluded from doing what they are doing by reason of the non-application to any portion of the amalgamated undertaking other than the dock of any of the provisions of the dock Acts, which, before the amalgamation, applied exclusively to the dock undertaking, or the defendant company in respect thereof. Similarly it has not been pointed out to me, and I have not been able to discover, how the defendants are precluded from doing what they are doing by reason of the non-application to the dock undertaking or the defendant company in respect thereof of the provisions of the railway Acts which, before the amalgamation, applied exclusively to the railway and the traffic thereon. The defendants might and must have fresh water at the dock not only for strictly railway purposes, but for the working of the dock. The defendants might undoubtedly purchase water at Hessle or anywhere else on their line of railway from any adjoining landowner, or other person, or company, that had water to sell, and might then convey such water in tanks upon railway trucks down into the dock for consumption there. If they might convey such water in tanks, why not more conveniently and at less expense by a pipe or pipes into the dock? If at Hessle or any other place the defendants have a supply of water of their own, either upon the surface or underground, amply sufficient both for strictly railway purposes and for the dock, why may they not convey such water either by tanks carried on wheels or by pipes on their own property into the dock for all necessary purposes there? They have such a supply at Hessle, and I fail to see how what they are doing is *ultrà vires* or illegal. Consequently, in my opinion, this action fails, and must be dismissed, with costs.

Solicitors for the plaintiff, *Sharpe, Parker, Pritchards, & Co.*

Solicitor for the defendant company, *Kay Butterworth.*

K. B. Div.
(Lord Alverstone, L.C.J., and Kennedy and Jelf, JJ.) June 27, 1905.

GEISSE *v.* TAYLOR & HARTLAND.
TAYLOR & HARTLAND (LIMITED), *Garnishees.*
WESTON, *Claimant.* (*a.*)

Practice—Attachment of debts—Garnishee order—Execution—Rights of garnishor—Garnishee company—Debenture-holder—Priorities—Rules of Supreme Court, 1883, *ord.* 45; *Part I., App. K., Form* 39.

On an interpleader issue to try the right to the goods seized as between the garnishor and a debenture-holder,

Held, that a garnishee order did not give the garnishor any legal or equitable right in the property of a company in priority to a debenture-holder, who had given valuable consideration for the debenture, where the inference to be drawn from the facts was that the claimant had obtained the debenture simply to secure the amount of his loan without any intention to benefit the garnishees or to collude with them in any way, and therefore that the debenture-holder was entitled to succeed in the issue.

Appeal from a decision of the judge of the Bristol County Court in an interpleader issue remitted from the High Court for trial.

On the 13th of July, 1904, the plaintiff Geisse obtained judgment in an action in the High Court against the defendants, Taylor & Hartland, for a sum of money and costs.

In January, 1905, a limited company, Taylor & Hartland (Limited), owed the defendants a sum of money, and on the 16th of January the plaintiff obtained, under ord. 45, r. 1, of the Rules of the Supreme Court, a garnishee order *nisi* against the company attaching debts due from the company to the defendants' firm.

This order followed Form No. 39 in Appendix K, Part I., of the Appendices to the Rules of the Supreme Court, and ordered that all debts owing or accruing due from the garnishees to the judgment debtors be attached to answer the judgment recovered against the judgment debtors by the judgment creditor in the High Court action.

The order *nisi* was duly served on the company, and on the 2nd of February was made absolute, and the order absolute was sent to the company.

On the 3rd of February the company borrowed from the claimant Weston the sum of £250, and on the same day a debenture was issued by the company to Weston covering all the property and assets of the company. When the debenture was given both Weston and the company knew that the garnishee order absolute had been obtained, and that an execution would be put in forthwith to enforce it.

On the 8th of February execution was levied at the business premises of the company, and thereupon Weston claimed the goods taken by the sheriff, and appointed a receiver under powers conferred on him by the debenture. Subsequently Weston, under an order of the court, paid £38 to the sheriff, the value of the goods seized.

The sheriff then withdrew and paid the £38 into court, and this issue was directed to try the right to the sum paid in as between the judgment creditor and the claimant.

The county court judge held that the debenture was not void within the meaning of 13 Eliz. c. 5, and that the effect of the garnishee order absolute was not to give something in the nature of a charge on the property of the garnishees which prevented them from disposing of their goods, and that the garnishees had power to mortgage their goods by means of the debenture notwithstanding that at the time when they gave it a garnishee order absolute had been made against them.

He therefore gave judgment for the claimant.

The judgment creditor appealed.

R. V. Bankes, for the judgment creditor.—It is submitted first that the debenture is void under the statute of Elizabeth as being a fraudulent arrangement whereby the company were enabled to hinder, defeat, delay, or defraud their judgment creditor Geisse. Secondly, a garnishee order must be a charge of some kind, legal or equitable, upon the property of the garnishee. Equitable rights are clearly recognized in interpleader proceedings: *Jennings* v. *Mather*, 49 W. R. 495, [1901] 1 K. B. 108. A garnishee order obtained under ord. 45, r. 1, effects a charge upon the company's property that takes priority to the debenture: *Emanuel* v. *Bridger*, 22 W. R. 404, (1874) L. R. 9 Q. B. 286; *Ex parte Joselyne*, 26 W. R. 645, (1878) 8 Ch. D. 327. The learned judge in the court below thought that those two decisions no longer applied because of section 45 of the Bankruptcy Act, 1883, which puts an end to questions which formerly arose under the Bankruptcy Act, 1869, as to the right of an execution creditor to prove as a secured creditor, but Wright, J., held otherwise in *In re National United Corporation*, [1901] 1 Ch. 950, 49 W. R. Dig. 36. In the case of *In re Stanhope Silkstone Collieries Co.*, (1879) 27 W. R. 561, 11 Ch. D. 160, the Court of Appeal held that the creditor was not a secured creditor at the commencement of the winding up, but they intimated that if the garnishee order *nisi* had been served before the winding up, his debt would have been secured.

He also cited *In re General Horticultural Co., Ex parte Whitehouse*, 34 W. R. 681, (1886) 32 Ch. D. 512; *Robson* v. *Smith*, 43 W. R. 632, [1895] 2 Ch. 118; and *In re Roundwood Colliery Co., Lee* v. *Roundwood Colliery Co.*, 45 W. R. 324, [1897] 1 Ch. 373.

Roskill, K.C. (*F. E. Weatherly* and *E. Layman* with him), for the claimant.—On the first point the county court judge found that there was no fraud or collusion to bring the case within the statute of Elizabeth, and there being evidence on which he could arrive of that conclusion of fact, his decision cannot be reviewed. As to the second point, a garnishee order creates no charge upon the goods or property of the garnishee. It does not place him in so high a position as a judgment creditor. For instance, it gives him no right to petition for the winding up of a company who are garnishees: *In re Combined Weighing and Advertising Machine Co.*, 38 W. R. 67, (1889) 43 Ch. D. 99. [Per KENNEDY, J.—That decision appears to have been doubted by Romer, L.J., in *Pritchett* v. *English and Colonial Syndicate*, 47 W. R. 577, [1899] 2 Q. B. 428.] It is not a final order within section 4 of the Bankruptcy Act, 1883, and the judgment creditor who has obtained the order cannot issue a bankruptcy notice on it and make the garnishee a bankrupt. *Ex parte Chinery*, 32 W. R. 469, (1884) 12 Q. B. D. 342. The county court judge was right in holding that the cases of *Emanuel* v. *Bridger*, 22 W. R. 404, L. R. 9 Q. B. 286, and *Ex parte Joselyne*, 26 W. R. 645, 8 Ch. D. 327, have no application here, for the question there was only whether the garnishee orders affected a "charge" within the meaning of the Bankruptcy Acts so as to make the garnishors secured creditors.

R. V. Bankes replied.

Lord ALVERSTONE, L.C.J., after stating the facts, said: I accept Mr. Bankes' argument that upon the garnishee order being made absolute and served upon

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

the company, the garnishees, they were bound to respect that order, and possibly might have been guilty of contempt of court if they did not. That is the result of *Rogers* v. *Whiteley*, [1892] A. C. 118, 40 W. R. Dig. 184. Mr. Bankes' first point was that the debenture was void as being a fraudulent arrangement to hinder or defraud their judgment creditor Geisse. But the county court judge has found as a fact, that was not the case, and we must take it that a sum of money was advanced to the company by the claimant by way of loan secured by the debenture without any fraud or collusion on either side. Therefore the garnishees were entitled to issue the debenture without committing any breach of their duty under the garnishee order.

The second point taken for the garnishor was that the garnishee order absolute served upon the company gave him some kind of legal or equitable charge upon the property of the company which prevented the claimant from exercising his rights under the debenture. But it cannot reasonably be contended that a person who issues execution under rule 3 of order 45 can thereby place himself in any higher position than any other execution creditor of the garnishee who has issued execution either before or after the garnishor. It cannot be said that the position of a person who has obtained a garnishee order is analogous to that of an ordinary creditor or judgment creditor. The Court of Appeal in *In re Combined Weighing and Advertising Machine Co.* decided that a garnishee order cannot be made the ground for a petition to wind up a company, and it was held in *Ex parte Chinery* that a bankruptcy notice could not be founded upon it. It is true that in *Ex parte Joselyne* James, L.J., said: "The moment the order of attachment was served on the garnishee the property in the debt due from him was absolutely transferred from the judgment debtor to the judgment creditor"; but that must be taken in conjunction with what Cotton, L.J., said in the same case—that as against the judgment debtor the garnishee order *nisi* was a final and complete order transferring at once "the right to receive the money which might be due" from the garnishee to the judgment debtor. In *Rogers* v. *Whiteley* Lord Halsbury, L.C., said: "The order attaches all debts—that is to say, all the money which Mr. Whiteley could be called upon to pay away, although more than the amount sufficient to satisfy the particular debt in question." The position of the garnishor in respect of the garnishee is different from that of an ordinary creditor or judgment creditor. The provisions of ord. 45, r. 3, enable him to obtain the issue of execution in aid of his rights under the garnishee order; execution is only a mode of enforcing the duty which the garnishee owes to the garnishor under the order. If I am right the act of the garnishees here in obtaining, in their own interest and *bonâ fide*, an advance upon the debenture was valid and effectual, and the garnishor could not give himself priority by the issue of his writ of *fi. fa.* Unless the decisions establish that a garnishor is in a better position than an ordinary creditor, I cannot say that the garnishee's hands are so tied that he cannot deal with the assets, even though those assets might in certain events be made available for the payment of the garnished debt. Mr. Bankes' argument seems to concede that in order to succeed he must put the garnishor in a better position. In my opinion it is impossible to put the claim of the garnishor in a higher position than the debt of an ordinary judgment creditor, and that, I think, was the ground of the learned county court judge's judgment.

I desire to add that, in my opinion, Mr. Bankes was right in his criticism of that part of the judgment dealing with the effect of the Bankruptcy Act, 1883.

My judgment is therefore for the claimant.

KENNEDY, J.—I have nothing to add to what my lord has said with respect to the point taken under the statute of Elizabeth. On the other point I have felt during the argument a doubt, and it is this: whatever may be the correct legal phrase to describe the position of a person who is a garnishor under the code relating to these proceedings, and accepting the decisions that he cannot properly found a bankruptcy notice upon the garnishee order or present a petition to wind up a garnishee company upon it, whether, having proceeded under the code and got a garnishee order absolute and served it upon the garnishee, he is after all in no better position, inasmuch as the garnishee may divest himself of the whole of the property which would enable him to obey the order of the court and so make that order wholly ineffective. I am not prepared to differ from the county court judge, because in the authorities cited to us it has been said that the only effect of a garnishee order is to attach the debt. But it is the fact that a debenture was here given to the claimant, who had full notice of the garnishee order, which purported to be a charge upon all the property of the garnishees available for paying the debt due to the garnishor. When the execution was put in and the sheriff levied, the garnishor was met with this debenture for £250. If this debenture has priority admittedly nothing would be left with which to pay the debt. I have hesitated as to whether some equitable right at least had not been gained by the garnishor under his order entitling him to say that in determining priorities he ought to come in first. It is not disputed that equitable rights are to be recognized in interpleader proceedings. I am not, however, prepared to say that the county court judge was wrong, having regard to the language of the House of Lords in *Rogers* v. *Whiteley* and of the Court of Appeal in *In re Combined Weighing and Advertising Machine Co.*, citing *Chatterton* v. *Watney*, and the strong opinion of my lord upon the question before us.

JELF, J.—I agree with the judgment of my lord for the reasons which he has given.

Judgment for the claimant.

Solicitor for the judgment creditor, *Henry Boustred.*

Solicitors for the claimant, *Busk, Mellor, & Co.*, for *Weston*, Bristol.

K. B. Div.
(Kennedy and Ridley, JJ.) } May 26, 1905.

GRUNNELL v. WELCH. (a.)

Landlord and tenant—Illegal distress—Trespass ab initio *—Right of landlord to make fresh levy.*

A landlord levied a distress for rent. The bailiff illegally entered the house by breaking the chain of the front door and seized furniture belonging to the plaintiff. After remaining in possession some days he went out, was refused re-admission, and made no attempt to re-enter. Subsequently the landlord levied a fresh distress for the same rent, whereupon the plaintiff brought an action for replevin against him.

Held, following Attack v. Bramwell, 3 *B. & S.* 220, *that the second distress was justified, as the first distress was wholly void and a trespass* ab initio.

(a.) Reported by ALAN HOGG, Esq., Barrister-at-Law.

Appeal from a judgment of the judge of the Waltham County Court.

The plaintiff was the wife of a tenant of a house which had been let to her husband by the defendant.

At Midsummer, 1904, two quarters' rent were in arrears, and on the 19th of July the landlord put in a distress.

The bailiff entered the house by forcibly breaking the chain of the front door, and seized furniture which admittedly belonged to the plaintiff.

The bailiff remained in possession eleven days, on which day he left the house for two hours, was refused re-admission, and made no attempt to return.

On the 5th of August a fresh distress for the same rent was levied by a different bailiff under a fresh warrant, and goods were seized which were to some extent different from those seized on the previous occasion.

The goods were removed and advertised for sale, whereupon the plaintiff took the necessary steps to replevy her goods, and in due course brought the present action of replevin in the county court.

Before the replevin became effectual the plaintiff and her husband had brought an action in the High Court against the defendant, in which they claimed damages in respect of the illegal entry on the 19th of July, and the plaintiff had brought a further action in the High Court in which she claimed the restoration of the goods seized on the 5th of August, together with an injunction against the defendant selling or dealing with them. These actions, however, were abandoned after the present action of replevin had been brought.

The county court judge held that the first proceeding was, upon the authority of *Attack* v. *Bramwell*, 3 B. & S. 220, a trespass *ab initio* and void as a distress, and that the subsequent distress for the same rent was lawful.

The plaintiff appealed.

Foà, for the plaintiff.—The learned judge has misapplied *Attack* v. *Bramwell*. Cockburn, C.J., held in that case that the illegal entry of the bailiff constituted a trespass *ab initio*, and that defendant's right in distress was beside the question as he had not availed himself of it. He held that the distress was no justification for the seizure, not that the distress was wholly void. In the present case the plaintiff's goods were taken out of the possession of the plaintiff, and there was a fully completed distress, after which the plaintiff could not retake the goods without being guilty of pound breach: 3 Black. Com., p. 12; Gilbert on Distress, p. 61. Secondly, if the first distress were void the defendant is here seeking to take advantage of his own wrong: see *In re Hallett's Estate*, 13 Ch. D. 696.

Morton Smith, for the defendant.—The case is covered by *Attack* v. *Bramwell*. The real question is, had the landlord a fair opportunity of working out the first distress, and it is submitted that the illegal seizure was not such an opportunity: *Dawson* v. *Cropp*, 1 C. B. 961, and *Bagge* v. *Mawby*, 8 Ex. 641.

Foà replied.

KENNEDY, J.—In my opinion the decision of the county court judge was right and must be affirmed. It is contended by the plaintiff that there ought not to have been what may be styled a second distress upon her goods because one had already been levied. The question is a short one: Was the first proceeding a distress? In my opinion it was not. The county court judge relied upon *Attack* v. *Bramwell* as showing that the first distress was wholly void; and even looking at the question wholly apart from authority, I cannot see why there should not be what I call for brevity a second distress in the present case. Distress is a special remedy for the protection of landlords, and clearly a landlord cannot levy twice for the same rent. If he levies for too small a sum it is his own fault, and he cannot repair it by a second levy. And if anything is done by the landlord after levying by which, when he has the opportunity of rendering the distress fruitful, he surrenders or forbears to exercise his power of doing so, he cannot distrain a second time. What happened in the present case was that the first proceeding was simply a trespass, an illegality, and void *ab initio*; it was an actionable trespass, and an action of trespass has in fact been brought in respect of the act of the bailiff in wrongfully breaking into the house under colour of the distress warrant. The question really is, Was the first proceeding a distress? That is, was it a proceeding in which the landlord would have got what he got by the second proceeding? That is the way in which the pleader puts it in *Dawson* v. *Cropp*. In that case there had been a levy which was not carried through, but was abandoned by the landlord for reasons which the court held not to be good, and the court had to consider whether the proceeding on the part of the landlord amounted to a voluntary surrender of his rights under the levy. The pleadings are given in the judgment of Tindal, C.J., upon which it appears that the replication of the plaintiff was (omitting immaterial portions) that the "defendant took and distrained various goods and chattels of the plaintiffs other than those in the last count mentioned as a distress for the said arrears of rent, and of sufficient value to satisfy the said arrears of rent, and the defendant then could and might and ought to have fully satisfied and paid the said arrears of rent and the costs, &c., out of and with the said goods and chattels; yet the defendant wrongfully and vexatiously, and without any cause or excuse refused and neglected to do so. . . ." Could such a plea have been pleaded in the present case? I am clearly of opinion it could not. When the landlord became aware that the bailiff was a trespasser it was clearly his duty to put an end to the situation, and it was also to his interest to do so, for by continuing the trespass he was rendering himself liable for damages; but as it turned out the tenant prevented the landlord from acting by shutting out the bailiff and refusing to re-admit him to the premises. It is quite clear that the landlord could not have satisfied the arrears of rent out of the property seized under the proceedings which had been called a distress. The whole foundation of a plea that there has been a prior distress lies in the fact that the landlord has already exercised his rights by taking proceedings which might and would have given him all that he was vexatiously seeking to get by the second proceedings. But there is nothing in the present case which could be successfully pleaded as a voluntary act on the part of the landlord amounting to a withdrawal from the completion of a distress which would, if persisted in, have given him all that he sought to obtain by means of the second proceeding.

Then it was contended for the plaintiff that, assuming that the first proceeding was a trespass and was void within the principle of the decision in *Attack* v. *Bramwell*, the defendant was estopped from setting up such a defence, and thereby taking advantage of his own wrong, and a passage as to the doctrine of estoppel was cited from the judgment of Jessel, M.R., in *In re Hallett's Estate*. But in my opinion the defence of estoppel has no foundation in the facts of the present case upon which it can properly be based. Rent was admittedly due from the plaintiff, and the defendant levied a distress for that rent. It is contended that he had no right to do so because he had

previously distrained in respect of it. It is the tenant who is setting up the previous proceeding, and I do not see how any principle of estoppel can be invoked to prevent the landlord from saying that the illegal act of his bailiff cannot be set up as a prior distress, and that the plaintiff's right was to treat it, as in fact it was treated by the plaintiff, as a trespass. I think that the defendant is entitled to our judgment.

RIDLEY, J.—I am of the same opinion. The principles upon which a second distress is not allowed are fully discussed in *Bagge* v. *Mawby* and *Dawson* v. *Cropp*. In the former case Parke, B., said: "There is nothing more clear than this, that a person cannot distrain twice for the same rent, for if he has the opportunity of levying the amount of the first distress it is vexatious in him to levy the second, unless there be some legal ground for his adopting such a course, as, for example, in the instance put by Lord Mansfield, C.J., in the case referred to in the argument, *Hutchins* v. *Chambers*, 1 Burr. 789. But if there is a fair opportunity, and there is no lawful or legal cause why he should not work out the payment of the rent by reason of the first distress, his duty is to work it out by the first distress, and he cannot distrain again." How is the principle there enunciated to be applied to the facts of this case. The first distress was illegal because it was a trespass, and it follows from the decision in *Attack* v. *Bramwell* that, being a trespass, it was void *ab initio*. It is impossible to treat the language used in the judgment in that case as amounting merely to a *dictum*; there is the most definite statement in the judgment of Cockburn, C.J., that the distress was altogether void and the entry on the plaintiff's premises and seizure of his goods a trespass *ab initio*. If that is the true doctrine, how does it apply to a case where the first so-called distress is altogether void and the landlord seeks to confirm his rights by distraining again. I think it clear that in the present case the landlord had no opportunity of making the first distress effective; he had no means of doing that which in *Bagge* v. *Mawby* it was said to be his duty to do—that is, to work out the payment of the rent by the first distress; he could not do so legally, for he was not in the position of a distrainer at all. It has been contended that he had had the opportunity because he employed a bailiff; but that is not the sense in which the expression has been used. It may be true in a sense that an opportunity once presented itself to the landlord, by which one phrase in the judgment of Parke, B., might be satisfied; but if we take the concluding words of the same sentence it is perfectly obvious that the defendant could not have worked out the payment of the rent by reason of the original distress. When Parke, B., used the expression "if there is a fair opportunity," he obviously meant to refer to a state of circumstances in which, during the distress, the landlord has an opportunity of working out the amount of the rent by the machinery of the distress. Here the landlord had no such opportunity. For these reasons I think the decision in *Attack* v. *Bramwell* really governs this case. Then it is contended for the plaintiff that there was an impounding of the goods by the broker as the landlord's agent, and that during the continuance of that impounding the plaintiff could not take his goods out of the custody of the law. But the doctrine there invoked had its origin in the prevention of a breach of the peace, and it cannot compel us to hold that the first proceeding, which was a trespass *ab inito*, was equivalent to an actual distress. And it is further said that the defendant is estopped from taking advantage of his own wrong; but I agree with my brother Kennedy that that principle has no application to the case.

Appeal dismissed; leave to appeal.

Solicitors for the plaintiff, *Lumley & Lumley*.

Solicitors for the defendant, *Avery & Son*.

C. C. R.
(Lord Alverstone, L.C.J., and Wills, Kennedy, Channell, and Bucknill, JJ.) Oct. 24.

REX v. VASEY AND LALLY. (a.)

Criminal law—Fisheries—Construction of statutes—Malicious Injuries to Property Act, 1861 (24 & 25 *Vict. c.* 97), *s.* 32—*Salmon Fishery Act*, 1873 (36 & 37 *Vict. c.* 71), *s.* 13.

By section 32 *of the Malicious Injuries to Property Act*, 1861, *as amended by section* 13 *of the Salmon Fishery Act*, 1873, *it is an offence to unlawfully and maliciously put lime or any other noxious substance into a salmon river with the intention of destroying fish, notwithstanding that the language of the section of the amending Act cannot be read grammatically with that of the principal Act; the duty of the court, in such cases, being to give effect to the intention of the Legislature.*

Case stated for the opinion of the Court for Crown Cases Reserved by Grantham, J.:

"John Thomas Vasey and Joseph Lally were convicted before me at the Midsummer Assizes, 1905, for the county of Durham, upon an indictment under 24 & 25 Vict c. 97, s. 32, and 36 & 37 Vict. c. 71, s. 13, charging them with having, on the 18th of June, 1905, at the parish of Walsingham, in the county of Durham, unlawfully and maliciously put a quantity of lime into Bradley Burn, a tributary of a certain salmon river called the River Wear there situate, with intent thereby to destoy the fish then being in the said tributary of the said salmon river.

"Judgment was postponed, and the prisoners were discharged upon their own recognizances of bail to appear and receive judgment when called upon.

"All the facts necessary to support this indictment were proved, but a question was raised as to the effect of the sections under which the indictment was laid.

"Those sections are in the terms following—24 & 25 Vict. c. 97 (Malicious Injury to Property Act, 1861), s. 32: 'Whosoever shall unlawfully and maliciously cut through, break down, or otherwise destroy the dam, floodgate, or sluice of any fish-pond or of any water which shall be private property or in which there shall be any private right of fishery, with intent thereby to take or destroy any of the fish in such pond or water or so as thereby to cause the loss or destruction of any of the fish, or shall unlawfully or maliciously put any lime or other noxious material in any such pond or water with intent thereby to destroy any of the fish that may then or that may thereafter be put therein, or shall unlawfully or maliciously cut through, break down, or otherwise destroy the dam or floodgate of any mill-pond, reservoir, or pool shall be guilty of a misdemeanour, and being convicted thereof shall be liable at the discretion of the court to be kept in penal servitude for any term not exceeding seven years and not less than three years, or to be imprisoned for any term not exceeding two

(a.) Reported by ALAN HOGG, Esq., Barrister-at-Law.

years with or without hard labour and with or without solitary confinement, and if a male under the age of sixteen years with or without whipping.' 36 & 37 Vict. c. 71, s. 13: 'The provisions of the 32nd section of the Malicious Injuries to Property Act so far as they relate to poisoning any water with intent to kill or destroy fish shall be extended and apply to salmon rivers as if the words 'or in any salmon river' were inserted in the section in lieu of the words 'private rights of fishery,' after the words 'noxious material in any such pond or water.'

"The question for the decision of the court is whether having regard to the apparent inconsistency of its language the later section is effective to extend the provisions of the former section to salmon rivers, for although there is no doubt as to the object of the section, it seems impossible to make the section of the amended Act read grammatically when altered as directed by the amended section."

Mitchell-Innes, for the prosecution.—This section cannot obviously be read literally, and it is suggested that the simplest course is to construe section 13 of the Salmon Fishery Act, 1873, as if did not contain the words "in lieu of the words 'private rights of fishery.'" It is submitted that where the intention of the Act is clear, effect should be given to that intention by the court. Here the draftsman has made nonsense of the section, and the section should be so construed as to give effect to the manifest intention of the Legislature: *Salmon* v. *Duncombe*, 11 App. Cas. 627; *Curtis* v. *Stovin*, 22 Q. B. D. 613; *Stone* v. *Corporation of Yeovil*, 25 W. R. 240, 1 C. P. D. 673.

No counsel appeared on behalf of the prisoner.

Lord ALVERSTONE, L.C.J.—After the clear argument on behalf of the prosecution I have no doubt that effect ought to be given to the principle which he has referred to, and which is to be found in the authorities he has cited to us. If, however, the effect of strictly following the words of the statute were that a limited application would be given to section 32 of the Act of 1861, we should be bound to apply the Act in its strict meaning. But Mr. Mitchell-Innes has called our attention to a passage in Maxwell's Interpretation of Statutes (3rd ed., p. 319), which has been referred to. The language is: "Where the language of a statute in its ordinary meaning and grammatical construction leads to a manifest contradiction of the apparent purpose of the enactment or to some inconvenience or absurdity, hardship, or injustice, presumably not intended, a construction may be put upon it which modifies the meaning of the words and even the construction of the sentence," and in support of that statement a series of authorities are given extending over a period of fifty or sixty years. Further, in *Salmon* v. *Duncombe* Lord Hobhouse after referring to the general proposition that when the object of a statute is clear it is not to be reduced to a nullity by the draftsman's unskilfulness or ignorance of law, says: "If such a construction left a substantial operative effect to the enactment it might be necessary to answer that question in the affirmative, but as it destroys the expressed objects altogether unless the word 'resident' be construed to mean 'domiciled,' and in that case destroys the expressed objects so far as regards real property, their lordships answer it in the negative." In the present case we have to see whether or not section 13 of the Act of 1873 requires to be modified in consequence of its effect being reduced to a nullity if what I call the literal directions are followed. Now, the object of the section is abundantly plain. The provisions of section 32 of the Act of 1861 so far as they relate to the poisoning of any water with intent to kill or destroy the fish are intended to be extended and applied to salmon rivers and therefore it is quite plain that the object of the Act of 1873 is stated on the face of section 13 of that Act, and it was to prevent the destruction of property in salmon rivers by the very grave and serious act of putting poison in the water. Then in order to mark it out the draftsman has added the words "as if the words 'or in any salmon river' were inserted in the said section in lieu of the words 'private rights of fishery.'" I think that in all probability the language of the amending section was adopted in consequence of the draftsman forgetting that "private rights of fishery" was not the description of the class or the ambit of the property to which the previous section applied, but was only the end of a sentence which begins with the words "destroy the dam, floodgate, or sluice of any fish-pond or of any water which shall be private property or in which there shall be any private right of fishery with intent thereby to take or destroy any of the fish in such pond or water, or so as thereby to cause the loss or destruction of any of the fish, or shall unlawfully and maliciously put any lime or other noxious material in any such pond or water." The draftsman has obviously forgotten that the words "private rights of fishery" were not words of description of the property which was protected by section 32 of the Act of 1861, and I have no doubt that the words "in lieu of the words 'private rights of fishery'" are merely meant to indicate salmon rivers in the place of the property which comes within the ambit of that previous section. That intention is made abundantly clear because the place in which the words "salmon rivers" are to be added is to be after the words "noxious material in any such pond or water," and if regard is had to the intention of the direction as to the words "or any salmon river" being inserted in lieu of the words "private rights of fishery," and the words "or in any salmon river" are inserted after the words "any such pond or water," section 32 of the Act of 1861 so amended reads perfectly well. I therefore think that this case is an instance involving the principle recognized in those authorities where it has been held that the manifest intention of a statute must not be defeated by a too literal construction of its precise terms. Whether the words "in lieu of the words 'private rights of fishery'" are to be disregarded as merely indicating that the salmon river is to take the place of the other rights of property that were protected; or whether the word "such" is to be taken to import the previous description, "fish-pond or of any water which shall be private property or in which there shall be any private right of fishery," so that in one sense there may be a substitution of a salmon river for a property so described under the words "such pond," the same result is arrived at.

In my opinion, the intention of the statute being that which I have alluded to, it would reduce the effect of a very important amendment for the protection of property to nothing, if we were to hold that there could be no conviction in consequence of this special provision; and I think, therefore, this conviction must be affirmed.

WILLS, J., concurred.

KENNEDY, J.—I am of the same opinion.

CHANNELL, J.—I agree. *Qui hæret in litera hæret in cortice* is exactly applicable.

BUCKNILL, J.—I agree.

Solicitors, *Belfrage & Co.*, for *Halcro & Raine*, Sunderland.

Prob. Div. & Adm. Div.
Divorce.
(Bargrave Deane, J.)

Dec. 11.

DODSON v. DODSON. (a.)

Divorce—Adultery of petitioner—Discretion of court—20 & 21 Vict. c. 85, s. 31.

The petitioner was an actress, and was at the time of her marriage sixteen years old and an orphan. The respondent seduced her and afterwards married her; he took her to various places and compelled her to obtain money by prostitution, he taking the money and ill-treating her. After about two years she ran away, and while away occasionally obtained money by prostitution, as she was destitute.

The Court held that the facts of the case justified it in pronouncing a decree in the petitioner's favour, notwithstanding her adultery.

Maria Kate Dodson prayed for a dissolution of her marriage with Christopher George Frederick Dodson under the following circumstances. The case was undefended.

The petitioner was married to the respondent on the 4th of April, 1899, at the district registry, Southwark, and there were no children of the marriage. The petitioner was about seventeen years old at the time of her marriage and was an orphan, her father having died when she was twelve and her mother when she (the petitioner) was fifteen. She was left practically unprovided for and was without friends and endeavoured to support herself by the stage. After her mother's death the petitioner was adopted by a friend, a Miss Murray, who was also an actress, and she lived with her until April, 1899. The two were residing in a lodging-house, but during Miss Murray's absence on tour for a few days the son of the lodging-house keeper (the respondent) seduced the petitioner and afterwards married her.

He then took her to live at an immoral house, took her to the Royal Aquarium, and told her she must earn money by prostitution, while he passed himself off as her brother. He gave up his work and compelled her to hand over the money she obtained by prostitution. He ill-treated, thrashed, and bullied her and terrorized her into the life that she led.

In 1901 she ran away from her husband, and occasionally earned money by prostitution from sheer destitution.

She had no relations of her own, but again came across Miss Murray, who again befriended her, and with whom she had since been living a perfectly respectable life.

She had ascertained that the respondent was committing adultery with a girl named Lilly Coombs, and the petitioner asked that the court should exercise its discretion in her favour and grant a decree on the ground of the respondent's cruelty and adultery.

Barnard, K.C., and *Randolph*, for the petitioner.

BARGRAVE DEANE, J.—His lordship said he was satisfied that the case of adultery and cruelty had been made out against the respondent. It was a horrible story, but it was clear to him that the petitioner's adultery was the direct result of the respondent's gross and depraved conduct. With regard to the wife's acts of prostitution after she had left her husband, she said it was the result of destitution. He (the learned judge) thought that that also was attributable to the husband's own conduct, and he should grant the petitioner a decree *nisi*.

Solicitor, *Arthur Newton*.

(a.) Reported by GWYNNE HALL, Esq., Barrister-at-Law.

Prob. Div. & Adm. Div.
Divorce.
(Bargrave Deane, J.)

June 22; July 3, 1905.

SMITH v. SMITH. (a.)

Divorce—Desertion—Summary Jurisdiction (Married Women) Act, 1895, s. 5—Matrimonial Causes Act, 1857, s. 27.

The Court held that the provisions of the Summary Jurisdiction (Married Women) Act, 1895, with regard to desertion do not oust the jurisdiction of the Divorce Court with regard to desertion, and hence the matrimonial offence of desertion under the Matrimonial Causes Act, 1857, may be committed notwithstanding the existence of a separation order made under section 5 of the Summary Jurisdiction Act.

On the 25th of November, 1896, the parties were married, and in January, 1899, the husband refused to cohabit with his wife.

On the 5th of March of that year the wife obtained a separation order under the Summary Jurisdiction (Married Women) Act, 1895.

In February, 1905, the husband wrote to his wife saying that for some years past he had been "walking out" with a girl and that she was about to be confined. The wife then petitioned for a dissolution of her marriage on the ground of adultery and desertion, and the question raised for the consideration of the court was whether the respondent had been guilty of desertion within the meaning of section 27 of the Matrimonial Causes Act, 1857, inasmuch as the wife had obtained a separation order which was subsisting.

Bayford, for the petitioner, referred to *Kay* v. *Kay*, [1904] P. 382, 53 W. R. Dig. 49.

BARGRAVE DEANE, J., in delivering judgment, said that the point to be decided was a very important one. The original order of the magistrates—and this was material to the case—did not find, in terms, that the husband had deserted the wife, although they had ordered him to pay her an allowance, having found that he neglected to provide for her. The order had been made under section 4 of the Summary Jurisdiction (Married Women) Act, 1895, and had the effect of a judicial separation granted, not on the ground of desertion, but on that of neglect to maintain. Since the 5th of March, 1897, the date of that order, the respondent had occasionally neglected to pay the allowance, and on one occasion had gone to prison for omitting to do so, the petitioner being all the time ready and willing to resume cohabitation while the order remained in force. The respondent, however, simply kept aloof until 1901, when he took up with another woman, so that between March, 1897, and the latter date the petitioner had no ground of complaint outside the matters that had been dealt with on the magistrates' order. A judicial separation could not be granted for neglect to maintain in this court, but could for desertion, but that desertion must continue for two years. What, therefore, was the position? Could it be said that the Act of 1895 conferred upon the magistrates the power to grant a judicial separation for a desertion of two months? He did not think it possible that the jurisdiction of this court had been extended in that direction by the Act. He had therefore decided to take no cognizance of the desertion complained of by the petitioner in March, 1897. The order made said that it had the effect of a judicial separation. The Act of 1895 had not referred to this

(a.) Reported by GWYNNE HALL, Esq., Barrister-at-Law.

court, nor did it say that it extended its powers. The present petitioner had been deserted in 1897, and the case could only be dealt with in that way. Her husband had never approached her since then, and desertion continued, and four years ago he had taken up and lived with another woman. The decision of the magistrates, so far as this court was concerned, was a nullity. It had been meant only as a protection for the woman, and could have been set aside at any time. He therefore found as a fact that desertion and adultery had taken place, and he granted the petitioner a decree *nisi*, with costs.

Solicitors for the petitioner, *Nicholson, Graham, & Beesly*, for *Heygate & James*, Wellingborough.

Court of Appeal.

From K. B. Div. (Collins, M.R., and Mathew, L.J.) — Nov. 17.

BAINBRIDGE v. THE POSTMASTER-GENERAL AND CRANE. (a.)

Crown—Postmaster-General—Liability to be sued in official capacity—Action for negligence of subordinate—Immunity of head of Government department—Telegraph Act, 1863 (26 & 27 *Vict. c.* 112), *s.* 42—*Telegraph Act*, 1868 (31 & 32 *Vict. c.* 110), *s.* 2.

The Postmaster-General is not liable to be sued in his official capacity for the negligence of a person employed in the telegraph service; his immunity from liability to an action for the default of a subordinate official in the Post Office not being affected by anything contained in the Telegraph Acts, 1863, 1868, *and* 1878.

Appeal by the Postmaster-General from the refusal of Walton, J., to order the name of the Postmaster-General, as a defendant to the action, to be struck out.

The plaintiffs were Elizabeth Lawson Bainbridge and her father John Bainbridge. The indorsement on the writ, as amended, was as follows: "The plaintiff Elizabeth Lawson Bainbridge's claim is for damages for personal injuries to the said plaintiff sustained through the negligence of the defendants or their servants. The plaintiff John Bainbridge's claim is for damages for loss of services and wages owing to the said personal injuries. The plaintiffs' claim against the defendant, the Postmaster-General, is in his corporate capacity under statutes 26 & 27 Vict. c. 112, ss. 18 and 42, and 31 & 32 Vict. c. 110."

The action was based on alleged negligence in the reinstatement of a footway at Wigan, which had been taken up for the purpose of repairing a telegraph cable. The defendant Crane was the Post Office sectional engineer of the district.

The action was originally brought by the female plaintiff alone against the defendant Crane alone, but the plaintiff subsequently obtained leave from the registrar of the Liverpool District Registry of the High Court of Justice, out of which the writ issued, to add the name of John Bainbridge as plaintiff, and the name of the Postmaster-General in his corporate capacity as defendant.

After the writ had been amended, a summons was taken out on behalf of the Postmaster-General asking for an order that his name should be struck out. The district registrar referred the summons to the judge. Walton, J., declined to make an order, but gave leave to appeal.

The Postmaster-General appealed accordingly.

Sir Robert Finlay, A.G., and *A. H. Maxwell*, for the Postmaster-General.—This case raises the question whether the Postmaster-General can be sued in tort in his corporate capacity. He cannot be so sued either at common law or by virtue of any statute. Walton, J., expressed the opinion that this question ought not to be decided in an interlocutory proceeding. But the matter must be dealt with at this stage. The Postmaster-General cannot appear to this action brought against him in his corporate capacity, his contention being that he is not a corporation. The position of the Postmaster-General at common law is clear. He is the head of a Government department. Neither he nor the head of any other Government department is liable, in the absence of some special statutory provision, to be sued for the default of a subordinate. The principle of the non-liability of the head of a department of State for the negligence of persons working under the department in a subordinate capacity was laid down in the case of *Lane* v. *Cotton*, 1 Ld. Raym. 646, where it was held by the Court of King's Bench, Lord Holt dissenting, that the Postmaster-General was not liable for the loss of certain Exchequer bills sent by post. The question was again considered, and the same principle was laid down, by Romer, J., in the case of *Raleigh* v. *Goschen*, 46 W. R. 90, [1898] 1 Ch. 73. That was an action of trespass brought against the Lords of the Admiralty, and the decision was that the head of a Government department was not liable for the neglect or torts of subordinate officials in the department unless it can be shown that the act complained of was substantially the act of the head of the department himself. *Graham* v. *Public Works Commissioners*, 50 W. R. 122, [1901] 2 K. B. 781, was an action for breach of a contract entered into by the commissioners of works with a firm of builders for the erection of a public building. Ridley, J., and Phillimore, J., held on different grounds that the commissioners were liable, but the general principle previously laid down was admitted. There is therefore no liability at common law. But the plaintiff relies on certain statutes which he says render the Postmaster-General liable to be sued in such circumstances as the present—viz., the Telegraph Acts, 1863, 1868, and 1878. The Post Office Act, 1837 (7 Will. 4, and 1 Vict. c. 33), by section 2 enacted that her Majesty's present Postmaster-General, and the person or persons to be from time to time thereafter appointed by the Queen's Majesty by letters patent under the Great Seal, should be the master of the Post Office by the style of her Majesty's Postmaster-General, and conferred on the Postmaster-General the exclusive privilege of conveying from one place to another all letters, with certain exceptions. By section 11, the letters patent granted to the then Postmaster-General, the Earl of Lichfield, were to continue in force. The Post Office Act, 1840 (3 & 4 Vict. c. 96), by section 67 enables the Postmaster-General to hold and take conveyances and leases of messuages, tenements, lands, and hereditaments for the service of the Post Office, and makes him and his successors a body corporate for that purpose. The Telegraph Act, 1863, is a sort of Telegraph Companies Clauses Act. Section 3 gives a definition of "company." Section 4 incorporates the provisions of the Railways Clauses Act, 1845, with respect to the recovery of damages not specially provided for, and of penalties (section 6). Sections 17 and 18 impose certain restrictions on the

(a.) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

right of telegraph companies to open streets and public roads, by providing that they shall only be opened after notice and under superintendence, and that they shall be restored and kept in repair for six months. Section 42 enacts that every telegraph company should be answerable for all accidents, damages, and injuries happening through the act or default of the company or of any person in their employment by reason or in consequence of any of the company's works. The Telegraph Act, 1868 (31 & 32 Vict. c. 110), is an "Act to enable her Majesty's Postmaster-General to acquire, work, and maintain electric telegraphs." The preamble states that it is expedient that her Majesty's Postmaster-General be empowered to work telegraphs in connection with the administration of the Post Office. Section 2 is as follows: "The Telegraph Act, 1863, shall be incorporated with this Act, except so far as the same, or any part thereof, may be expressly varied, altered, or be inconsistent with this Act; and the term 'the company,' in the Telegraph Act, 1863, shall, in addition to the meaning assigned to it in that Act, mean the Postmaster-General." Section 4 empowers the Postmaster-General to purchase the undertakings of telegraph companies. Section 5 contains provisions with regard to the sale by the companies of their undertakings to the Postmaster-General, and section 6 provides that all Acts, charters, and grants, and all valid deeds and agreements of companies selling their undertakings shall remain in full force, and all the powers thereof shall be exercised by the Postmaster-General. The Telegraph Act, 1878, by section 11, provides as follows: "Any legal proceedings may be instituted by the Postmaster-General for any of the purposes of any of the Telegraph Acts in the name of her Majesty's Postmaster-General for the time being, and shall not abate or be discontinued by reason of any change in the person who is Postmaster-General, but may be carried on as if her Majesty's Postmaster-General for the time being were a body corporate." The result of all these statutory provisions is that the Postmaster-General is not under any greater liability with regard to the working of the telegraphs than he previously was with regard to the service of letters. The legislation is inconsistent with the idea that he is a body corporate. He is made a body corporate for one purpose, and one purpose only—viz., the holding of property—and proceedings instituted by him are to be carried on as if he were a body corporate. That implies that he is not a body corporate in any general sense. It follows that he cannot be held liable in tort for the default of a subordinate on the ground of being a body corporate, neither do the statutes impose that liability on him in any other way. The only case in which the liability of the Postmaster-General has been considered since the Telegraph Act, 1868, is the Irish case of *Jones* v. *Monsell*, Ir. Rep. 6 C. L. 155. That was a claim for damages for negligence similar to the present. The court held that the Postmaster-General was not liable in his personal capacity. They did not in any way decide that he could have been made liable in his official capacity. The judgment of the majority of the court in *Lane* v. *Cotton* was approved and followed by the whole of the Court of King's Bench in the time of Lord Mansfield in the case of *Whitfield* v. *Lord Le Despencer*, 2 Cowp. 754. There is a subsidiary difficulty to the maintenance of this action, viz., that there is no fund out of which the Postmaster-General could pay damages.

F. E. Smith, for the plaintiff.—The Postmaster-General in his corporate capacity is liable to be sued in circumstances such as the present. The *primâ facie* constitutional difficulty which has been raised is not a serious one. It is based on the old maxim that the King can do no wrong, and on the old rule that neither the King nor those who represent him directly are liable to an action of tort. That rule had its origin at a time when the moral element in the conception of tort occupied a larger space than it does now, and at a time when the Crown had not yet undertaken any functions which involved the carrying on of trade. Up to the year 1868 the business of transmitting and delivering telegrams was carried on by telegraph companies. Those companies possessed rights and were subject to liabilities like other ordinary trading companies. It is suggested that the Telegraph Act of 1868, while transferring to the Postmaster-General the rights which the companies possessed, renders him immune from the liabilities to which they were subject. If that had been the intention of the Legislature, it would have been expressly so enacted. On the contrary, section 2 of the Act of 1868 provides that, in construing the Telegraph Act of 1863, the term "the company" shall be read as including the Postmaster-General. Section 18 of the Act of 1863, so amended, imposes on the Postmaster-General the duty to keep in repair for six months any street or public road which has been opened for laying down telegraph wires, and renders him liable to penalties for failure to comply with any of the provisions of the section. And section 42 of the Act of 1863, so amended, reads as follows: "The Postmaster-General shall be answerable for all accidents, damage, and injuries happening through the act or default of the Postmaster-General or of any person in his employment by reason or in consequence of any of the Postmaster-General's works." The Act of 1878 does not seem to have anything to do with this case. The effect of the Act of 1868 was that the Government took over the advantages and the disadvantages of the telegraph companies. The Postmaster-General, as a public official, was substituted for the trading companies, and, like any other master, he is liable to answer for the wrongs of his servants—that is to say, of persons who are employed in the telegraph service. The constitutional difficulty is met by section 2 of the Act of 1868. The action therefore lies.

Sir Robert Finlay, A.G., in reply.—The head of a Government department is not the master of the persons employed under the department. He and they alike are all servants of the Crown. This is clearly shown in the judgments in *Lane* v. *Cotton*. Section 42 of the Telegraph Act, 1863, even when read in the way proposed by the plaintiff, does not establish the liability of the Postmaster-General. For the word "employment" still remains in the section, and subordinate officials of the Post Office are not in the employment of the Postmaster-General. It is a mistake to suggest that the non-liability of the head of a Government department has not been affirmed since the State has undertaken any trading functions. In the very case of *Lane* v. *Cotton* the question arose with regard to the Postmaster-General. If the Postmaster-General could be held liable in this action he would be liable for the negligence of an employee in the transmission of a telegram. If it had been intended to put any liability on the Postmaster-General with regard to the working of the telegraph service it would have been clearly so enacted.

Cur. adv. vult.

Nov. 17.—COLLINS, M.R.—This case comes before us by way of an appeal from an order of Walton, J. Elizabeth Lawson Bainbridge, the daughter of John Bainbridge, was injured by reason, as she alleges, of the negligence of one Crane, who is a subordinate official of the Post Office; he is called a post office

sectional engineer. The action was brought, in the first instance, in her name against Crane, charging him with responsibility for the pain and damage sustained by her through an accident arising, as was alleged, out of his negligence in dealing with the laying of an electric wire. Afterwards her father was introduced into the action as plaintiff claiming damages for the loss of his daughter's services, and a further amendment was made adding the name of the Postmaster-General as defendant. On that part of the case, the addition of the Postmaster-General as defendant, the question arises which we now have to determine. The Postmaster-General took steps to have his name struck out on the ground that there was no cause of action against him. His name was introduced in his public capacity. The amendment makes the action against the Postmaster-General in his corporate capacity under the statutes of 26 & 27 Vict. c. 112 and 31 & 32 Vict. c. 110. The meaning of that is this. The first of the statutes referred to, the Telegraph Act, 1863, was passed for the purpose of regulating the exercise of powers under special Acts for the construction and maintenance of telegraphs. It lays down provisions applicable to the working of telegraphs by companies. Section 3 gives the definition of a company: "The term 'the company' means any company to be hereafter authorized as aforesaid (hereinafter distinguished by the term 'future company') or any company already so authorized (hereinafter distinguished by the term 'existing company')." Section 6 mentions the various works, including the opening of streets and roads, which a telegraph company may execute subject to the restrictions of the Act. Section 18 provides that, after a company have opened a street or road, they shall restore it and keep it in repair for six months, and that, if they fail to comply in any respect with the provisions of the section, they shall for every such offence be liable to a penalty. Section 42, which is the section most relied on, is as follows: "The company shall be answerable for all accidents, damages, and injuries happening through the act or default of the company or of any person in their employment by reason or in consequence of any of the company's works, and shall save harmless all bodies having the control of streets or public roads, collectively and individually, and their officers and servants, from all damages and costs in respect of such accidents and injuries." That was the law regulating companies who undertook the duty of laying down telegraph wires. Subsequently the Act on which the present question arises was passed—viz., the Telegraph Act, 1868. The preamble of that Act is as follows: "Whereas the means of communication by electric telegraphs within the United Kingdom of Great Britain and Ireland are insufficient, and many important districts are without any such means of communication; and whereas it would be attended with great advantage to the State, as well as to merchants and traders and to the public generally, if a cheaper, more widely extended, and more expeditious system of telegraphy were established in the United Kingdom of Great Britain and Ireland, and to that end it is expedient that her Majesty's Postmaster-General be empowered to work telegraphs in connection with the administration of the Post Office." The Act then proceeds to enact by section 2: "The Telegraph Act, 1863, shall be incorporated with this Act, except so far as the same, or any part thereof, may be expressly varied, altered, or be inconsistent with this Act; and the term 'the company' in the Telegraph Act, 1863, shall, in addition to the meaning assigned to it in that Act, mean the Postmaster-General." The Act then empowers the Postmaster-General to purchase the undertakings of telegraph companies, which are to vest in him in his corporate capacity, which had been conferred on him for the purpose of holding property by the Post Office Act, 1840. Something turned on that in the course of the argument to which I will refer later on.

We now see the foundation on which the plaintiffs base their action. Their argument is that an action lies, not only against Crane, the author of the wrong, but also against the person upon whose behalf and by whose orders he was carrying out the work of laying the telegraph wires, and that the statute makes the Postmaster-General one of the persons who must be taken to be charged with the duties imposed by the Legislature on telegraph companies. They say that if section 42 of the Act of 1863 is read with the introduction of the words "the Postmaster-General" in addition to "the company," it will be seen that the Postmaster-General is responsible for the negligence of his subordinate Crane, and that an action for damages lies against him in his official capacity. Now, apart from the statutory enactments, and unless the section, which says that the term "the company" shall include the Postmaster-General, has the effect of making him liable in his official capacity, it seems to me to be perfectly clear that he would not have been liable for the negligent act of a subordinate officer. It is important to see the principle on which at common law the conclusion was arrived at that the Postmaster-General could not be so liable unless there was direct proof that he had ordered the act to be done, if the act purported to be done on his behalf. The question first arose a long time ago. The leading authority is the case of *Lane* v. *Cotton*, decided in 1701. The head-note of the report is as follows: "The head of a public office under Government with power to appoint and remove the servants of the office who are to be paid by, and give at his discretion security to, Government, is not responsible to an individual for a loss occasioned by the default of such servants. The servant, who is guilty of the default, is. The Postmaster-General is not answerable for a packet delivered to the receiver at the post office and lost out of the office. But the receiver is." Lord Holt differed from the opinion of the other judges, Turton, Powys, and Gould, JJ., who decided that case. The same question came up again for discussion in the time of Lord Mansfield, when the whole court affirmed the decision of the majority in the earlier case. It seems to me that the principle on which that majority acted is the principle which was adopted and made the basis of the judgment of Lord Mansfield in the subsequent case. I will therefore refer to the judgments of the majority in *Lane* v. *Cotton* to see what the principle was on which they were based. Gould, J., who was the first to give judgment, said: "If anything can support this action, it must be a contract express or implied; but here is neither one nor the other. The security of the despatcher depends upon the credit of the office, as founded upon the Act. Breese"—that is the delinquent receiver—"is as much an officer as the defendants, but they are more general officers. But Breese is the King's officer, and if there is any contract, it is between the plaintiff and Breese; which appears by the Act, which appoints several acts for all, and puts confidence in all. And, therefore, they resemble a community of officers acting in several trusts, and every one shall answer for himself, not one for the act of another, as in case of a dean and chapter: 1 Edw. 5, 5, *a*. If the defendants had died, yet Breese would have continued officer, and therefore Breese has a charge and trust of himself, and is

not a deputy to the defendants." Powys, J., said: "The defendants have not the power of the management of the office according to their discretion, but are subject to the control of the King and of the Treasury. And because the inferior officers are servants of the King and not of the defendants, their wages being paid to them out of the revenue of the Post Office, and the security taken of them in the name of the King; and therefore it is unreasonable that the defendants should be answerable for the acts of their inferior officers." Turton, J., gave judgment to the same effect. The ground of all their judgments seems to be that there is no relation of master and servant between a superior officer of the Crown and a subordinate officer, and that therefore the superior officer cannot be made responsible in an action for damages for the default of the subordinate officer. The same principle applies whether the claim be one in tort or in contract. Being all equally servants of the Crown, they are not servants of each other. When the question again came up for discussion, the dissenting judgment of Lord Holt was much canvassed, and the court adopted the decision of the other judges. The case is that of *Whitfield* v. *Lord Le Despencer*. The head-note is: "Case does not lie against the Postmaster-General for a bank note stolen by one of the sorters out of a letter delivered into the post office." Lord Mansfield said: "The Postmaster-General has no hire, enters into no contract, carries on no merchandize or commerce. But the Post Office is a branch of revenue, and a branch of police, created by an Act of Parliament. As a branch of revenue, there are great receipts; but there is likewise a great surplus of benefit and advantage to the public arising from the fund. As a branch of police, it puts the whole correspondence of the kingdom (for the exceptions are very trifling) under Government, and entrusts the management and direction of it to the Crown and officers appointed by the Crown. There is no analogy, therefore, between the case of the postmaster and a common carrier. The branch of revenue and the branch of police are to be governed by different officers. The superior has the appointment of the inferior officers, but they give security to the Crown. One requisite is that they shall take the oaths taken by all public officers, another strong guard is that they are made subject to heavy penalties." Then, further on, he said: "If the man who receives a penny to carry the letters to the post office loses any of them he is answerable; so is the sorter in the business of his department; so is the postmaster for any fault of his own. Here no personal neglect is imputed to the defendants, nor is the action brought on that ground, but for a constructive negligence only by the act of their servants. In order to succeed, therefore, it must be shown that it is a loss to be supported by the postmaster, which it certainly is not. As to the argument which has been drawn from the salary which the defendants enjoy, in a matter of revenue and police under the authority of an Act of Parliament the salary attached to the office is for no other consideration than the trouble of executing it. The case of the postmaster, therefore, is in no circumstance whatever similar to that of a common carrier." And at the end of his judgment he said: "If there could have been any doubt, therefore, before the determination of *Lane* v. *Cotton*, the solemn judgment in that case, having stood uncontroverted ever since, puts the matter beyond dispute." Those passages show that the court adopted the reasoning of the majority of the judges in the earlier case, and arrived at the conclusion that these subordinate officers are servants of the Crown and are not in the relation of servants to their superior officers.

That being so, has the Legislature altered the immunity of the Postmaster-General? Are there any words to be found in the statute which cut down the position of the Postmaster-General with regard to immunity from what it was before he took over the telegraphs? When the provisions which are supposed to have this effect are analyzed, they seem to me to leave the Postmaster-General where he was before. In his official capacity he retains his former immunity. It is contended that he is made liable by section 42 of the Act of 1863 as amended by the alteration in the definition of "company." So amended the section reads: "The Postmaster-General shall be answerable for all accidents, damages, and injuries happening through the act or default of the Postmaster-General or of any person in his employment by reason or in consequence of any of the Postmaster-General's works," &c. It is not suggested that the Postmaster-General himself had anything to do with the negligence of which the plaintiff complains. The plaintiff is obliged to put his case on the footing that Crane was in the employment of the Postmaster-General. That condition is not fulfilled. Crane was not in the employment of the Postmaster-General. He is a subordinate officer of the Crown, and the suggested *nexus* between the Postmaster-General and him is broken at once. That is sufficient to dispose of this this case, but there are other difficulties in the way of the action. There is no section in any of the statutes providing for any fund out of which damages could be paid by the Postmaster-General in such a case as this. And it is clear that the revenue of the country cannot, in the absence of some legislative provision, be reached by an action brought by a private individual against a public officer in his official capacity: *Palmer* v. *Hutchinson*, 6 App. Cas. 619. I think that this case is analogous to that which is mentioned by Lord Lyndhurst, L.C., in *Viscount Canterbury* v. *Attorney-General*, 1 Phill., p. 324. He there says: "But then it is said, these officers are appointed by the Crown, and are removable at the pleasure of the Crown. That circumstance alone will not, I conceive, create any such liability. The Keeper of the Great Seal and other persons holding high situations in the State have authority to appoint to many offices, and also to remove the persons so appointed at their pleasure. But they are not on that account subject to make compensation for injury occasioned by the neglect or misconduct of the persons so appointed. The mere selection of the officers does not create a liability. But if the Crown would not be responsible for the act had it been done by the superiors, it follows that it cannot be held liable for the negligence of their subordinate agent whom they appoint and remove, and with the selection or control of whom the Crown has no concern." I think the authorities I have cited show that there was no *nexus* or relation of master and servant between the Postmaster-General and Crane. The question of the liability of the Postmaster-General was raised in Ireland in the case of *Jones* v. *Monsell*, the only case in which this subject has been considered since the passing of the Telegraph Acts. The question there was whether the Postmaster-General could be made liable in his personal capacity, and the court held that he could not. The question whether he could be made liable in his official capacity was left open, but the court spoke of his corporate capacity, and from some of their expressions it might be thought they considered incorporation to be a cardinal factor in the discussion. If the standard was whether the Postmaster-General was incorporated or not, that would give rise to a difficulty in this case; for it is pointed out that he is not incorporated generally for all pur-

poses, and certainly was never incorporated for the purpose of being made liable to an action for damages. In my opinion, however, it is not necessary to rely on that, for I think that the meaning of the decision in the Irish case was not to make incorporation the test, but to emphasize the distinction between what the Postmaster-General did in his personal capacity and what he did in his official capacity. The whole law on the subject of the liability of the heads of Government departments has recently been fully stated by Romer, L.J., in the case of *Raleigh* v. *Goschen*.

On these grounds I think that Walton, J., was wrong in not stopping the action against the Postmaster-General. In point of fact the learned judge seems to have done little more than invite us to consider this question, not giving any final opinion himself. But in point of form we must reverse his decision and allow the appeal.

MATHEW, L.J., concurred.

Appeal allowed.

Solicitor for the plaintiffs, *Norris, Allens, & Chapman.*

Solicitor for the Postmaster-General, *Solicitor to the Post Office.*

From K. B. Div. (Collins, M.R., and Romer and Mathew, L.JJ.) And K. B. Div. (Lord Alverstone, L.C.J., and Wills and Darling, JJ.) — Nov. 7, 16.

KENT AND ANOTHER *v.* FITTALL. (*a.*)

Election law — Registration — Occupation franchise — Lodger—Dwelling-house—Part of a house—Landlord residing in house — Control — Representation of the People Act, 1867 (30 & 31 *Vict. c.* 102), *ss.* 3, 4—*Parliamentary and Municipal Registration Act,* 1878 (41 & 42 *Vict. c.* 26), *s.* 5.

Where rooms in a house are let out to tenants so as to constitute separate dwelling-houses, the mere fact that the landlord resides in the house does not of itself make the tenants lodgers. It is a question of fact in each case depending upon whether the landlord has any right of control over the rooms let to the tenants. If the landlord has no control over the part of the house which is let to a tenant it is immaterial that he retains control over the passages and staircases and other parts which are used in common by the tenants. Nor is the fact that the landlord pays the rates and taxes and executes the repairs to the house inconsistent with an independent occupation, of the part let, by the tenant as an occupier and not as a lodger.

Case stated by a revising barrister.

"1. At a court holden before me, the barrister duly appointed to revise the lists of voters for the Parliamentary borough of Devonport, Henry Hartnell duly objected to the name of Frank Herbert being retained in the occupiers' list (Division I.) for the parish of Devonport on the ground: 'That you have not occupied as owner or tenant the premises named in the said list for twelve months immediately preceding the 15th of July in this year.'

"2. The facts of the case as found by me were as follows: Frank Herbert occupies as his residence, and has so done for the necessary qualifying period under a verbal hiring agreement from week to week, at a rent of 3s. 8d. per week, one unfurnished tenement room on the third floor of a house, No. 8, Morice-square, such room constituting a separate dwelling and being used by him for all purposes of living, and being separately occupied by him as a dwelling or dwelling-house; and he has let to him therewith such use of the passages and staircases as is necessary and convenient to the access to, and enjoyment of, the said dwelling.

"3. Frank Herbert's landlord is one Charles John Weevil, to whom the said premises, 8, Morice-square, are demised on a yearly tenancy by the owner, one Mrs. Waterhouse.

"4. The said Charles John Weevil resides in a separate and independent tenement or set of rooms upon the said premises.

"5. There are four other occupiers under agreements of hiring with the said Charles John Weevil residing upon the said premises under exactly similar conditions as the said Frank Herbert, save that their tenements are upon different floors and the number of rooms occupied varies. There is also let to the said Frank Herbert and the other said occupiers the use in common of the courtyard, w.c., and wash-house situate therein.

"6. The said Charles John Weevil occupies a set of rooms similarly with the other occupiers of the said house, and so far as their relationship *inter se* as residents is concerned the said Charles John Weevil occupies no different position than he would if he were not the landlord.

"7. The said Frank Herbert has the exclusive occupation, use, and enjoyment of his said room or dwelling, and the said landlord neither does nor has by agreement or otherwise any right to enter or in any way interfere with or exercise any control or dominion over the said room or the joint user of the portion of the said premises so used in common as aforesaid, nor has he any personal relationship with the said Frank Herbert, nor does he, nor has he any right to, exercise any control or dominion over him in his occupation and user aforesaid.

"8. The said landlord's use of and right of control over the parts of the said premises so used in common as aforesaid is identical with that of his tenants and he does not reserve himself or exercise any right of general control or dominion or mastership over the said premises. The cleansing of the said passages and staircases is shared in common by those using the same, and no service is rendered by the said landlord to his said tenants.

"9. The said Frank Herbert has a key which enables him at all times to open the front door and obtain access to the said house and his dwelling aforesaid, and the landlord reserves to himself no right to otherwise fasten such door.

"10. The landlord is obliged by his contract with the owner to keep the said premises in repair.

"11. The said house is rated as a whole in the name of the said Charles John Weevil, who has duly paid the rates therefor, and whose name appears as the rated occupier in the rate-book. The said Frank Herbert is not rated, and has never demanded or been required to be rated, in respect of his dwelling aforesaid. His name appears upon the rate-book for October, 1904, in a column which is number 24, as appears upon the copy sheet from the rate-book annexed hereto. It does not appear in the rate-book for April, 1905. Copies of these rates are annexed hereto.

"12. The names of 2,595 others on the occupiers'

(*a.*) Reported by ERSKINE REID and W. F. BARRY, Esqrs., Barristers-at-Law.

list whose names and places of abode (as appearing in column 2 of the list) are set out in Schedules I. and II. attached hereto were objected to under similar circumstances save that the number of rooms constituting the separate dwelling in each case may vary from one to two, to three, to four, as the case may be, and floors upon which they are situate be different, and save that, as regards the persons objected to in the township of East Stonehouse (where the objections relate only to the Parliamentary franchise), their names appear upon the rate-book as occupiers together with the landlord's name, who alone is the person actually rated and paying rates in respect of the particular house, and save that in some cases the resident landlord is himself the owner of the premises, and save that the terms of the demises to the resident lessee landlord may vary in length, and save that where two or more rooms are occupied by one person they sometimes do not directly intercommunicate nor are they on the same floor. But the above-mentioned distinctive circumstances are admitted by both sides to be, and treated by me as being, immaterial so far as concerns the principle covering the various cases. A copy of the rate for the East Stonehouse parish is annexed hereto.

"13. It was contended for the appellants that the said Frank Herbert was not an inhabitant occupier of a dwelling-house as tenant or owner, but a lodger, by reason of an alleged control or right of control on the part of the resident landlord and by reason of the said tenement not being separately rateable.

"I held such contention to be wrong, and found that neither in fact nor in law was there on the part of the said landlord any general control or right thereto over the said house or its occupants, and that the relative position of the said occupants to the landlord was the same as if he did not reside upon the premises, and that in fact and in law the said tenement dwellings were separately rateable, and I decided that the said Frank Herbert was an inhabitant occupier of a dwelling-house and entitled to be upon Division I., and allowed his name and that of the 2,595 other persons to stand upon such occupiers' list (Division I.)

"14. Due notice of appeal from my decision was given in each case, and I ordered the appeals in all the cases to be consolidated.

"15. If the court be of opinion that my decision is wrong, then the register is to be amended by expunging the said names from the said lists."

The town clerk of Devonport (R. J. Fittall) was named by the revising barrister as respondent on the appeal under section 38 of the Parliamentary and Municipal Registration Act, 1878.

Nov. 7.—*Dickens, K.C.* (*W. H. Clay* with him), for the appellants.—The whole question is whether the revising barrister could properly find on the evidence that Herbert was an inhabitant householder; and the proposition on the part of the appellants is that where a landlord merely lets out rooms in the house where he himself lives the occupants of those rooms are lodgers, and not inhabitant occupiers. In this test case Weevil, the landlord, let out rooms with the right of ingress and egress to and from the rooms by a common staircase, with the right in common to each tenant to use the back-yard, w.c., and so forth, while he retained a set of rooms in the house in which he and his family resided. It is submitted that the proper inference to be drawn from these facts is that Weevil held the control of the house, and that his weekly tenants were lodgers. The cleansing of the passages and staircase being shared in common made no difference, and the legal control of the house must be vested in the landlord and not in the tenant, whether the landlord chose to exercise that control or not. His very residence in the house was for the purpose of letting rooms and keeping guard over vacant rooms, the possession in which at once reverted to him so soon as a tenant left and gave up possession. He alone would have the right to bring an action of trespass against a stranger who improperly entered the building. The fact of his living in the house as landlord prevented the tenants from claiming a vote as inhabitant occupiers of separate tenements. The inhabitant occupiers' franchise is conferred by section 3, and the lodgers' franchise by section 4 of the Representation of the People Act, 1867. Section 61 so far as it defined "dwelling-house" has been repealed by 56 & 57 Vict. c. 14, and its place has been taken by section 5 of the Parliamentary and Municipal Registration Act, 1878, which enacts that "the term 'dwelling-house' shall include any part of a house where that part is separately occupied as a dwelling: and the term 'lodgings' shall include any apartment or place of residence, whether furnished or unfurnished, in a dwelling-house." The service franchise is given by section 3 of the Representation of the People Act, 1884. It is submitted that there is no such exclusive occupation in the present case as there was found to be in *Toms* v. *Luckett*, 5 C. B. 23, because in that case the landlord did not reside on the premises, and did not retain the character of master as must be presumed he did here. *Bradley* v. *Baylis*, *Morfee* v. *Novis*, and *Kirby* v. *Biffen* (reported together), 30 W. R 823, 8 Q. B. D. 195, are the leading authorities on this question. The facts here are similar to those in *Morfee* v. *Novis*. In that case the facts, if anything, were stronger in favour of the inmates being occupiers than the facts found here, because there Brett, L.J., said it had been expressly found that the inmate had the exclusive use although not the exclusive occupation of the room. It is submitted that *Morfee* v. *Novis* decides that the claimants here are not inhabitant occupiers. The distinction between cases like this and that of flats has already been drawn by the courts.

Ancketill v. *Baylis*, 31 W. R. 233, 10 Q. B. D. 577; *Hogan* v. *Sterrett*, 20 L. R. Ir. 344; and *M'Laughlin* v. *Chambers*, [1896] 2 Ir. R. 497, were also cited.

J. A. Foote, K.C. (*G. W. Ricketts* with him), for the respondent.—Upon the findings of fact in paragraphs 6, 7, 8, and 9 of the case it was the duty of the revising barrister to follow *M'Laughlin* v. *Chambers*, [1896] 2 Ir. R. 497, where it was held that the residence of the landlord in the house did not *per se* disqualify the voter. Sir George Jessel, M.R., laid down the true test in *Bradley* v. *Baylis*, 8 Q. B. D., at p. 220, where he said: "On the other hand, suppose a landlord does not demise the whole of the house, but everything in it that can be demised, except the staircases and passages, &c., as to which he gives the inmates the right of ingress and egress, but exercises no control over and does not reside in the house, I think the inmates are occupying tenants. Here again, does the fact of the landlord repairing or paying rates and taxes make any difference? I think not. Of course he has a right to enter to make such repairs, but still in my opinion that does not prevent the occupier being in rateable occupation." The test, therefore, is not whether the landlord himself is resident in the house, but whether he exercises general control. That is a question of fact for the revising barrister, who has found that here the landlord has retained no control. The test is not whether he has exercised control, but whether he retained the right to exercise control. The present case is distinguishable from *Morfee* v. *Novis*, for Brett, L.J., during the

course of the argument, mentions the circumstance (8 Q. B. D., at p. 213) that there the finding in the case was that the claimant had the exclusive use and not the exclusive occupation of his rooms. Unless the test of the landlord's residence be the infallible test, which it is submitted it is not, there is no distinction between the present case and the ordinary case of flats in a block of buildings, the inhabitants of which undoubtedly enjoy a separate occupation, except that a flat has a main door with a knocker on it. The point taken that the landlord had only granted an easement over the staircase and those parts used in common which showed that he retained control, was an argument that would equally apply whether he resided there or not. Therefore in that view the residence of the landlord for the purpose of deciding the question was immaterial.

Dickens, K.C., replied.

Lord ALVERSTONE, L.C.J.—In my opinion this appeal must be allowed. If Mr. Foote be right in his contention that we ought to construe the case as a finding of fact that the landlord had no control over the house, a case might have been made out that did not or might not have fallen within the rule laid down in the decisions of the Court of Appeal in *Bradley* v. *Baylis*. But I do not think that the revising barrister intended to find that as a matter of fact at all; and I base my reason, for considering that we ought not to draw such a conclusion, upon the broad ground that the finding of the revising barrister applies to some 2,500 people, and it seems to me an extravagant thing to suggest that in all those cases he found as a fact that the landlord residing on the premises retained and exercised no control. I think what the barrister meant to say was that there was not such control as would make the cases in the Court of Appeal binding on him. Now, taking this as a test case, what we have to decide is whether when a landlord resides and lives in an ordinary house and chooses to let off some of the rooms to other tenants, giving them the use of such parts of the house not so let as may be necessary, it shows that the tenants of the parts so let are inhabitant occupiers notwithstanding the residence of the landlord. It seems to me, having regard to the class of the property, very probable that the landlord would himself reside in the house for purely personal reasons, such as the easy collection of rents, the exercise of control over and taking care of vacant rooms, and, as he has to repair, seeing that the house is generally speaking kept in repair by him and is properly conducted. Therefore I think that to say that the landlord occupied his rooms in the house in the same way that his tenants occupied theirs, and that the relation between him and the other occupants was the same as if he did not reside upon the premises is incorrect. Now, is the test of residence as regards inhabitant occupiers the main test or not? Mr. Foote says that if it be not we might not be able to distinguish this case from the case of flats. It is quite true that in modern times flats for registration purposes have been regarded as an aggregation of houses each of which forms a separate dwelling in a dwelling-house and have been recognized as separate houses. There is no difficulty in dealing with a number of houses put together as flats are, for it cannot be said that the landlord lives there. As was pointed out in one of the Irish cases, if the landlord lives in the house he must not return the tenants as occupiers. Is residence, then, to be the important criterion? I think that in every judgment of the Court of Appeal it has been made the test. Lord Lindley in *Bradley* v. *Baylis* says: "Taking this difference as a guide it appears to me that where a house is wholly let out in unfurnished apartments separately occupied by tenants, and their landlord does not reside in the house and has no servants in the house to look after it for him, the tenants are rateable and are not lodgers; whilst, on the other hand, where a house is let out in unfurnished apartments to tenants and their landlord resides in the house or has a servant in it to look after it for him, then it appears to me that such tenants are not rateable and are lodgers." And in the same case Brett, L.J., says: "Now, in one of the sets of cases before us the whole house had been let out in apartments during the whole time with the exception only of the two staircases. The landlord has gone away and given up the actual control over the house; therefore it seems to me that the persons who occupy those apartments must be held to be inhabitant occupiers of a dwelling-house within the meaning of the statutes. In the other two sets of cases, where the owner has reserved to himself a control over the house, the persons who occupy part of that house are lodgers."

If any distinction is desired to be drawn by reason of the facts set out in the case before us between the present case and the principle upon which the decisions I have referred to have been based, I think it ought to be drawn by the Court of Appeal. I certainly cannot reconcile the Irish case of *M'Laughlin* v. *Chambers* with the cases in the English Court of Appeal.

I am of opinion, therefore, that the revising barrister has drawn an inference of law or a mixed inference of law and fact not warranted by the facts as he has found them. Therefore the appeal must be allowed.

WILLS, J.—I agree. I think that the present case clearly falls within the meaning of the rule laid down in *Bradley* v. *Baylis*. Where a landlord lets out part of a house and does not divest himself of his interest in that part of the house which the tenants have a right to use, but retains to himself the right of general control, such as a right to interfere with the arrangements of the house with regard to vacant rooms and to turn out trespassers, I think that the English Court of Appeal has laid down a good working rule free from perplexity and difficulty. On the other hand, the rule laid down in the Irish case of *M'Laughlin* v. *Chambers* would lead to both, and legal proceedings would follow in very many cases. I think that when a landlord lets rooms with conditions attached to their occupation there is no inhabitant occupation on the part of his tenants, since the landlord necessarily retains a control. In *M'Laughlin* v. *Chambers* it was a question of fact whether the landlord actually did exercise control. I can find nothing to support the distinction suggested. If we follow the decision of the English Court of Appeal we have a rule to go by; but if we follow the Irish case we should allow people to drift into litigation in most of the cases in which this state of things arises, for it is idle to suppose that with regard to some 500 or 600 cases the facts as to *de facto* control will be all the same. If such a class of inquiry were cast upon revising barristers at the request of every tenant they would never get through their work, and this shows the extreme inconvenience that would follow the adoption of this test; whereas the rule laid down by the English Court of Appeal commends itself to our sense of what is practical.

DARLING, J.—I am of the same opinion. The question appears to be, Does the landlord retain his control as master of the house? If he lives in the house, being the lessee of the whole and letting off

certain of the rooms, that appears to me to be a strong reason in itself for saying that the landlord living there does retain a control. Here it is said that the revising barrister meant to find as a matter of fact that the resident landlord had no control over any part of the premises except that part in which he himself resided. But I do not think the revising barrister could have meant that, for it seems to me, if he did, he need never have stated a case at all. I think he must have meant it for a finding of law, and forgot or did not notice that the landlord must of necessity have all the rights in himself which he had not parted with. It is suggested that the finding means that so far as control went the landlord was in the same position as his tenant; but this cannot be so, for the landlord would have a right to go all over the house except into the rooms he had let, whilst the tenant of the first floor would have no right upon the second floor, or the tenant of the second would have no right upon the third floor, and so on. The landlord, however, could go all over the house as he liked so long as he did not enter rooms in the occupation of his tenants. I therefore think that the mere fact that the landlord resided in the house is almost conclusive to show that he exercised a certain control. Then, again, if a room fell vacant and was unoccupied, the right of the landlord would be to take possession of it at once, an act of control that would at once distinguish his position from that of his tenants, the other residents in the house.

The respondent, by leave, appealed to the Court of Appeal.

Nov. 15, 16.—The arguments were the same as is the Divisional Court, and the respective parties were represented by the same counsel.

COLLINS, M.R.—This is an appeal from the decision of the Divisional Court upon a case stated by a revising barrister, and the question raised is whether under section 3 of the Representation of the People Act, 1867, combined with section 5 of the Parliamentary and Municipal Registration Act, 1878, in the particular case before us the person objected to is or is not entitled to be on the list of voters as the inhabitant occupier of a dwelling-house. It is said that a number of other cases depend upon the result of this case, but it is also stated that the facts of those other cases vary from the facts of this case in certain particulars, and therefore it seems to me that it is only by agreement between the persons interested and not by any decision of the revising barrister that those cases were made to depend upon the result of the decision in the present case. Therefore I will deal with the matter upon the footing that we are deciding this particular case, the facts in which have been stated by the revising barrister. It seems to me that, in the discussion as to what has been said by various judges with regard to the meaning of the words "lodger" and "inhabitant occupier" as used in the Franchise Acts, we are likely to lose sight of the foundation of the whole matter, that is to say, the conditions on which the Legislature has conferred the franchise. That brings me to section 5 of the Act of 1878, which defines the term "dwelling-house": "In and for the purposes of the Representation of the People Act, 1867, the term 'dwelling-house' shall include any part of a house where that part is separately occupied as a dwelling; and the term 'lodgings' shall include any apartments or place of residence, whether furnished or unfurnished, in a dwelling-house." The section further provides that "where an occupier is entitled to the sole and exclusive use of any part of a house, that part shall not be deemed to be occupied otherwise than separately by reason only that the occupier is entitled to the joint use of some other part." Therefore we have, in dealing with the case of a person who did not occupy a dwelling-house in the ordinary sense of the term, to see whether he comes within the special provisions which give him the franchise in respect of the occupation of part of a dwelling-house, for if so, he is the occupier of a dwelling-house within section 3 of the Act of 1867, and is entitled to the franchise. The question, therefore, is, does he occupy part of a house in such a manner and in such circumstances as to give him a qualification for the franchise? The part of the house must be "separately occupied as a dwelling," and there may be a separate occupation of part of a house as a dwelling so as to give the franchise, although the occupier is entitled to the joint use of some other part. He must occupy as tenant under section 3 of the Act of 1867. Whether he does so or not depends, in the first instance, upon what the facts of the case are—what are the terms upon which he holds under his landlord—and then it becomes an inference of law from those facts whether the occupier is a tenant or lodger. In view of that question the control of the landlord is a material element, and the answer depends upon what is the relation between the landlord and the occupier, and it is only in considering that relation that the residence of the landlord in the house becomes material. The claimant for a vote must show that he occupies as tenant part of a house separately as a dwelling. If another person is really in control of that which the claimant in fact occupies, the latter cannot be said to occupy it separately as a dwelling within the Acts. His occupation would be, not his own, but that of his landlord. That again depends upon his relation between himself and his landlord. The essential question is, is his occupation the occupation of the landlord, or is it an independent occupation of his own? If the occupation is that of the landlord, though the claimant lives in the rooms, he does not fulfil the conditions of the Act. If, on the other hand, he has an independent occupation of his own, then he has such occupation as fulfils the conditions of the Act. I come now to the findings of fact in the case. The revising barrister has found in the most clear and absolute manner that the voter occupies a separate dwelling in the house free from all control by the landlord. We are bound by those findings as findings of fact, unless it can be said that they are inferences of law and not findings of fact. He finds that the voter occupies as his residence one unfurnished tenement room in the house, such room constituting a separate dwelling, and being used by him for all purposes of living, and being separately occupied by him as a dwelling. Therefore the subject-matter of the occupation is clearly brought within the definition of dwelling-house in the Act. [His lordship then read other paragraphs in the case, and proceeded:] In my opinion those are findings of fact, and if the judgment of the Divisional Court contradicts those findings, that judgment cannot stand. It seems to me that it is only by arriving at the conclusion that the statements in the case are not statements of fact but inferences of law that the Divisional Court were able to differ from the decision of the revising barrister who allowed the names to stand in the list. It is only by ignoring the conclusions of fact stated in the case that the Divisional Court were able to arrive at the conclusion they did. I do not think that there is really any conflict upon the law between the view of the Lord Chief Justice and my view, because he thinks that, if he were bound by the findings as findings of fact, his conclusion of law would be the same as mine; and it is only by placing an interpretation upon the case different from that

which it will bear that he arrives at his conclusion. It seems to me that the revising barrister has found conclusions of fact and the case does not rest upon inferences of law. I do not know the evidence before the revising barrister the result of which has been summarized in the case. What were the terms of the contract between the landlord and tenant must be a question of fact. The revising barrister has found as a fact that the landlord has retained no control over the part let. If that is so, it is immaterial whether he retained control over the part used in common. We are dealing with the subject-matter itself, not with the access to it. The occupation of the subject-matter itself confers the qualification and not the occupation of the outlying modes of approach. It is contended, in an admirably clear argument, that it is impossible for the occupier to have the dwelling-house occupation franchise if the landlord resides in the house. The residence of the landlord in the house is said to be incompatible with the other occupiers having the dwelling-house franchise. On principle I cannot say that the occupation by the landlord of a distinct subject-matter is any more a bar than if he lived next door or in the next street. The only thing which prevents the occupier from being entitled to the franchise is if his occupation is such that he cannot be properly described as an occupier. If it is an independent occupation, and not the occupation of another person, he is entitled. Again, the right of the landlord to repair is entirely compatible with an independent occupation by the actual occupier.

That being my view upon principle, we are pressed with authorities. *Bradley* v. *Baylis* and the two cases decided along with it were pressed upon us as deciding that the dwelling-house occupation franchise cannot be acquired if the landlord resides in the house. In my opinion those cases do not so decide. I think that the observations of the judges in those cases negatived that contention. All their remarks about residence were coupled with another condition—namely, control of the landlord. They showed that the control of the landlord was the essential consideration. No one disputes that if it was found that the landlord of a house let out in separate tenements lived in the house *primâ facie* he would be deemed to exercise control over the house; but it is not conclusive. I think that Cotton, L.J., summed up what the other members of the court said. He said (8 Q. B. D., at p. 241): "In my opinion there is involved in the term 'lodger' that the man must lodge in the house of another man and lodge with him. With respect to lodging in the house of another man, there is no difficulty about that. What constitutes his lodging with the landlord is the difficulty. In my opinion it is not necessary that the person with whom he lodges—that is, his immediate landlord, should live in the house to make him a lodger. Nor is it necessary that the immediate landlord should have the exclusive control over the key of the outer door; but, in my opinion, some control over the house must be exercised by the person in whose house a man lives to make him a lodger." In those cases control was considered the substance of the matter. The case of *Bradley* v. *Baylis* and the two other cases decided with it were carefully and elaborately considered by the Court of Appeal in Ireland in *M'Laughlin* v. *Chambers*, and notably by the Lord Chief Baron, who dealt specifically with that point. After dealing with the *dicta* in *Bradley* v. *Baylis* the Chief Baron said that control by the landlord, where he resides in a house let out in separate dwellings, is the important question to be considered. He said ([1896] 2 Ir. R., at p. 509): "In that case, *Charlton* v. *M'Manus*, 29 Ir. L. T. R. 16, the landlord came into possession of part of a structure by reason of the tenant of a separate room therein quitting possession and giving the same over to the landlord, who came to live there, and we held that the mere residence of the landlord in the same structure did not of itself disqualify the tenant of another room occupied as a separate dwelling-house, who had been, previous to the arrival of the landlord on the premises, admittedly entitled to be registered as an inhabitant householder. In that case I endeavoured to show that *Bradley* v. *Baylis* did not establish that the presence of the landlord in a house let out in tenements does not of itself determine the question whether a person is a lodger or an inhabitant householder. I want now to go a little further and to point out what is the determining factor. . . . In my opinion the rule laid down by *Bradley* v. *Baylis* is this: where a claimant dwells in rooms forming part of a structure, in any other part of which structure the landlord dwells, over which structure the landlord exercises a control as master, a paramount governing control, which is to be attributed to his position as master, and which is something different from that of a man who merely occupies rooms in the same structure, then every one of the tenants in the structure or house is a lodger." It is said that that decision is in conflict with the earlier decision of the same court in *Hogan* v. *Sterrett*. The Lord Chief Baron also dealt with that suggestion, for he said that "neither of these cases"—*Bradley* v. *Baylis* and *Hogan* v. *Sterrett*—"decides that the mere fact of the residence of the landlord in the structure in which his tenants reside is enough *per se* as matter of law to disqualify the tenants." So that when the cases are examined it is seen that there is no difference of view between *M'Laughlin* v. *Chambers* and the earlier case in the same court. In that earlier case there is a passage in the judgment of the Master of the Rolls where he said: "I do not mean to decide that in every case where the landlord resides under the same roof the persons occupying the other portion of the structure may not be entitled otherwise than as lodgers. I think they may be entitled; but the evidence of separate occupation must be very clear, such as in the case of flats; for there the landlord would live in a separate 'house' within the meaning of the Act, and there would be several 'dwelling-houses' all under the same roof. When that case arises, it will have to be considered on its merits." That is really the case here. When one finds that a part of a dwelling-house occupied separately as a dwelling is made a dwelling-house within the Act, it seems to me that it is placed by the Act in exactly the same position as a flat. It is equally capable of being the subject-matter of the franchise. I can see no distinction in law between a part of a house which is made a separate dwelling-house by the Act and a flat which is made a separate dwelling-house by its construction. Therefore it seems to me that the mere fact that the landlord lives in one part of the house, which part is itself a separate dwelling-house, is not incompatible with his tenants being inhabitant occupiers of separate parts of the house as separate dwellings. There is a passage in the judgment of Sir James Hannen in *Ancketill* v. *Baylis* to the same effect: "It is difficult to define the difference between a tenant and a lodger; but probably it may be said with accuracy that where the landlord himself resides in the house the other inmates are lodgers because they submit themselves to his control; but where the landlord does not reside in the house, or where he occupies a separate set of rooms in the basement, or where the house is divided into separate and independent dwellings, or into separate flats with a porter, or, as happens abroad, a *concierge* living upon the premises, in each of those

cases, even although a servant of the landlord may be present, the separate occupation exists which is necessary to constitute a tenancy. Whenever the relation of landlord and tenant has been created it must continue so long as the tenant continues to dwell in the house, unless he agrees or submits to a change in the nature of his occupation." That seems to me to be in point, and it is a *dictum* of a learned judge sitting in the Court of Appeal. For the above reasons there seems to me to be no foundation for saying that there is any difference between the decisions in the English and the Irish Courts of Appeal. On the contrary, Palles, C.B., one of the ablest judges upon the bench of either country, after a most careful analysis of the cases, bases his judgment in *M'Laughlin* v. *Chambers* upon the English cases. The fact that the landlord resides upon the premises under the conditions described in the case does not prevent the other tenants from being entitled to the franchise as inhabitant occupiers of separate dwelling-houses. The appeal must therefore be allowed.

ROMER, L.J.—The subject of this appeal affords a striking example of the difficulty which arises in determining whether a person is the occupier of a rateable tenement or whether he occupies or uses the tenement as a lodger only. It seems to me to be impossible to lay down a hard-and-fast proposition of law or to define the difference between an occupying tenant and a lodger which will solve the difficulty in all cases. In *Bradley* v. *Baylis* Sir George Jessel, M.R., said: "I have been quite unable, so far as I am concerned, to frame an exhaustive definition. Some judges have tried to do so, and, in my opinion, they have failed; and I think it wiser and safer to say that the question whether a man is a lodger or whether he is an occupying tenant must depend on the circumstances of each case." I respectfully agree, and I proceed to apply it to the present case. The facts which we have to consider depend upon the findings of the revising barrister. I say at once that in my opinion his findings are findings of fact which it is not right or competent for us to disregard. They cannot be treated as opinions on points of law which it is open to us to disregard or to vary or mould as we think proper. It is really, it seems to me, upon those findings that the difference between us and the Divisional Court arises. Paragraph 2 of the case states that the claimant has during the qualifying period occupied one unfurnished tenement room on the third floor of a house, such room constituting a separate dwelling and being used by him for all purposes of living and being separately occupied by him as a dwelling or dwelling-house, and he has let to him therewith such use of the passages and staircases as is necessary and convenient to the access to and enjoyment of the said dwelling. We may at once disregard the use of the passages and staircases, for section 5 of the Parliamentary and Municipal Registration Act, 1878, enacts as follows: "For the purposes of any of the Acts referred to in this section, where an occupier is entitled to the sole and exclusive use of any part of a house, that part shall not be deemed to be occupied otherwise than separately by reason only that the occupier is entitled to the joint use of some other part." We may, therefore, confine our attention to the consideration of the exact premises occupied solely and exclusively by this inmate. It is also stated in paragraphs 7 and 8 of the case that the claimant has the exclusive occupation, use, and enjoyment of his said room or dwelling, and the landlord neither does nor has, by agreement or otherwise, any right to enter or in any way interfere with or exercise any control or dominion over the said room, nor has he any personal relationship with the claimant, nor does he, nor has he any right to exercise any control or dominion over him in his occupation; that the landlord does not reserve to himself or exercise any right of general control or dominion or mastership over the premises; and (paragraph 9) that the claimant has a key which enables him at all times to open the front door and obtain access to the house and his dwelling, and the landlord reserves to himself no right to otherwise fasten such door. On these findings it is clear that this room was occupied by this inmate as a dwelling-house within the meaning of the Act, and there appears to be no doubt that he was, within the meaning of section 3, subsection 2, of the Representation of the People Act, 1867, an inhabitant occupier, and, I should say, a tenant occupier, and therefore *primâ facie* entitled to the franchise. The fact that the landlord pays the rates and does the general repairs of the house does not alter the position of matters. I say so because it cannot be disputed on the part of the respondent that if the landlord did not reside in part of the house and did not exercise control over the inmates, this inmate would not be a lodger, but an occupying tenant. Sir George Jessel said in *Bradley* v. *Baylis*: "On the other hand, suppose a landlord does not demise the whole of the house, but everything in it that can be demised, except the staircases and passages, &c., as to which he gives the inmates the right of ingress and egress, but exercises no control over and does not reside in the house, I think the inmates are occupying tenants. Here, again, does the fact of the landlord repairing or paying rates and taxes make any difference? I think not. Of course he has a right to enter to make such repairs, but still, in my opinion, that does not prevent the occupier being in rateable occupation. The fact that the landlord executes the repairs and pays the rates and taxes makes no difference." In the case of ordinary flats the owner often takes upon himself when he lets the flats the obligation of paying the rates and taxes and doing the repairs. In that position of affairs, if this inmate was an occupying tenant within the meaning of the Act, does the mere fact that the landlord occupies a separate part of the house suffice, as a matter of law, to turn what would otherwise be an occupying tenancy into a lodger tenancy? I see no reason why we should so hold as a matter of law, and I agree with the decision of the Court of Appeal in Ireland in *M'Laughlin* v. *Chambers*, and with the very excellent reasons given for that decision. To hold otherwise would lead to strange consequences. Take the case of the owner of two houses living in one and letting the other to occupying tenants. Suppose one tenant goes out, and the landlord chooses to come in and live in the part of the house that has thus become vacant; would that mere fact, without any change in the central or other circumstances, change the position of the tenants into that of lodgers? We are not compelled as a matter of law to hold that, which I should regard as an anomalous and ridiculous state of things. It seems to me that the mere residence of the landlord in part of the house would make no difference unless he retained or had some right of control over the parts demised. The right of control is the essential matter to be considered. It has been frequently pointed out that to make an inmate a lodger there must be some right of control. In *Toms* v. *Luckett* Maule, J., said that "the question depends upon whether or not the owner of the house resides upon the premises, retaining his quality of master, and reserving to himself the general control and dominion over the whole." Other judges are, to my mind, referring to the same thing when they say that, in considering whether a person is a

lodger, it is necessary to see if that person lodges in the same house as the landlord and "with him," or as some other judges say, there must be a personal relation between him and his landlord. I think that this essential right of control was pointed out by Sir George Jessel in *Bradley* v. *Baylis*, where he says: "It seems to me, as to unfurnished lodgings (and I will only deal with unfurnished lodgings, as it is the only class of cases with reference to which questions are likely to arise) where the owner of the house does not let the whole of it, but retains a part for his own residence, and resides there, and where he does not let out the passages, staircase, and outer door, but gives to the 'inmates' (I use that term for my present purpose) merely a right of ingress and egress, and retains to himself the general control, with the right of interfering—I do not mean an actual interference, but a right to interfere, a right to turn out trespassers, and so on; there I consider that such owner is the occupying tenant of the house, and the inmate, whether he has or has not the exclusive use of the room, is a lodger." In that passage the learned judge showed the necessity, in considering the question whether an inmate was or was not a lodger, of seeing whether there was a right of general control on the part of the landlord. That being so, in the present case the revising barrister has found that there was no right of control by the landlord over the tenant, and as I cannot hold as a matter of law that the mere residence of the landlord in part of the house makes the occupying tenants lodgers, the appeal must succeed.

One word as to *Morfee* v. *Novis*. That case seems to me to be clearly distinguishable. In that case there was no finding by the revising barrister that there was no right of control by the landlord over the premises, but, on the contrary, the inference from his finding was that there was such a right of control, because he found that the occupation was such as to give to the landlord the right to sue for trespass. There was no finding that the inmate had the exclusive occupation, but only the exclusive use of the rooms; and, lastly, Cotton, L.J., pointed out that the immediate landlord exercised control over the whole house—that is, including the part let.

Therefore upon the facts of the present case the inmate was a tenant and not a lodger, and the appeal succeeds.

MATHEW, L.J.—I am of the same opinion. Section 5 of the Parliamentary and Municipal Registration Act, 1878, makes part of a house separately occupied as a dwelling a dwelling-house within the Representation of the People Act, 1867. To constitute a person an occupier of part of a house he must have the exclusive occupation of the part let. There must be no right of control over that part by the lessor. It is said that the revising barrister has neglected an imperative rule of law, that there cannot be exclusive occupation of a room in a house if the landlord resides in another room in the same house. It is said that the fact of the landlord living in the house shows conclusively that he has a general control over the whole house, including the room that is let. If that were true an extraordinary result would follow. If all the rooms in a house were let out to tenants as separate dwelling-houses, and one room became vacant, and if the landlord came and lived in that room, then that mere fact would convert all the tenants from occupying tenants into lodgers with all the consequences attaching thereto. I am of opinion that the mere fact of the residence of the landlord in the house does not of itself indicate such control by him over the whole house as to make the tenants lodgers.

Appeal allowed.

Solicitors for the appellant in the Court of Appeal, *Cunliffes & Davenport*, for *R. J. Fittall*, Devonport.

Solicitors for the respondents, *Ayrton, Biscoe, & Barclay.*

High Court of Justice.

Chan. Div. Buckley, J. — Aug. 5, 7, 8, 1905.

VICTORIAN DAYLESFORD SYNDICATE (LIMITED) v. DOTT. (*a.*)

Money-lender—Contracting while unregistered—Money-lenders Act, 1900 (63 & 64 *Vict. c.* 51), *ss.* 1 *and* 2.

Section 2 (1) (c) *of the Money-lenders Act,* 1900, *applies to a money-lender who has not registered himself under the Act, and consequently has no "registered name"; and he cannot sue upon any contract made by him while unregistered, the contract being illegal.*

Action.

This was an action brought by the plaintiff syndicate and a Mr. Bonnard, who was one of its directors, seeking to re-open a money-lending transaction between the plaintiffs and the defendant. The defendant admitted for the purposes of the action that he carried on the business of a money-lender, but he had not registered himself under the Money-lenders Act, 1900.

On the 31st of March, 1904, the defendant lent to the plaintiffs £500 upon the security of a bill for £525 at one month drawn on behalf of the plaintiff syndicate by Bonnard and another director and accepted by the Victorian Cornish Gold Mines Co. The defendant also received as consideration for the advance 100 fully-paid shares of £1 each in the Victorian Cornish Gold Mines Co., and an option to purchase 500 more of such shares at 7s. 6d. each. The bill was renewed monthly seven times, and as consideration for each renewal the defendant received £25 in cash, 100 more fully-paid shares, and a further option to purchase 500 shares at 7s. 6d. each. The defendant received altogether from the plaintiffs as consideration for the loan or the renewals, the bill for £525, £175 in cash, 800 fully-paid shares of £1 each, and options to take 3,000 more such shares at 7s. 6d. each. The value of the shares varied from time to time, but at the date of the action they were worth fully 15s. each. The amount due on the bill was repaid to the defendant on the 23rd of December (the date on which the writ in the action was issued), and on payment of such amount the defendant delivered to the plaintiffs the bill and 2,000 shares which had been deposited as security on making the loan.

The defendant had sold 400 shares for £303 13s. 9d. and retained 400 shares; he also held unexercised options to take 3,000 more shares at 7s. 6d. each.

The plaintiffs claimed that, the defendant being unregistered, the contract was void, and also to have the transactions re-opened on the ground that they were harsh and unconscionable, and that the defendant might be restrained from dealing with the shares or exercising the options which he held, and that he might be ordered to return the shares, and that the options might be cancelled.

(*a.*) Reported by H. H. KING, Esq., Barrister-at-Law.

The defendant contended that the terms had been proposed by the directors of the plaintiff syndicate themselves, who were fully aware at the time of their effect, and that the transaction was not harsh and unconscionable in view of the speculative nature of the shares at the time when the advance was made. He counterclaimed for specific performance of the agreements giving him the options on 3,000 shares at 7s. 6d. each.

Astbury, K.C., Gore-Browne, K.C., and *W. E. Vernon*, for the plaintiffs.—The defendant is a money-lender and is not registered under section 2, sub-section 1 (*a*), of the Money-lenders Act, 1900; he therefore has not made this contract in his registered name as required by section 2, sub-section 1 (*c*), and the contract is therefore void and cannot be enforced by the defendant: *Cope* v. *Rowlands*, 2 M. & W. 149, 157, 158; *Fergusson* v. *Norman*, 5 Bing. N. C. 76; *Learoyd* v. *Bracken*, 42 W. R. 196, [1894] 1 Q. B. 114. An Act which is passed for the protection of the public, and imposes a penalty upon the doing of a certain thing impliedly prohibits such thing, and the thing, if done, is void: Benjamin on Sales (4th ed.), 518. The plaintiffs do not desire to rely on the Act except as a defence to the counterclaim. Under the circumstances of this case the transaction was harsh and unconscionable, and we ask the court to adjudge what was fairly due to the defendant and to order him to return the rest. We do not object to his retaining the cash actually paid by the plaintiffs on the renewals and on repayment of the loan.

J. B. Matthews, for the defendant.—I do not dispute that whenever a statute prohibits a contract, that contract is illegal and void; but the court has to look at the statute in each case and see whether the particular thing is prohibited. Nothing in the Money-lenders Act, 1900, prohibits the contract of an unregistered money-lender. The argument for the plaintiffs is that, being a money-lender and unregistered, the defendant has no registered name, and therefore has committed an offence under section 2, sub-section 1 (*c*). I submit that the offence can only be committed by a registered money-lender. The only section of the Act dealing with a person who lends money not being registered is section 2, sub-section 1 (*a*). If sub-section 2 (*c*) is to be held to apply to him, the protection that a prosecution can only be instituted with the consent of the Attorney-General or Solicitor-General is taken away. The fact that the borrower is a corporation and not an individual must be taken into consideration on the question of whether the transaction was harsh and unconscionable: *National Trustees Co. of Australasia (Limited)* v. *General Finance Co. of Australasia (Limited)*, [1905] A. C. 373, 381.

Astbury, K.C., replied.

Cur. adv. vult.

BUCKLEY, J.—The defendant in this case is at the present time, and was at the date of the transaction in question, a money-lender, and his name is not now and was not at that date registered under the Money-lenders Act, 1900. On the 31st of March, 1904, he lent £500 for certain purposes, upon which he has received the following sums: First, the repayment on the 23rd of December of his £500; secondly, sums amounting to £503 13s. 9d. in cash; thirdly, 400 fully-paid shares of £1 each in the Victorian Cornish Gold Mines (Limited), equivalent at 15s. a share to £300; and, fourthly, he claims to be entitled, under options which he says he has exercised, to 3,000 like shares at the price of 7s. 6d.; taking these to be worth 15s. a share, this is equivalent to £1,125. The outcome of this is, that for a loan of £500 made on the 31st of March and repaid on the 23rd of December, the defendant will have received, if he succeeds in holding the bargain, the aggregate value of £503 13s. 9d., £300, and £1,125, making together £1,928 13s. 9d. This £1,928 13s. 9d. is the interest for the advance of £500 for, roughly, nine months. The value is in fact more than £1,928, for the shares are quoted at more than 15s. The plaintiffs say two things—first, that the defendant being a money-lender not registered under the Money-lenders Act, 1900, the contract is void; and secondly, that even if that is not so, the terms are harsh and unconscionable.

Upon the first question the relevant provisions of the Act are two—namely, first, that a money-lender, which the defendant is, must register himself under the Act; and, secondly, that he shall not enter into any agreement in the course of his business as a money-lender otherwise than in his registered name. Mr. Matthews, for the defendant, argues that, inasmuch as the defendant has not complied with the first of these provisions, he is not amenable to the second of them; that he escapes altogether from the provision of the Act that he shall not enter into any agreement in the course of his business as a money-lender except in his registered name by failing to comply with the provision of the Act that he shall have a registered name. I am unable to adopt that argument. The argument is rested upon this: It is said, and truly, that sub-section (3) of section 2 requires that if a money-lender is prosecuted under clause (*a*) of sub-section (1)—that is to say, for not registering himself—the consent of the law officer of the Crown must be obtained, and that a like consent is not required for a prosecution under clause (*c*). I do not know, but I can easily understand that the intention of the Act may be this—that it might be a hardship upon a person to prosecute him for non-registration as a money-lender without getting the consent of a law officer of the Crown, when the fact in debate might be the very difficult one, whether he is or is not a money-lender within the Act; whereas, if that is not the question, but he is prosecuted for the offence of failing to contract in his registered name, the same reason does not apply. That may be the meaning; I do not know, but suppose that it is so. Mr. Matthews' contention is that clause (*c*) relates only to the contract of a registered money-lender when he contracts otherwise than in his registered name. I think the contention is not supported by the provisions of the Act. If the unregistered money-lender be prosecuted, whether under (*a*) or (*c*), it would be necessary to aver that he was a money-lender, and an issue of fact might be whether he was a money-lender or not. If that issue did arise, it may be that the consent of the law officer would be necessary. It is unnecessary for me to determine that. That will have to be determined if ever any such prosecution should be instituted. To my mind it does not at all follow as a matter of construction of the Act that clause (*c*) does not apply to the contract of an unregistered money-lender. In my opinion it does. It follows from that, that the respondent has committed a breach of that clause of the Act of Parliament which requires him, being a money-lender, to contract in the course of his business as a money-lender in a registered name.

The next question is whether the Act is so expressed that the contract is prohibited so as to be rendered illegal. There is no question that a contract which is prohibited, whether expressly or by implication, by a statute, is illegal and cannot be enforced. I have to see whether the contract is in this case prohibited expressly or by implication. For this purpose statutes may be grouped under two heads—those

in which a penalty is imposed against doing an act for the purpose only of the protection of the revenue, and those in which a penalty is imposed upon an act not merely for revenue purposes, but also for the protection of the public. That distinction will be found commented upon in numerous cases, including those which have been cited of *Cope* v. *Rowlands*, 2 M. & W. 149, and *Ferguson* v. *Norman*, 5 Bing. N. C. 76. Parke, B., in the former case says the question to determine is whether the Act "is meant merely to secure a revenue to the city, and for that purpose to render the person acting as a broker liable to a penalty if he does not pay it? or whether one of its objects be the protection of the public, and the prevention of improper persons acting as brokers?" If I arrive at the conclusion that one of its objects is the protection of the public, then the act is impliedly prohibited by the statute and is illegal. I desire to point out that the present case is on that point abundantly plain. There is no question of protection of the revenue here at all; the whole purpose is the protection of the public. The money-lender has to be registered and has to trade in his registered name obviously and notoriously for the protection of those who deal with him. The purpose is a public purpose, and therefore upon all the authorities the act for the doing of which a penalty is imposed is an act which is impliedly prohibited by the statute, and is consequently illegal. The short effect of the statute, as it seems to me, is this: That it provides that a money-lender's contract must be in that money-lender's registered name, otherwise a penalty is imposed upon him; the result being that the act done is an act forbidden by the statute, and is illegal. There is another consideration. Not a bad test to apply, which leads in exactly the same direction, is this: whether the penalty in the Act is imposed once for all, or whether it is a recurrent penalty imposed as often as the act is done; if it be the latter, then the act is a prohibited act. Now, here the penalty is imposed every time the act is done. Further, the Act goes on to provide that on a second or subsequent conviction a man may be imprisoned with or without hard labour for a term not exceeding three months. Every time the money-lender contracts otherwise than in his registered name he is doing an illegal act. For these reasons I come to the conclusion that the contract under which the defendant was to receive certain sums was an illegal contract on which he cannot sue. The result is that his counterclaim fails, and I dismiss it with costs.

In the action the plaintiffs say that they do not wish to rely upon the non-registration of the defendant; they are desirous that the man should have what is a fair return for his money, and they ask me to act upon section 1 of the Act and find what is fairly due. I cannot put myself in that position. I have held that the contract is void. I cannot then set myself to see whether, under the Act of Parliament, I ought to set it aside, because there is nothing to set aside; and I cannot say how its terms ought to be reduced, because there are no terms to reduce. But in case this should go further, and the Court of Appeal should want to know what my judgment is upon the facts so far as they are material upon this part of the case, I will add this: There is a dispute of fact between Mr. Bonnard and Mr. Dott as to what passed when the bargain was originally made. Mr. Bonnard says that Mr. Dott represented himself as being unable himself to advance the money but as knowing a Mr. Richard Webster (who, according to Mr. Matthews' case, did not exist) who was willing to lend the money on the terms that he should have 60 per cent. (£25 a month) and certain fully-paid shares, and that Dott said that he (Dott), as his remuneration, would want a call on 500 fully-paid shares in the Victorian Cornish Co. upon the terms that were agreed. Dott says this is not so; that no Mr. Richard Webster was ever mentioned at all. On that question of fact I think that Mr. Bonnard is speaking the truth and Mr. Dott is not. There are other cases in which Mr. Dott professed himself unable to find the money, and I have to consider whether or not he is likely to have done so in the present case. One consideration which should be borne in mind in determining whether or not this was a harsh and unconscionable bargain is, I think, that the original bargain was obtained by a misstatement as to how the payments which were to be made for the loan were to be shared as between Dott and the supposed Mr. Richard Webster. Another matter which should be borne in mind is this—that Dott was certainly getting all the liability of the Cornish Co., such as it was; and was getting the liability, such as it was, of Bonnard and Dillon, who signed the note; and was getting the security of 2,000 fully-paid shares in the Victorian Cornish Co. That is a strong element in estimating the risk run by the defendant.

On the other hand, it is very necessary to bear in mind that, except in the particulars which I have stated, the terms were not, so far as I can see, extorted from Mr. Bonnard at all. He was willing to pay for a transaction which no doubt was not one of ordinary money-lending, in which there might be a considerable risk. All those are matters which should be borne in mind, and if I had had to estimate as best I could what would have been a fair return for the money, I do not know that I should have arrived at any higher figure than that which the plaintiffs are willing to concede. In point of fact the plaintiffs say this: "We do not seek to get back the £25 a month—that is, the 60 per cent. on the £500; let the defendant keep that." I can put this into the order: "The plaintiffs voluntarily offering to allow the defendant to retain the 60 per cent., order the defendant to repay the other sums and to re-transfer the shares." I believe all the figures are agreed between the parties, and, subject to any error of arithmetic which I may myself have made, it seems to me that there will be an order for the repayment of £303 13s. 9d., and an order to re-transfer 400 fully-paid shares in the Victorian Cornish Co., and an order for the dismissal of the counterclaim. As regards the costs, the defendant must pay the costs of the action, and, as I have already stated, the costs of the counterclaim.

I may add that in arriving at this conclusion I do so largely, not upon the basis of any merits of the plaintiffs, but upon the demerits of the defendant.

Solicitors, *John Vernon, Son, & Stephen; Morton & Patterson.*

Chan. Div. }
Warrington, J. } Nov. 1.

In re CHILDE AND HODGSON'S CONTRACT. (*a*.)

Vendor and purchaser—Contract for sale of freeholds—Undisclosed easement—Underground goit or watercourse—Constructive notice—Rescission of contract—Vendor and Purchaser Act, 1874 (37 & 38 *Vict. c.* 78).

Where a contract for the sale of freehold land contains a provision that the land is sold subject to the conditions contained in or referred to by a specified deed, and reference to that deed would have disclosed the fact that the land was subject to certain restrictions contained in a second deed, a purchaser, who before executing the contract has not inspected either the first or the second deed, will not be granted relief on the ground that he had no notice, at the time when he entered into the contract, of the restrictions contained in the second deed.

Adjourned summons.

This was a purchasers' summons under the Vendor and Purchaser Act, 1874, asking for rescission of a contract for the sale of freehold property, or for an abatement of the purchase-money, on the ground that the vendors had not made out a good title by reason of a material defect in the premises (the existence of a goit or watercourse), undisclosed at the time when the contract was entered into.

By an agreement in writing dated the 5th of July, 1904, the vendors, who were the receivers and managers appointed by the court for the debenture-holders in the Empire Boiler and Engineering Co. (Limited), agreed to sell to the purchasers certain freehold property situate at Ovenden, near Halifax, in the county of Yorkshire, consisting of a factory and other buildings known as the Empire Boiler Works.

Paragraph 9 of the contract of sale provided that the property was sold "subject to all easements affecting the same, and also subject to and with the benefit of the covenants, conditions, restrictions, and stipulations contained or referred to in and by an indenture of conveyance dated the 21st of December, 1899."

By the indenture of the 21st of December, 1899, the property was conveyed to the present vendors' predecessors in title subject, *inter alia*, to the conditions mentioned or referred to in an indenture dated the 5th of September, 1898.

The indenture of the 5th of September, 1898, which was a deed of compromise to settle disputes which had arisen between one John Todd and certain of the vendors' predecessors in title, provided, *inter alia*, that the said John Todd was to be entitled to the uninterrupted supply and flow of water running through an underground goit or watercourse under the land in question, subject to the right of the vendors' predecessors in title to divert such goit or watercourse so far as it did not lessen or interfere with the supply of water.

It appeared from the affidavits that the goit or watercourse in question consisted of a walled conduit about two feet square running under the premises contracted to be sold, and lying about nine or ten feet below the floor of one of the buildings, and a few inches below the floor of another building. It formed the head goit supplying water to a mill-dam belonging to John Todd, who had the right to enter and repair it.

It appeared also from the affidavits that the existence of the goit would not have been disclosed on an ordinary inspection of the premises by an intending purchaser, nor were either of the deeds of 1899 or 1898 inspected by the purchasers previously to signing the contract.

On the 1st of May, 1905, the purchasers issued the above summons.

Rowden, K.C., and *J. G. Wood*, for the purchasers.—It is the duty of a vendor to disclose all material defects at the time when the contract is entered into, and not to leave the purchaser to discover them for himself by inspecting the title-deeds. This was the rule laid down by the Court of Appeal in *Reeve* v. *Berridge*, 36 W. R. 517, 20 Q. B. D. 523, and followed in *In re White and Smith's Contract*, 44 W. R. 424, [1896] 1 Ch. 637, and *Molyneux* v. *Hawtrey*, 52 W. R. 23 [1903] 2 K. B. 487. A walled goit or watercourse, such as the present one, is rather in the nature of an exception or reservation from the land itself than of an easement proper, and as such it does not come within paragraph 9 of the contract. In *In re Puckett and Smith's Contract*, 50 W. R. 532, [1902] 2 Ch. 258, there was a provision in the contract similar to paragraph 9 of the present contract, but it was held not to excuse the vendor from disclosure of an underground watercourse, which would not be visible on an ordinary inspection of the premises.

Norton, K.C., and *Abraham*, for the vendors, were not called on.

WARRINGTON, J.—In this summons the purchasers are asking for rescission of a contract for the sale of freehold property, or for compensation, on the ground of a material defect in the property of which they had no notice at the time when the contract was entered into. [His lordship stated the facts as set out above.] The question is one of law arising upon the construction of the contract, the material stipulations being contained in paragraph 9. [His lordship read the paragraph and the reference to the deed of 1898 contained in the deed of 1899.] Now, the deed of 1898 was in effect a deed of compromise as to disputes over certain land, of which the land now in question, known as lot 31, forms part. On the plan annexed to the deed of 1898 this lot 31 is shown as having a goit or underground watercourse running through it; not only this but the deed itself contains a stipulation that the West Yorkshire Land Investment and Guarantee Society (Limited), the predecessors in title of the present vendors, are to have the right of diverting the goit flowing through lots 30 and 31 for the purposes of developing their estate, subject to Todd's right to the uninterrupted flow of water through it. Now, if the purchasers had inspected the deed of 1899 they would have ascertained that they were buying subject to the conditions contained in the deed of 1898; and if they had looked at the latter they would have found that they could only interfere with the goit subject to Todd's rights, and the plan would have shown them that the goit ran through the land they were proposing to buy. Mr. Rowden has cited two cases, both of which relate to leaseholds, and the point in each case is that a purchaser of leaseholds is only fixed with notice of the ordinary covenants which would be contained in a lease, and not of any special onerous covenants which it is the duty of the vendor to disclose at the time of the contract, and not for the purchaser to ascertain by inspecting the lease itself. In *In re White and Smith's Contract*, [1896] 1 Ch., at pp. 641, 642, Stirling, J., thus sums up the law: "In my opinion . . . it is *primâ facie* the duty of the vendor to disclose all that is necessary to protect himself, and not the duty of the purchaser to make inquiry before entering into a contract. . . . The circumstances under which a purchaser without

(*a*.) Reported by E. WAVELL RIDGES, Esq., Barrister-at-Law.

actual knowledge of a state of facts ought to be held to have constructive notice of it have been recently considered by the Court of Appeal in *Bailey* v. *Barnes*, 42 W. R. 66, [1894] 1 Ch. 25, where the law as laid down by Lord Cranworth in *Ware* v. *Lord Egmont*, 3 W. R. 48, 4 De G. M. & G. 460, was adopted. One test according to what is there laid down appears to be whether inquiry ought to have been made as a matter of prudence having regard to what is usually done by men of business under similiar circumstances." The question, then, for me to decide is, ought the purchasers, as a matter of prudence in the ordinary course of business, to have inquired into this deed of 1899? and if that is so, what ought they to have discovered by that inquiry? Now paragraph 9 of the contract says: "Subject to . . . the covenants, conditions, restrictions, and stipulations contained or referred to in and by" the deed of 1899; is it possible to say, in the face of that, that it would not be prudent for the purchaser to look at the deed of 1899? Assuming that is so, would it be prudent not to look at the deed of 1898, which is clearly referred to in the deed of 1899? It seems to me quite hopeless to say they should not, as a matter of prudence, have looked at the deed of 1898. Therefore I arrive at the conclusion that as a matter of prudence they should have looked at the deed of 1898, and had they done so they would have had notice of the goit. This summons therefore fails.

Solicitors for the purchasers, *Nussey & Fellowes*, for *Vint, Parkinson, & Co.*, Bradford.

Solicitors for the vendors, *Bridges, Sawtell, & Co.*, for *William Postlethwaite*, Leeds.

K. B. Div.
(Lord Alverstone, L.C.J., and Wills and Darling, JJ.) — Oct. 26.

SECRETARY OF STATE FOR WAR *v.* WYNNE AND OTHERS. (*a.*)

Crown—Prerogative—Distress for rent—Chattels belonging to Crown seized on tenant's premises by landlord—Immunity from distraint of Crown chattels.

Chattels belonging to the Crown are exempt from liability to seizure by distress.

So held, reversing the decision of the county court judge in an action for damages for illegal distress of a horse, the property of the Crown, seized on a farm belonging to the defendant for rent due to her from the tenant, although only formal notice that the horse was Crown property had been given to the bailiff and to the auctioneer, and no legal proceedings in the nature of an extent had been instituted to establish the title of the Crown in the horse.

Appeal from the decision of the judge of the Winchester County Court in an action for damages for illegal distress, raising the question of the immunity from distraint of the goods of the Crown.

The facts which were not in dispute were that the defendant, Miss Wynne, had distrained for rent upon a horse which belonged to the Government and was one of those used in the South African War. The horse was lent by the officer commanding the yeomanry in the district to one Tibble, who was Miss Wynne's tenant, a member of the yeomanry who had served in the war. The horses which had been acquired as mounts for the various bodies of yeomanry were insured by the Government for £30 each, the premiums being paid by the Secretary of State for War.

When the fact became known to the military authority that a distress had been put into Tibble's farm they gave notice to the bailiff, and subsequently to the auctioneer, that the horse which bore the Government mark belonged to the Crown. Nevertheless it was put up and sold for £9 10s.

The present action was then brought in the county court claiming damages for illegal distress, and it was not disputed that the horse was the property of the Crown. The county court judge held, however, that the plaintiff was not entitled to recover because in order to make good his right on behalf of the Crown some legal proceedings in the nature of an extent ought to have been instituted by him to establish his title to the property in question. He accordingly dismissed the action

The Secretary of State for War appealed.

J. Simon (*Henry Sutton* and *G. S. Robertson* with him), for the plaintiff.—It is submitted that goods belonging to the Crown, which are upon the land of another person, are not liable to be distrained for rent due from that person to his landlord. There is no direct authority to support this proposition, but in Woodfall's Landlord and Tenant (17th ed.), p. 496, citing Viner's Abridgment, among a list of things enumerated as exempt from liability to seizure by distress is Crown property. In Chitty's Prerogatives of the Crown (1820 ed.), p. 377, it is stated that the King's cattle damage feasant were not distrainable. This case is an *a fortiori* one because it might there have been urged that the owner of straying cattle was in the wrong, which could not be alleged here. With regard to the damages, the plaintiff's witnesses agreed that £25 to £30 was the value of the horse, but no evidence was called by the defendant. At the sale the horse only fetched £9 10s. [THE COURT intimated they did not desire to hear further argument.]

No one appeared for the defendant.

Lord ALVERSTONE, L.C.J.—I regret that this case has not been argued on the other side, because I cannot pretend to recollect, or even ever to have known, all the law there may be in connection with such a matter as this; but I have no doubt that Mr. Simon, aided as he has been by very able assistance, has done his best to ascertain what the authorities are; and would have called to our attention anything which he found against him if there had been substantial authorities the other way.

In my opinion, the decision of the learned county court judge was wrong, and cannot be maintained. I think he has fallen into the error of thinking that the authorities establish that the Crown must take proceedings in the nature of legal proceedings before its goods can be protected, because at the conclusion of his judgment he says: "It is, in my view, not sufficient that a mere claim or demand for the delivery of the goods seized should be made by the Crown. There must, in my opinion, be something equivalent to an extent—that is, formal legal process of some kind actually commenced." It is rather difficult to see if the Crown's goods are upon a man's property and the Crown claims them what legal process could be commenced except the claim or an action founded on the claim, as this was. There is no necessity for a writ of extent; not only is there no necessity for it, but a writ of extent would not be applicable. The learned judge does not seem to have quite appreciated that the authority he has cited is only useful for the purpose which Mr. Simon has last mentioned in his argument—namely, of showing that

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

the title of the Crown derived from proceedings—"inchoate" is scarcely the right word—the title of the Crown which is founded upon proceedings, takes precedence of the right of the landlord who would otherwise be entitled. But it seems to me there is a much broader principle involved here which unfortunately the judge overlooked, and that is that the Crown property never was, according to the law of England, subject to these incidents. There is the passage cited to us from Woodfall's Landlord and Tenant, and which seems to me to be a logical deduction, in which the author, speaking of distress for rent, says: "There is no modern decision as to Crown property. But it is laid down in the old text-books that a man cannot distrain during the possession of the Crown, and it would seem to follow that Crown property, even though the Crown be not tenant, is privileged, on premises demised to a subject." If even when the Crown is tenant and owes the rent the Crown property cannot be taken in distress, it would seem a strange thing to hold that the Crown property could be taken for someone else's rent. Therefore logically the proposition contended for follows. Again, if we refer to books of great learning, such as Chitty's Prerogative of the Crown and other authorities there cited, it would certainly seem that there are many instances in which the Crown goods are exempt from rights and privileges of other people and liabilities of other people. I do not refer to them all because they may rest on different considerations—for instance, taxes, tolls, and rates, and things of that kind, but when it is stated in Chitty's Prerogative of the Crown that the personal property of the King is not subject to the laws relative to sale in market overt and distress damage feasant, I think two very strong instances are given, because, of course, the sale in market overt depends upon an old common law right that by a sale in market overt the purchaser gets a good title, and it must be the exemption of the Crown property from that, which gives the Crown the right. In the same way, I think Mr. Simon's point is well founded although it is not direct authority, that the argument in favour of Crown property being liable to distress damage feasance would be very much stronger than the argument as to the liability of Crown property to pay the rent of other persons because the property happens to be on their land.

I think, therefore, the county court judge is mistaken in thinking that legal proceedings, and those only, are the root and foundation of the protection of Crown property and that the law which has prevailed for centuries with regard to the custom of a landlord to levy distress at common law, is not sufficient to enable the landlord to take Crown property. Therefore judgment ought to be for the plaintiff.

There is some slight difficulty in regard to there being no finding as to the value which is involved, and no agreement as to the value in the court below, but I think substantially justice will be done if we take the lowest figure mentioned as the value of the horse—namely, £25 (it is quite clear that the learned judge would not be bound to take the £9 10s. for which the horse was sold at a forced sale), and if we enter judgment for the plaintiff with costs here and below for £25, giving the defendant leave to have a new trial if she considers the value is less, upon the terms, of course, of paying the costs of this appeal and of the previous trial.

WILLS, J.—I am of the same opinion, and the only observation I wish to add is that to my mind utter absence of direct authority upon the subject, seeing how far back our books of precedent and our books of abridgment and so on go, is of itself an argument in favour of the proposition of the appellant in this case; because if Crown property had been subject to this distress, seeing the immense number of Crown properties that there were in ancient times and the very considerable number there are still, it would be almost impossible that there should not have been sub-leases and sub-demises which should from time to time have affected the property of the Crown.

DARLING, J.—I agree. To my mind this is an important and interesting case, and but for the fact which my brother Wills, J., has just pointed out, one would be rather surprised not to find among the list of things absolutely privileged from distress mention made of the goods of the Crown. But if one reflects upon what the history of the country has been, and why goods are held by the Crown and who represented the Crown, and whose business it was to seize goods, one would not expect to find that any high sheriff would have ventured to take the goods of William the Conqueror or any succeeding monarch. I add a word or two on this matter because there seems to me to be a real principle involved here, making it manifest that the goods of the Crown are privileged from distress and ought to be privileged from distress for the public good. Goods called goods of the Crown are held by the Crown for the public advantage, for the benefit of the whole country, and many of those goods by their very nature are held for the defence of the country by the Crown, to whom the defence of the country is confided. This very horse was a horse which had served in the Boer War and which might be required at any moment for the defence of this country. Therefore it seems to me that anyone who had to consider this matter from the beginning would say among goods which shall not be liable to be seized for rent due to anybody, whether by the Crown or by anyone else—*a fortiori* by anyone else—shall be those things which belong to the Crown because the Crown has to keep the country defended against the enemies of whom it always has plenty.

Now, it is worth noticing, I think, that all goods, with certain well-known exceptions, even those of a stranger, are subject if they be on the demised premises to distraint for rent owing by the tenant of those premises. If the goods of the Crown were not absolutely privileged it must constantly happen that when an expedition is being sent abroad, horses belonging to the Crown and military stores, the property of the Crown, would have to be temporarily placed in some town on their way to the seaport; or in sheds and buildings actually at the seaport; and it might well be that those premises where the goods or horses were placed were held by a person who had not paid his rent. Can it be supposed for a moment that things absolutely necessary to a military expedition should be liable to be seized and held and sold with all the formalities necessary to distress for rent, and the military expedition perhaps delayed while this enforcement of civil right went on. I should have been very much surprised if anybody could have pointed to a case in which the goods of the Crown on the way to the battle of Agincourt or Waterloo had been seized—let us say at Southampton, close to where this very horse was seized. It seems to me that the whole of history shows that what could not have been possibly tolerated in the case of those expeditions could not be tolerated now in the case of this horse which was held by the Crown manifestly for the purpose to which I have alluded—namely, the defence of the country.

Appeal allowed with costs.

Solicitor for the plaintiff, *The Treasury Solicitor.*

Court of Appeal.

From Chan. Div. (Vaughan Williams, Stirling, and Cozens-Hardy, L.JJ.) — Dec. 5.

In re BENETT.
WARD *v.* BENETT. (*a.*)

Executor—Administration—Legal personal representative—Right of retainer—Executor of sole trustee—Breach of trust—Cestui que trust—*Exercise of right of retainer.*

A sole trustee of a fund died insolvent and indebted to the beneficiaries. His executrix never acted in the trust.

Held, that the executrix could not be compelled at the instance of the beneficiaries to exercise her right of retainer for their benefit in respect of moneys due from the estate of the deceased trustee to the trust fund.

In re Ridley, [1904] 2 *Ch.* 774, 9 *W. R. Dig.* 108, *approved.*

Fox *v.* Garrett, 28 *Beav.* 16, *overruled.*

Sanders *v.* Heathfield, 23 *W. R.* 331, *L. R.* 19 *Eq.* 21, *distinguished.*

This was an appeal from a decision of Buckley, J.

By her will, dated the 8th of January, 1891, Elizabeth Horne (hereinafter called the testatrix) appointed M. C. W. Horne and C. H. Benett to be trustees and executors thereof and devised the residue of her real and personal estate to her trustees upon trust to pay the income thereof to M. C. W. Horne for life or until such act or thing as therein more particularly mentioned, and after his death if he should die leaving lawful issue then to pay the annual sum of £200 to Maude Laura Horne during her widowhood, and after making provision out of the residue of the income for the maintenance of the infant children of M. C. W. Horne she declared that the trustees should hold her residuary trust estate subject to the above-mentioned life interest in trust for such child or children of M. C. W. Horne, and in such shares and manner as he should by deed or will appoint, and in default of appointment in trust for all the children equally.

The testatrix died on the 7th of March, 1891, and her will was duly proved by M. C. W. Horne and C. H. Benett, the executors and trustees thereof.

M. C. W. Horne died on the 7th of March, 1893, without ever having exercised the powers of appointment given him by the testatrix's will. C. H. Benett thenceforward until his death intestate on the 28th of June, 1903, was the sole trustee of the testatrix's will.

The defendant Edith Pearce Benett, the widow of C. H. Benett, was on the 25th of July, 1903, granted letters of administration to the estate and effects of C. H. Benett.

On the 3rd of September, 1903, the defendant paid to the Royal Exchange Assurance Co. a premium of £17 on a policy on the life of Maude Laura Horne which had been assigned by her on the 10th of July, 1895, to C. H. Benett to secure repayment by her to the trust estate of a sum of £600 advanced to her thereout.

By indenture of the 30th of November, 1903, made between the defendant of the one part and W. R. Law and H. L. Crawford, of the other part, the said W. R. Law and H. L. Crawford were appointed trustees of the testatrix's will in the place of M. C. W. Horne and C. H. Benett, but no part of the testatrix's estate was vested thereby in them.

On the 25th of April, 1904, two leasehold houses, being part of the trust estate, were assigned by the defendant to the new trustees.

C. H. Benett's estate was insolvent, and an administration action was commenced by the plaintiff on behalf of himself and all other creditors of C. H. Benett against the defendant as his legal personal representative.

On the 7th of December, 1903, the usual order for accounts and inquiries was made by Buckley, J.

A summons was taken out in the administration action by the new trustees, asking (1) that it might be determined whether it was the duty of the defendant in her capacity of legal personal representative of C. H. Benett to prove in the administration action as a creditor of C. H. Benett's estate in respect of the moneys belonging to the estate of the testatrix which were in his hands at the time of his death or in respect of which he was then indebted to or otherwise liable to account to her estate, and in respect of interest, &c., and that the defendant might be directed to prove in the administration action for the moneys; (2) in case he should be so directed to prove that it might be determined whether the defendant was entitled to exercise for the benefit of the applicants a right of retainer over the assets belonging to the estate of C. H. Benett in respect of these moneys or some of them; (3) that the defendant might be directed to exercise such retainer if entitled so to do.

Buckley, J., came to the conclusion in fact that Mrs. Benett had acted as a trustee of Elizabeth Horne's will and directed her to exercise her right of retainer for the benefit of the estate.

Mrs. Benett appealed.

Norton, K.C., Frederic Thompson, and *George Henderson,* for the appellant.

Upjohn, K.C., and *Elgood,* for the respondent.

The following cases were referred to in the course of the argument: *Davies* v. *Parry,* 47 W. R. 429, [1899] 1 Ch. 602; *Sanders* v. *Heathfield,* 23 W. R. 331, L. R. 19 Eq. 21; *In re Owen, Poe* v. *Shortt,* 23 L. R. Ir. 328; *In re Faithfull,* 57 L. T. 14; *In re Ridley,* [1904] 2 Ch. 774, 53 W. R. Dig. 58; *Legg* v. *Mackrell,* 2 De G. F. & J. 551, 9 W. R. Dig. 91; *Fox* v. *Garrett,* 28 Beav. 16, 8 W. R. Dig. 3.

VAUGHAN WILLIAMS, L.J.—In this case we really have to decide whether the decision of Buckley, J., in the court below was correct, or the decision of Joyce, J., in *In re Ridley.* A question of fact has been raised here, whether Mrs. Benett did anything by way of acceptance of the trusts of the will of the testatrix Elizabeth Horne of which her deceased husband was the trustee. In our judgment she did nothing whatever by way of acceptance of those trusts. In that state of things the question arises whether the beneficiaries who are entitled under that trust, of which the deceased Mr. Benett was the trustee, can come to the court and insist on Mrs. Benett as the legal personal representative of her deceased husband exercising her right of retainer, she not having in any way accepted the position of a trustee. I need not go at length into the question of what are the rights of the legal personal representative of a deceased trustee in respect of declining to accept the position and duties of a trustee. The case of *Legg* v. *Mackrell* shows—whether you look at the judgment of Campbell, L.C., in the Court of Appeal, or of Stuart, V.C., in the court below—that the legal personal representative of a deceased trustee has an absolute right to decline to accept the position and the duties of a trustee. That being so, we have to consider the question whether these beneficiaries

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

under the will have the right to call upon the legal personal representative of the deceased trustee to exercise the right of retainer in their favour. It is said, with a good deal of reason, that this question has already been determined in the cases of *Fox* v. *Garrett* and *Sanders* v. *Heathfield*. With regard to the later case, which is a decision of Malins, V.C., when the facts of the case are looked at, it is plain that the Vice-Chancellor had not really this question to decide, because on the facts of that case what he had to decide was whether the beneficiaries had a right to insist upon the application of moneys which had been retained in accordance with the trust. It was a case in which the right of retainer had been already exercised, therefore that case does not seem to me at all to stand in the way of a decision in accordance with the view of Joyce, J., in *In re Ridley*. With regard to *Fox* v. *Garrett*, that was a case in which in point of fact there were two estates, both being administered by the court, and possibly the ground of the decision in that case was that the two estates were both being administered, and the court may have taken the view that where two estates were being administered by the court the court had a right to deal with the matter in a way in which it would not otherwise have dealt with it. I confess for myself I am not quite certain that the real ground of the decision was the fact of the two estates both being administered by the court, but it occurred to me in the course of the argument that this was a material matter which the court took into consideration in *Fox* v. *Garrett*, and I am somewhat confirmed by the fact that in the 6th ed. of Williams on Executors, vol. 2, p. 978, published in 1867, some years after the decision, the view seems to be taken that this circumstance of the two estates both being administered was to a considerable extent the ground for making the administrator retain for the benefit of the persons interested in the creditor's estate. Whether the decision in that case can be so explained or not, it is necessary for us to consider whether that case was rightly decided. For myself I am prepared to say that it was wrongly decided. Everyone agrees that the right of retainer was a legal right. Before very long after that right had been established the question arose whether the right could be exercised in respect of a debt due to the executor, but in respect of which he had no beneficial interest, though the legal right was vested in him, for the purpose of benefiting the persons beneficially interested. What was held was that the legal right of retainer in an executor was in no way affected by the fact that when he had received the debt due to him from his testator's estate he would have to hold and apply and distribute it according to the requirements of the trust of which his testator was the trustee. That being so it seems to me that the proper statement of the result is that the right of an executor to retain is not a right which he holds in trust, but it is a personal privilege of his own which was given to him because the acceptance of the office of legal personal representative put him in a position which was disadvantageous as compared with the position of other creditors of the deceased. He could not have sued himself, and he was deprived of the advantage of being the first to sue. In these circumstances he was granted by the common law the privilege of retainer. If the earlier cases upon the right of retainer are examined, this right is always there spoken of as a privilege. In the first edition of Williams on Executors, where the author speaks of the right of retainer, I observe there is a good deal which does not appear in the later editions; but in all the earlier passages dealing with right of retainer, Sir Edward Vaughan Williams speaks of it as a privilege, and the cases referred to also deal with it as a privilege. He says (Part III., Book II., ch. 2, s. 6, p. 685, of the first edition): "This privilege of the personal representative arises from the mere operation of law on the ground that it were absurd and incongruous that he should sue himself, or that the same hand should at once pay and receive the same debt"; and he goes on to speak of the circumstances in which it can be exercised. Where the privilege has been exercised and the right of retainer asserted, from that moment I do not doubt that the executor, in respect of the proceeds of the retainer, is a trustee for the *cestui que trustent* under the trusts, but in my opinion there is no trust whatever in respect of the right of retainer itself. It was suggested by Mr. Upjohn in his very instructive argument that really and of necessity the executor must be a trustee in a sense from the first. That he certainly was bound to preserve and collect this property of which his testator had been trustee I agree; but in my view he had to preserve and collect it because that obligation was thrown upon him *virtute officii*. I do not think it would be proper to describe him as a trustee in the matter of this collection, or to say that because in the course of the collection he was entitled to exercise his personal privilege the same obligation which made it his duty to preserve and collect all the personal estate of his testator made him a trustee in any sense for the beneficiaries entitling them to insist on the exercise of this right of retainer in their favour. The case is really not unlike the case of a trustee in bankruptcy. The trustee takes over the estate of the bankrupt, but with regard to a great many kinds of property vested in the bankrupt they might be of such a nature that no interest whatever could come to the creditors, because no part of the property in question was the beneficial property of the bankrupt. But very often there was property as to which it was not certain whether the bankrupt had any interest or not. It was held that in such cases the mere possibility of an interest in the bankrupt was not enough to pass the property to the trustee, though in some cases the circumstances might be explained so as to show that some beneficial interest belonged to the debtor and passed on his bankruptcy to the representative of the estate. I do not think that in these cases the trustee in bankruptcy became a trustee for the *cestui que trustent* to whom the debtor was indebted, though no doubt the trustee in bankruptcy had duties to perform in respect of the preservation of the property. Suppose the trustee in bankruptcy died and some estate was still outstanding, he being in the position of a sole trustee. I do not think that in either of the cases I have put, the executor of the trustee would be responsible for or have any duty as to getting in that estate.

In these circumstances, in my judgment, the right conclusion to come to is that which Joyce, J., arrived at in *In re Ridley*. He does not in terms deal either with *Fox* v. *Garrett* or *Sanders* v. *Heathfield* or *In re Faithfull* or *In re Owen*, but I agree with the conclusion at which he arrived, that the executor of a sole trustee who has not accepted the trusteeship or in any way acted as trustee cannot be ordered by the court at the instance of the *cestui que trustent* of the deceased testator to exercise his right of retainer. I should like to add that I am not at all sure that after the appointment of the new trustees the power to exercise the right of retainer continued. In my opinion, therefore, the appeal must be allowed.

STIRLING, L.J., referred to the facts and continued: The will of Elizabeth Horne is so expressed that the administratrix might have become trustee of the will and acted in the execution of the trusts had she

elected to do so; but she did not desire to become a trustee of the will, and she studiously abstained from doing anything which amounted to an acceptance of the trusts. In so holding we differ from Buckley, J., who came to the contrary conclusion upon the evidence, which was not so fully before him as it has been before us. The defendant, as legal personal representative, did, however, appoint new trustees of the will, but the deed of appointment contained no vesting declaration so as to pass to the new trustees the right to sue in respect of any legal *choses in action* which were vested in the last trustee. The new trustees now ask that the legal personal representative of the last trustee may be ordered to exercise the right of retainer vested in her, for the benefit of the persons beneficially entitled under the will of the testatrix. The question that we have to decide is really whether a legal personal representative is under a legal obligation to exercise his right of retainer for the benefit of beneficiaries. We have had the benefit of an able argument from Mr. Upjohn, and the way in which he puts it is this. He begins by considering the position of a sole trustee in whom is vested a legal *chose in action*. On the death of such a trustee, he says, the new trustee properly appointed being unable, as he would have been before the Judicature Acts, to get a legal assignment to himself of the *chose in action*, might have called on the legal personal representative of the deceased trustee to permit him to sue in the name of the representative for the purpose of getting in the *chose in action* for the estate. I think that the new trustee would have had that right. Then Mr. Upjohn goes on to say that if the debtor was the deceased trustee, then, as is perfectly obvious, the representative of that trustee could not sue himself, but he is given by law the privilege of retaining out of the assets of his testator an amount sufficient to satisfy a debt due to himself, and the new trustee could call on the legal personal representative to exercise the right of retainer for the benefit of the *cestui que trustent* just as he could call on him to allow his name to be used for the purpose of recovering the legal *chose in action*. That reasoning, supposing it to be sound, is all based upon the impossibility of the trustee suing in his own name to recover a legal *chose in action*, but in the case before us it breaks down because the debt was a purely equitable one. It was a debt which arose from the deceased trustee having dealt with the estate in such a manner as to render himself liable for a breach of trust. The right to enforce that liability is that of an equitable owner, and the beneficiaries could have sued the legal personal representatives of the deceased trustee, and the new trustees when properly appointed could have sued her without waiting to obtain a vesting order from the court. I think, therefore, that argument fails, and this result would follow if it were well founded, that in every case in which a sole trustee dies insolvent and having committed a breach of trust, his legal personal representative would have to exercise his right of retainer for the purpose of recouping the trust estate, and would be guilty of a breach of trust if he did not exercise the right in that way. For that proposition no authority was adduced, and breaches of trust by sole trustees who have died insolvent not having been unknown for a long period one would have expected some authority for that proposition if there had been any, but no such authority has been produced. I do not deny that there may be cases in which the legal personal representative might be called upon by the *cestui que trustent* to exercise a legal right of retainer vested in him. It would be easy to cite examples of this. For instance, if there were a surviving trustee of a marriage settlement which contained a covenant by one of the trustees to pay a sum of money, which would when paid form part of the trust estate, and that trustee died insolvent and intestate and the surviving trustee took out administration to him, I think it would be clear that, having got administration by virtue of being a creditor in his trust capacity, he would be bound to exercise such rights as the law gives him for the benefit of his trust estate. I can conceive other cases where the legal personal representative of a deceased surviving trustee would stand in the position of a trustee for the beneficiaries, but I do not see how a legal personal representative who is under no such obligation as I have indicated towards the beneficiaries under another instrument could be compelled to exercise for their benefit that personal right which the law gives him of retaining out of the assets of his testator in favour of his own personal debt. As regards the authorities, the case of *In re Ridley* is an express authority in favour of the view which I take. The principal authority cited, on the other hand, was *Fox* v. *Garrett*, which has been followed in Ireland in the case of *In re Owen*. In both these cases, as I read them, there was a legal debt, and this case is therefore distinguishable on that ground. Another distinction is that in both those cases two estates were being administered by the court, and it is possible, though it is not so stated in the report in either case, that some circumstances may have occurred in which a duty towards one particular estate may have been established. Therefore, on that ground also, this case is not covered by the decisions in those cases. But if these distinctions are not satisfactory, I must say I prefer the view taken by Joyce, J., in *In re Ridley* to that of Romilly, M.R., in *Fox* v. *Garrett*. As regards *Sanders* v. *Heathfield*, which was followed in *In re Faithfull*, I do not think that our decision trenches in any way upon those cases. In both those cases the legal personal representative had elected to exercise the right of retainer, and it was held that having thus elected he had done nothing with which a court of equity could interfere, and was entitled to appropriate the fund for the benefit of the persons beneficially entitled under the trust. As regards the decision of Buckley, J., in this case, it rested on the ground that the legal personal representative had accepted the trusts of Elizabeth Horne's will. We have held that that view is not the right view. That removes the legal ground on which Buckley, J., based his decision. I think therefore the appeal must be allowed.

COZENS-HARDY, L.J.—I am of the same opinion, and for the same reasons, and I have very little to add. Buckley, J., held that the defendant had accepted the trusts of Elizabeth Horne's will because her solicitors had paid the premium due in respect of a policy of life assurance. We must treat the payment by the solicitors as a payment by her, whether she knew of it or not, but I think it was a payment by her for the benefit of whomsoever it concerned, it not being known at the time of the payment whether the policy was part of the testator's estate or of the estate of which he was trustee, and I should be sorry to hold that by an act of such dubious import the defendant accepted the position of a trustee of Mrs. Horne's will. Then we have to consider what is the position of the legal personal representative of a sole trustee with reference to the right of retainer. As my lord has pointed out, the right is a personal privilege, though, of course, there may be a duty superadded to it. If the debt is due to the personal representative in the character of a trustee, then I think that the view taken by Romer, J., in *Davies* v. *Parry* was correct. He says: "If as

trustee he represents a creditor, he is compellable at the instance of his *cestui que trust* to enforce his right." That comes from the superadded relation owing to his filling the position of trustee. If, however, we do not find that relationship existing in fact, I do not, apart from authority, see any reason why the legal personal representative should be bound to satisfy these particular creditors rather than other creditors. The right of retainer is a personal privilege, and I do not see why the court should compel a legal personal representative, who is not willing to exercise it, to exercise this right. No doubt the view we take is opposed to *Fox* v. *Garrett*, but I prefer the view taken by Joyce, J., in *In re Ridley*, which is contrary to *Fox* v. *Garrett*, and I agree with my lord and with Stirling, L.J., that the latter case was wrongly decided.

Solicitors, *Law & Worssam; Downing, Handcock, Middleton, & Lewis*, for *Bond & Pearce*, Plymouth; *Pearce & Sons*.

High Court of Justice.

Chan. Div. } Nov. 21, 22, 23, 28, 29, 30;
Farwell, J. } Dec. 1, 5, 12.

MANCHESTER (MAYOR OF) *v.* NEW MOSS COLLIERY (LIMITED). (*a.*)

Mines and minerals—Subsidence—Lateral and vertical support—Construction of Waterworks Clauses Act, 1847 (10 *&* 11 *Vict. c.* 17).

Undertakers cannot claim under conveyances made in pursuance of Acts incorporating the Railway Clauses Consolidation and Waterworks Clauses Acts—whether such conveyances be of surface alone or of surface and minerals—any right to support from land belonging to any person to whom they have not paid, or are not ready and willing to pay, compensation under the Act.

Pountney *v.* Clayton, 31 *W. R.* 664, 11 *Q. B. D.* 820, *followed.*

Trial of action.

In this case the plaintiffs, who were the local authority for the city of Manchester, sought to obtain an injunction to restrain the defendants from working mines underlying land adjacent to land acquired by the plaintiffs in such a way as to cause subsidence of the land so acquired and injury to reservoirs constructed thereon.

Part of the land in question had been purchased from one Taylor and part from the Earl of Stamford.

The defendants counterclaimed that, if they were liable for workings under the Stamford land at more than forty yards from the Taylor land, they were entitled to compensation under the Waterworks Clauses Act in respect of the obligation to leave mines unworked at such greater distance.

The facts of the case sufficiently appear from the judgment.

J. Fletcher Moulton, K.C., Jenkins, K.C., and *Hugh Moulton*, for the plaintiffs.—We base our case on the simple common law right of a freeholder and our land must not be let down. We do not rely on the Waterworks Clauses Act; the clauses of that Act relating to compensation do not apply here. The fundamental case is *Great Western Railway Co.* v. *Bennett*, 15 W. R. 647, 2 H. L. 27. For the purposes of this case we make no distinction between land and buildings thereon. We say that the defendants are letting down our land. As part of the damage we are entitled to damage done to buildings. It is for the defendants to show that the result of the subsidence is due to our buildings and not to their mining operations: *Stroyan* v. *Knowles*, 6 H. & N. 459. In cases of this class, if a railway or a water company acquires a right to support, there is nothing in the Waterworks Clauses Act to take it away from them. When surface and mines are severed, a right to support is created, but previously there is no such right.

Neville, K.C., Upjohn, K.C., and *R. F. Macswinney*, for the defendants.—The real question is, What, having regard to the authorities, is the true construction of the Waterworks Clauses Act, 1847, with regard to the position of waterworks undertakers with reference to their mines. The authorities all lead to this conclusion—that both the Railway Clauses Act, 1845 (8 & 9 Vict. c. 20), and the Waterworks Clauses Act, 1847, are substantially similar enactments, which introduce, with regard to both railway undertakers and waterworks undertakers, a code, which is not in addition to the common law rights of landowners, but is in substitution for those rights in the case of railways and in the case of waterworks. It makes no difference whether the land is taken compulsorily or voluntarily, or whether the surface land is purchased alone or with the mines.

Fletcher Moulton, K.C., in reply.—Section 6 and sections 18 to 27 are the sections of the Waterworks Clauses Act by which we are affected. These sections together constitute an addendum to or modification of the main code of expropriation contained in the Lands Clauses Act (8 & 9 Vict. c. 18). Section 6 of the Waterworks Clauses Act shows that it was intended that certain sections of the Act should be supplementary to the main expropriation code contained in the Lands Clauses Act. Section 18 deals only with the construction of the conveyance and has nothing to do with rights. Sections 19, 20, and 21 are purely administrative clauses, enabling machinery which is going to be established by later clauses to be effectively worked. Section 22 does not confer rights. All it says is that notice must be given under certain conditions, and that undertakers shall have rights of expropriation on compensation terms. Section 23 deals with rights. Section 24 is for the benefit of both parties. Section 25 provides for payment by the undertakers in respect of their interference. Section 26 provides for mutual inspection of, and information about, work being carried on. Section 27 deals with cases where water accumulated by the waterworks may be a danger to the mines below, on the principle of *Fletcher* v. *Rylands*, 3 H. L. 330.

Dec. 12.—FARWELL, J.—The plaintiffs claim to be owners in fee simple of certain lands in Lancashire, and as such seek an injunction to restrain the defendants from working the mines under adjacent land so as to let down the surface. Under their special Act (10 & 11 Vict. c. ccii.), which incorporated the Lands Clauses Consolidation Act, 1845, and the Waterworks Clauses Act, 1847, the plaintiffs were empowered to acquire and construct waterworks for the supply of Manchester and other places with water, and accordingly, by conveyances dated the 13th of January, 1875, they acquired under the powers of the Acts from Lord Stamford and had conveyed to them 246 acres, 3 roods, 31 poles, delineated on the plan on the deed, excepting to the grantor all mines and minerals with full liberty to work the same without making any compensation for injury to the surface; and by another conveyance, dated the 1st of July, 1875, they acquired under the like powers from John Taylor and had conveyed to them 23 acres, 3 roods,

(*a.*) Reported by F. HARDINGE DALSTON, Esq., Barrister-at-Law.

39½ poles, delineated on the plan thereon, together with all mines, minerals, delphs, and quarries thereon. This latter property forms a sort of peninsula running up into, and on three sides nearly surrounded by, the Stamford land, as appears from the plan that has been put in evidence. In 1875 the plaintiffs obtained a further Act (38 & 39 Vict. c. clxi.) enabling them to extend their waterworks. I do not think it necessary to go further into details of the plaintiffs' title, as I hold that it is plain, on the face of the conveyances and Acts, that both the Taylor and Stamford land were acquired under statutory powers for the purpose of the waterworks, and it follows that the principles laid down by the House of Lords in *Elliot* v. *The North-Eastern Railway*, 11 W. R. 604, 10 H. L. Cas. 333, apply—namely, that the conveyances are to be read as if the Acts of Parliament were incorporated therein, and that, too, whether the lands were taken under compulsion or by agreement. When the undertakers have compulsory powers it can make no difference whether the landowner drives them to put those powers into actual execution or whether he yields without doing so; in either case he sells because he must. The case of *Elliot* v. *The North-Eastern Railway* arose on the construction of a private Act with clauses differing materially from those that I have to consider, but the general principle is the same, and *Fletcher* v. *Great Western Railway*, 8 W. R. 501, 4 H. & N. 242 affirmed in the Exchequer Chamber 6 H. & N. 689, is to the same effect. There the land was, as here, acquired by agreement and not by putting into actual execution any compulsory power, and Cockburn, L.C.J., in the Exchequer Chamber, at p. 697, says: "The owners of the land in the question had conveyed it to the defendants, a railway company, for the purposes of their railway. This was not a voluntary conveyance in the ordinary sense of that term, but a conveyance of the land according to the provisions of the Railway Clauses Consolidation Act"—I think he must mean the Lands Clauses Consolidation Act—"by which the owners must necessarily have parted with it." This is material, because the plaintiffs' case is pleaded and was opened as if they were simply owners in fee who had acquired land as a common law corporation and not under any statutory powers. I hold that this is not so, but that their rights fall to be determined as owners who have acquired under statutory powers.

The facts in the case are not really in dispute to any material extent. I find that the plaintiffs duly constructed their reservoirs, partly on Stamford land and partly on Taylor land, more than twenty years ago, part of the northern embankment being on Taylor land; and that the defendants have worked, and are continuing to work, under the Stamford land in such a way as to cause subsidence to the Taylor land and to render further subsidences inevitable, whether the working be continued or stopped at once, and that such subsidences would have occurred whether the embankment had been placed on the land or not. This last finding renders it unnecessary to refer further to the reservoirs on the point either of damages or of injunction: *Stroyan* v. *Knowles*, 6 H. & N. 459. There is a small discrepancy of expert opinion on the exact extent to which the area of danger of subsidence extends, but it is unnecessary for me to decide between the conflicting experts because it is common ground that this area extends considerably beyond forty yards from the outside of the Taylor land. The defendants have given notice of their intention to work up to the limits of their property, and the plaintiffs have declined to pay compensation under the Act and insist that they have the ordinary rights of a common law owner to lateral support; the defendants contend that the rights of the parties depend on the Waterworks Clauses Act, and that under that Act the plaintiffs have no such right; the plaintiffs retort that those Acts do not expropriate owners without compensation, but proceed on the basis that nothing is taken away without compensation, and that nothing has been done or paid to deprive them of the ordinary owners' right to lateral support, and that if they do not choose to compensate the defendants the latter can only proceed to exercise such rights as they would have had if the Waterworks Clauses Act had not passed.

Now the rights of surface and mineral owners at common law are well settled. Every landowner has, as an incident of his property in land, a right to its lateral support by the adjacent land to an extent sufficient to support it in its natural state. Where the surface and the minerals have been severed, whether by grant of surface reserving minerals or by grant of minerals reserving surface, the surface owner has a right to support both lateral and vertical unless a power of working the minerals so as to let down the surface is granted or reserved, and where there is nothing to show how or when surface and minerals were severed the same right to support exists. The authorities cited in argument undoubtedly establish that in the case of railway and waterworks undertakings the common law in this respect has been displaced by a statutory code. As Lord Esher says in *Lord Gerard's case*, 43 W. R. 374, [1895] 1 Q. B. D. 464: "I am of opinion that, wherever the company seek to take compulsorily from a landowner part of his land, leaving a mine, the case is governed by the group of sections in the Railway Clauses Consolidation Act, commencing with section 77. It appears to me that that group of sections is the law by which in such a case the rights and obligations of both parties are to be determined, to the exclusion of any common law right that might otherwise arise from the relation between the parties. The rights which arise from that relation are statutory, and all questions, both as regards compensation and other matters, are to be governed by the Act of Parliament." This is fully borne out by the cases in the House of Lords of the *Great Western Railway Co.* v. *Bennett*, 15 W. R. 647, 2 H. L. 27, and *Holliday* v. *Wakefield*, 40 W. R. 129, [1891] A. C. 91. Lord Esher confines his observations to the case before him, but for the reasons already given I am of opinion the code applies, whether the land is taken compulsorily or not, in all cases where the undertakers acquire lands under statutory powers which incorporate the Railway Clauses Act or the Waterworks Clauses Act, as the case may be. Further, I am of opinion that this statutory code cannot be dealt with piecemeal by taking section 18 of the Waterworks Clauses Act alone and looking no further into the Act, when it is shewn that the undertakers have acquired the mines as well as the surface, but that all the sections (from 18 to 27 inclusive) relating to mines are to be read together as part of one scheme of legislation, and, if any defect or obscurity be found in one, recourse is to be had to the whole series: see Lord Macnaghten's judgment in *Bwllfa and Merthyr Dare Steam Collieries* v. *Pontypridd Waterworks Co.*, [1903] A. C., at p. 430, citing *Smith* v. *Great Western Railway Co.*, 26 W. R. 130, 3 A. C., p. 165. Except that section 27 in the Waterworks Clauses Act has no equivalent in the Railway Clauses Consolidation Act, I agree with the late A. L. Smith, L.J.'s, statement in *Consett Waterworks Co.* v. *Ritson*, 22 Q. B. D., at p. 329, that there is no material distinction between the Railway Clauses Consolidation Act, 1845, and the Waterworks Clauses Act, 1847, in this respect; the sole difference is that in the former Act it is provided

that, if no compensation is paid, it shall be lawful for the mine owner to work the mines, and in the latter there are added these words, "as if this Act and the special Act had not been passed." In my opinion these words are necessarily implied in the Railway Clauses Consolidation Act, and their insertion in the Waterworks Clauses Act adds nothing to the clause, and the decided cases that have been cited are equally applicable whether they relate to railways or to waterworks. In considering the powers and duties to be given to and imposed on undertakers exercising the compulsory powers of the Land Clauses Act, the Legislature foresaw that, in the case of railway and waterworks undertakings peculiar conditions would exist with respect to mineral rights. It would be obviously unjust to deprive the mineral owners of their property without compensation, but there was great difficulty in most cases in assessing any immediate value that would be fair, and moreover in mineral districts the amount of compensation, if mines had to be purchased out and out in the first instance, might be so large as to render the construction of the undertaking financially impossible. It therefore appeared good to them to alter the common law by which a purchaser buying land acquires with it such rights as are necessary for its use for the purpose for which it is bought and which the vendor can convey, and (in the case of waterworks) the law by which undertakers, who are authorized to execute works, are under no liability for any loss arising from the proper construction and use of those works. By the former I mean the law as enunciated in *Caledonian Railway Co.* v. *Sprott*, 4 W. R. 659, 12 Macq. 449, and *Elliot* v. *North-Eastern Railway*, 11 W. R. 604, 10 H. L. Cas. 333, and by the latter the law as enunciated in *Fletcher* v. *Rylands*, L. R. 3 H. L. 330. In order to get over this difficulty the Legislature adopted the principle of deferred compensation, it relieved the undertakers from the necessity of immediate purchase, and it preserved to the mineral owner his right to be fully compensated when the time arrived at which it became practically possible for him to work his mines, or, in default of compensation, his right to work notwithstanding that he might thereby let down the surface. As Lord Macnaghten says in *Lord Provost and Magistrates of Glasgow* v. *Farie*, 37 W. R. 627, 13 A. C. 696, "Where lands containing mines are taken by a railway company it would probably be a most serious injury to the vendor to compel him to include his mines in the sale. In most cases he would be selling a long narrow strip of minerals, which might form an impassable barrier in the middle of his mines. If the sale were a voluntary sale to an ordinary purchaser it would be a matter of course to reserve the mines. On the other hand, neither railway companies nor persons who construct waterworks require mines as such, or are capable of working mines for profit. Mines are only useful to them so far as they may contribute to the support of the lands under which they lie. And in many cases they may be worked without interfering with the beneficial enjoyment of the surface." In the case of waterworks, if the mine owner works in default of receiving compensation the undertakers may be liable for injury done to his mines by flooding under the doctrine of *Fletcher* v. *Rylands*. This is carried out by the fasciculus of clauses in the Waterworks Clauses Act, 1847, ss. 18 to 27. Section 18 provides that the undertakers shall not be entitled to any mines or minerals under any land purchased by them except only such parts as are carried away in constructing their works unless they expressly purchase them, and all such mines are excepted out of the conveyance of such lands unless expressly named and conveyed. I cannot regard this section as a mere conveyancing section, inserted solely for the purpose of altering the ordinary construction of deeds in the case of railway and waterworks undertakings, and therefore of no application in cases where the mines are bought and conveyed; either by itself or in conjunction with the following clauses it has the effect of depriving the undertakers of all right to support from the excepted mines—a right that would otherwise be implied, as the sale is for the purpose of the undertaking: see Lord Esher's judgment in *Pountney* v. *Clayton*, 31 W. R. 664, 11 Q. B. D., at p. 834—as soon as the mine owner is in a position to give notice of intention to work his mines, and this appears to me to be material in considering the effect of the exception in the section. It is contended that it has the effect of placing the undertakers, who have purchased the mines, outside the Act altogether, and in the position of an ordinary owner in fee. But inasmuch as the courts have held on a consideration of all the sections, 18 to 27, that the conveyance of land, excepting the mines, does not grant any indefeasible right of support, it is necessary to consider whether there is anything in the same sections that will affect the right thus claimed under the exception in clause 18, where the conveyance under the statute has been of the mines as well as of the surface. Clause 22 provides that except where otherwise provided for by agreement between the undertakers and other parties, if the owners, &c., of mines under the undertakers' works or within the area prescribed by their private Act, or, if none, within forty yards therefrom (which I will call the statutory area) be desirous of working, such owners, &c., shall give notice of their intention to work thirty days before commencing to work, and if the undertakers make compensation shall not work; but if they fail so to do the mine owner may work as if the Act and the special Act had not been passed. This clause obviously applies to all mines within the statutory area, whether they belong to the owner of the surface taken by the undertakers or to other persons. The principle of the Act is that no person shall be deprived of his mines without compensation; if the owner of adjacent mines is not the same person as the owner of the surface taken, he is within section 22, and cannot work without giving notice; if he gives notice he is entitled to compensation or to work with the benefit of clause 27. This is clear if the surface owner has sold surface only, and how can any act of his alter the rights of the adjacent owner? If, as Mr. Moulton argues, the principle of the Acts is compensation, not expropriation, why is the owner of the adjacent mines to be deprived of his rights under clauses 22, 23, and 27 by the payment of compensation to another person? It is true that the owner in fee at common law who sells the fee sells also the rights that he has to lateral support; but the answer must be that in this case section 18 does not put the undertakers in the position of the ordinary owners in fee, but in the position of owners in fee according to a statute which gives them such rights only as they can possess and enjoy consistently with the rights given to others by the same statute. This leaves untouched the case where the owner of the surface who sells the mines as well is also owner of the adjacent mines. It may be (I express no opinion) that he grants the right to subjacent support, if he gets compensation which covers it; but this does not apply to the case of the adjacent mine owner who has received no compensation and has done nothing to displace or defeat his statutory rights. If this were not so, the waterworks company might purchase a strip of land a few yards wide and long with the mines below, and, by building the wall of their reservoir upon it, prevent large areas of coal from being worked with-

out paying any compensation at all, and without being under the liability imposed by section 27. The evidence in this case shows that the area of danger in deep mines with the seam on the dip is very large, and that the value of the minerals in question in this case is nearly a million sterling. Further, the acquisition of the mines by purchase under section 18 is entirely at the option of the company, and they are not likely to buy except in cases where the existence of workable mines is extremely unlikely. It is no part of their business to work mines, nor could such strips as they could buy be worked profitably. If they buy, they buy for support, and they can do this more advantageously under section 22, not only because they can defer payment, but also because they do not under that section buy and pay for the mines, but have only to compensate the mine owner for what the mine owner would have made out of it during the time it would have taken him to work it: see *Bwllfa and Merthyr Dare Steam Collieries* v. *Pontypridd Waterworks*, [1903] A. C. 426. Although there is no express authority on the point, this is the principle on which the Exchequer Chamber appears to me to have acted in *The Metropolitan Board of Works* v. *The Metropolitan Railway Co.*, 17 W. R. 416, 4 C. P., p. 192, where they held that the board of works had acquired no right to lateral support for one of their sewers, and this is the distinction between that case and the case of *In re The Corporation of Dudley*, 8 Q. B. D., p. 86, 30 W. R. Dig. 120, where the right to direct support by subjacent mines was held to have been acquired. I agree with Mr. Moulton's contention that the Land Clauses Consolidation Act and the Railway Clauses Consolidation Act and the Waterworks Clauses Consolidation Act are based on the principle that expropriation and compensation go hand in hand, but I apply it against the plaintiffs in favour of the owner of adjacent minerals, who is not to be expropriated without compensation. There is no question of expropriating the plaintiffs, they are the persons with statutory power to expropriate others, and the real question is, What extent of estate and interest on the true construction of the Act have they succeeded in appropriating to themselves?

I hold, therefore, that the defendants are entitled to work within the statutory area, whether they let down the plaintiffs' reservoirs or not. The next question is, as to the rights of the parties outside the statutory area, in this case forty yards, as the plaintiffs' private Acts give no other limit, for I find on the evidence that workings without as well as within the area have caused subsidences on parts of the plaintiffs' embankment on the Taylor land, although it is not possible to distinguish between the effect produced thereby. Now, the extent of the statutory area is left to the discretion of the undertakers, just as the extent of the land to which their compulsory powers and the limits of deviation therefrom are left to them, subject, of course, to the approval of the committee of the House. The scheme of all such Acts is that the undertakers state accurately the extent of the property required to be taken by them and obtain from the Legislature powers over the same in exchange for compensation; the courts never presume that the Legislature has authorized A. to take B.'s property without compensation. The Legislature can, of course, do so, if it thinks right; but, if it does, its intention must be expressed in clear and plain terms. The obvious intention of the Waterworks Clauses Act is that the undertakers should state the area from which they require support and should be authorized to acquire such support with the special privilege of deferring payment of compensation. Their contention is that they are entitled to support beyond that area so chosen by themselves without paying any compensation—that is, that they can give themselves rights without payment by neglecting to secure a proper area of protection either intentionally or from lack of foresight. I am of opinion that I cannot construe the conveyance according to the statute under section 18 as giving them any such rights; the undertakers have been given the powers and privileges in the statute in exchange for all other rights in respect of support, whether lateral or vertical; if they cannot claim the benefit of section 22 to an extent sufficient to protect their works, they have only themselves to thank, because they failed to extend the statutory area sufficiently. I cannot construe the Acts so as to enable them to increase their rights by their own defaults, and there is all the more difficulty in the plaintiffs' way because this right claimed by them is one to which it would be very difficult to give practical effect by way either of injunction or damages. A claim to lateral support, not from the adjacent land which can be rightfully worked out, but from land beyond the worked out adjacent land, is certainly difficult to enforce in practice: see *Corporation of Birmingham* v. *Allen*, 25 W. R. 810, 6 Ch. D. 284. Further, I think that my opinion on both points follows from and is not an undue extension of the decision in *Pountney* v. *Clayton*, 31 W. R. 664, 11 Q. B. D. 820. In that case the minerals under the land taken by the railway company were in lease to a tenant, and the Court of Appeal assumed (at p. 832) that the tenant was bound so to work the mines as not to let down the surface. The lessor conveyed the land to the company subject to the lease, and the company took advantage of the Railway Clauses Consolidation Act and did not purchase the lessee's interest. It was argued that, as the lessor had conveyed that surface to the company, he had thereby conveyed all the rights in respect of and for the benefit of the surface which he had as against the lessee; but the court rejected this contention and held that the company had only such rights as the mineral sections in the Railway Clauses Act had given them, and that the lessee could work so as to let down the surface as against the railway company and all persons claiming through them, although the lessor had not as between himself and his lessee parted with his rights to support. Mr. Moulton urged that the case merely decided that the plaintiff had not proved his title, but the gist of the decision is the reason why he failed to prove it. I venture to think that I am following the principle of that decision in holding, as I do, that undertakers cannot claim under conveyances made in pursuance of the Acts incorporating the Railway Clauses Consolidation and Waterworks Clauses Acts—whether such conveyances be of surface alone or of surface and minerals—any right to support from land belonging to any person to whom they have not paid or are not ready and willing to pay compensation under the Act. Reference has been made to the Public Health Amendment Act, 1883, but I do not think that it has any bearing on the case before me, except that section 3, sub-section 2, enables local authorities, such as the plaintiffs, to alter and extend the statutory area. This section obviates any difficulty that may arise from a mistake in the original estimate of the area of danger, and enables local authorities to protect themselves in case of danger on the usual and proper terms of paying compensation. The result is that the action fails, and is dismissed with costs.

Judgment for defendants.

Solicitors, *Austin & Austin*, for *W. H. Talbot*, Manchester; *Bower, Cotton & Bower*, for *H. G. Hall*, Ashton-under-Lyne.

Chan. Div. } Nov. 30; Dec. 5, 21.
Joyce, J. }

CARLISLE v. SALT. (a.)

Vendor and purchaser—Party-wall notice and award—Material facts—Non-disclosure of by vendor—Title—Deposit—Expenses of investigating title—Return of—London Building Act, 1894 (57 & 58 *Vict. c. ccxiii.*), *s.* 90.

A party-wall notice and award under the London Building Act, 1894, *are material facts, and the non-disclosure of them by the vendor entitles the purchaser to the return of the deposit with interest, and also the expenses of investigating the title, together with the costs of the action.*

Stevens *v.* Adamson, 2 *Stark.* 422, *followed.*

Action.

In this case the plaintiff claimed repayment of the deposit he had paid the defendants, together with the expenses he had incurred in investigating the title and the costs of this action.

The facts were as follows: On the 12th of October, 1904, an agreement was entered into by the plaintiff and the defendants whereby the plaintiff agreed to purchase the freehold hereditaments No. 9, Portsmouth-street, Lincoln's-inn, from the defendants for the sum of £1,950, and to pay forthwith a deposit of 10 per cent. on the purchase price. The plaintiff accordingly paid the defendants' agent the sum of £195 deposit as aforesaid.

Previously to this, on the 2nd of November, 1903, a party-wall notice under the London Building Act, 1894, was served on the defendants by the owner of the adjoining premises, No. 10, Portsmouth-street (hereinafter called the building owner), whereby the building owner gave notice that he intended to execute certain works therein mentioned in connection with the party-wall separating Nos. 10 and 9, and on the 10th of October, 1904 (two days before the agreement was entered into), an award was made whereby it was agreed that the existing party-wall should be demolished and a new one erected in its place.

The defendants failed to disclose these facts to the plaintiff on or previously to the 12th of October, 1904.

The building owner immediately proceeded to carry out the works mentioned in the said award.

On the 4th of November, 1904, a dangerous structure notice under the London Building Act, 1894, Amendment Act, 1898, was served upon the defendants requiring them forthwith to take down various portions of the said premises and to shore up the same immediately, and in obedience to a subsequent order by a magistrate the house was pulled down.

Previously to the pulling down of the said premises they were in the occupation of a tenant.

Younger, K.C., and *Cozens-Hardy*, for the plaintiff.—A party-wall notice had been served upon the defendants, and an award made under the London Building Act. These were material facts, and it was the duty of the defendants to disclose them. This duty the defendants had failed to perform. The condition of the premises which necessitated the dangerous structure notice and the magistrate's order arose from the carrying out of the works mentioned in the award. A good tenant had been lost owing to the pulling down of the house in obedience to the magistrate's order.

They cited *Stevens* v. *Adamson*, 2 Stark 422; *Turner* v. *Green*, 43 W. R. 537, [1895] 2 Ch. 205; *Whittington* v. *Seale-Hayne*, (1900) W. N. 31, 48 W. R. Dig. 99; *Newbigging* v. *Adam*, 35 W. R. 597, 34 Ch. D. 582.

Hughes, K.C., and *R. E. Moore*, for the defendants.—The plaintiff bought the premises with a view to pulling them down and rebuilding, and therefore the demolition of them by the defendants in obedience to the magistrate's order was no hardship on him. The party-wall notice and the award were not such material facts as it was the duty of the defendants to disclose. If, however, they were such material facts, that would only entitle the plaintiff to claim that the defendants should clear off the incumbrance before the completion of the contract.

They cited the following cases: *In re Leyland and Taylor's Contract*, 49 W. R. 17, [1900] 2 Ch. 625; *Howe* v. *Smith*, 32 W. R. 802, 27 Ch. D. 89; *Soper* v. *Arnold*, 38 W. R. 449, 14 A. C. 429; *Mostyn* v. *West Mostyn Co.*, 24 W. R. 401, 1 C. P. D. 140; *Torrance* v. *Bolton*, 21 W. R. 134, 8 Ch. App. 118; *Edwards* v. *M'Leay*, 2 Swanst. 287.

JOYCE, J., in giving a considered judgment, reviewed the facts and said: This is not an action to set aside for fraud a purchase completed by conveyance and payment, but simply to get payment back of the deposit and the expenses of investigating the title. The defendants admit that they did not disclose to the plaintiff that they had received a party-wall notice and that an award had been made, but no fraudulent intent is imputed to them. These were material facts affecting the price and the title of the property.

Now, the vendor of real estate is under an obligation to disclose a material defect in the title or in the subject of the sale which is exclusively within his knowledge, and which the purchaser could not be expected to discover for himself with the care ordinarily used in similar transactions. In this case the defendants concealed, for they did not disclose, facts which were material to the value of the property, and which constituted material defects in the title. I must follow *Stevens* v. *Adamson*, and order the defendants to repay the deposit with interest, and also the expenses to which the plaintiff has been put in investigating the title, together with the costs of this action.

Judgment for the plaintiff.

Solicitor for the plaintiff, *A. L. Jacobs.*

Solicitor for the defendants, *E. S. Bristowe.*

(a.) Reported by P. JOHN BOLAND, Esq., Barrister-at-Law.

Chan. Div. } Dec. 11, 12.
Warrington, J. }

OFFIN v. ROCHFORD RURAL DISTRICT COUNCIL. (a.)

Highway — Roadside waste — Road between irregular fences—Presumption of dedication—Local Government Act, 1894 (56 & 57 *Vict.* c. 73), *s.* 26 (1)—*Public Authorities Protection Act,* 1893 (56 & 57 *Vict.* c. 61), *s.* 1—*R. S. C*, 1883, *ord.* 25, *r.* 5.

The fact that a public highway runs between fences raises the presumption that all the open space between the fences forms portion of the highway, and was intended to be dedicated to the public, unless there is evidence to rebut that presumption. The fact that the fences are irregular, and not in a continuous line, does not by itself rebut the presumption of dedication.

Neeld *v.* Hendon Urban District Council, 81 *L. T. N. S.* 405, 48 *W. R. Dig.* 67, *and* Countess of Belmore

(a.) Reported by E. WAVELL RIDGES Esq., Barrister-at-Law.

v. Kent County Council, 49 *W. R.* 459, [1901] 1 *Ch.* 873, *distinguished.*

Reg. *v.* United Kingdom Electric Telegraph Co., 10 *W. R.* 538, 6 *L. T. N. S.* 378, *and* Harvey *v.* Truro Rural District Council, 52 *W. R.* 262, [1903] 2 *Ch.* 638, *followed.*

Trial of action.

The question to be determined in this action was whether a triangular strip of grass land inclosed by fences on two sides but lying open to a public highway on the third side, formed portion of the highway, or belonged to the owner or the adjoining inclosed land free from any public rights of way.

By a simple deed of conveyance dated the 24th of December, 1902, the plaintiff Offin purchased a freehold farm, known as Brick House Farm, situate in the parish of South Fambridge, in the county of Essex, including a triangular strip of rough grass land, about 1,600 square yards in extent and thirty yards in width at its broadest part, lying open to a public highway which intersected the farm upon one side, but separated from the farm premises by hedges and a gate on the remaining two sides.

In 1904 the plaintiff contracted to sell the farm, together with the triangular strip, to one Edward Thomson, and the latter having entered into possession under the contract, with the consent of the plaintiff erected a fence inclosing the triangular strip from the highway, leaving a margin of about seven feet between it and the highway.

In or about July, 1904, the Rochford Rural District Council, as highway authority for the district, and acting in compliance with the statutory duty imposed upon them by section 26 (1) of the Local Government Act 1894, by their agents entered upon the land and broke down and destroyed the fence.

In February, 1905, the plaintiff commenced this action claiming a declaration that the triangular strip of land belonged to him absolutely free from any public right of way or other right, and an injunction restraining the defendants, their servants and agents, from trespassing upon it.

The defendants claimed that the land formed portion of the highway, but did not rely upon any specific acts of dedication, or of intention to dedicate to the public, either alone or jointly with evidence of user. They also set up section 1 of the Public Authorities Protection Act, 1893, by way of defence.

The proved facts as to user and situation of the land and hedges appear in the judgment.

Rowden, K.C., and *Begg*, for the plaintiff.—Though it is admitted that the metalled portion of the road is a public highway, it is necessary to prove user of the unmetalled portion. The farm and the triangular strip of land have been in settlement since 1826, with the exception of a short period from 1871 to 1875, therefore there was no person capable of dedicating the land to the public during that period. This is sufficient to rebut any presumption of dedication arising from user by the public during that period: per Cotton, L.J., in *Spedding* v. *Fitzpatrick*, 38 Ch. D., at p. 414, 36 W. R. Dig. 157. The position of the fences shows that the strip of land once formed part of an ancient close before the road was made across it. This is sufficient to rebut any presumption of the fences having been put up as boundaries separating the highway from the inclosed land. The fences are irregular, and not in a continuous straight line, therefore there is no presumption that the whole of the land between the fences has been dedicated to the public: *Neeld* v. *Hendon Urban District Council*, 81 L. T. 405, 48 W. R. Dig. 67; *Countess of Belmore* v. *Kent County Council*, 49 W. R. 459, [1901] 1 Ch. 873. Further, the user by the plaintiff, or his predecessors, is sufficient to rebut the theory of dedication. As to the defence set up under section 1 of the Public Authorities Protection Act, 1893, the plaintiff is really claiming a declaration of title, and therefore this action does not amount to an "action, proceeding, or prosecution" such as is contemplated by that section. Even if it does, and the plaintiff has no cause of action, the action comes within ord. 25, r. 5, which enables the plaintiff to claim a declaration of title even though no "consequential relief is or could be claimed or not."

Dickens, K.C., and *Herbert Smith*, for the defendants.—Where the road runs between fences there is a presumption that the whole of the land between them has been dedicated to the public, even though the fences are irregular: *Harvey* v. *Truro Rural District Council*, 52 W. R. 262, [1903] 2 Ch. 638. If user by the public of the metalled portion is admitted, there is no need to prove user of the unmetalled portion: *Reg.* v. *United Kingdom Electric Telegraph Co. (Limited)*, 10 W. R. 538, 6 L. T. N. S. 378. In *Neeld* v. *Hendon Urban District Council* the land formed part of the waste of the manor, here it does not. *Countess of Belmore* v. *Kent County Council* does not apply, because in that case there was evidence to rebut the presumption of dedication. Here the evidence of user given by the plaintiff is insufficient, nor has there been given any evidence at all which is inconsistent with an intention of dedication. [They referred also to the following cases: *Rex* v. *Wright*, 3 B. & Ad. 681; *Locke-King* v. *Woking Urban District Council*, 62 J. P. 167, 46 W. R. Dig. 66; *Friern Barnet Urban District Council* v. *Richardson*, 62 J. P. 547; *Curtis* v. *Kesteven County Council*, 39 W. R. 199, 45 Ch. D. 504.] As to the defence under section 1 of the Public Authorities Protection Act, 1893, this is an action, proceeding, or prosecution within that section, and is therefore barred because the cause of action was the breaking down of the fence by the defendants, and that took place more than six months before the action was commenced. Ord. 25, r. 5, does not enable the plaintiff to bring an action for an injunction after the stipulated period has elapsed.

Rowden, K.C., replied.

WARRINGTON, J.—The question in this action is whether a piece of grass land abutting upon the metalled portion of a public highway is or is not roadside waste, and therefore portion of the highway itself. It is necessary first to consider the facts: The *locus in quo* is the rural district of Rochford, and the piece of land in question has until recently been treated as forming portion of a farm known as Brick House Farm. We know nothing with regard to the character of the road except from a point somewhat south of South Fambridge until it reaches the actual *locus in quo*, and between these points the road runs between some kind of fences, and by the side of the road are strips of roadside waste of varying width. When the fence reaches the corner of the triangular strip in question, it turns off somewhat sharply to form the boundary dividing the strip from the farm premises on two of its sides, and runs on until it almost meets the metalled portion of the road at the far corner of the strip. One portion of the fence or hedge, which forms two sides of the triangle, looks older than the other portion. The piece of land is covered with rough grass, and in 1901 there appears to have been a small dip in the soil near the boundary of the metalled portion, and beyond this the surface of the strip of land is somewhat higher than that of the metalled road, but it seems doubtful whether it is higher than the crown of the road. It looks, in fact, as though the elevation had been made by throwing

out the soil to form the gutter. As to the fences bounding the strip on two sides, looking at the map it is possible to conjecture that the strip of land once formed an ancient close with the land on the other side of the road, and that the road cut this close into two parts. But it appears from the evidence that the fences in the field on the other side of the road are not of the same nature as the fences bounding the strip on two of its sides, therefore I cannot hold that the road was made over an existing close.

As to the mode in which the land has been used at various times, it appears to have been used by the tenants for several purposes: They have from time to time placed clamps of manure upon it, but always, it seems, nearer to the fence than to the road; they have also grazed cattle, and perhaps sheep, upon it, but the sheep do not appear to have been penned, in fact the user as to grazing seems to have been the same as on all parts of the roadside waste along the road; they have used it as a means of passage in going to and from the road to the gate in the north-east corner of the fence; in one instance corn was threshed and the resultant straw stacked upon it, and on one occasion when steam ploughing was going on in an adjacent field a house on wheels for the use of the men stood upon it for a few days. Now none of these acts are inconsistent with the notion that the land is subject to public rights of way, and are therefore not enough to rebut the presumption upon which the defendants rely. In the evidence one act was mentioned which, if established, would have been inconsistent with the notion of public rights. It was said by one witness that at some date previous to 1859 a row of iron hurdles upon wheels was placed near the edge of the road, and that when threshing took place on that occasion these had to be moved back. Of the other witnesses not one has deposed as to this crucial fact, and in the absence of any testimony of the same kind I am unable to accept it, and must treat it as if it had not existed. On the other hand no acts of user by the public have been shown from which we can infer dedication, apart from the dedication of the metalled portion. But if the presumption relied on by the defendants exists—that is to say, that *primâ facie* all the land between the hedges was intended to be dedicated—it is not necessary to prove a separate dedication of the triangular strip apart from the dedication of the metalled road. Therefore the real point which I have to determine is whether the presumption exists or not. The proposition of law upon which the defendants rely is to be found expressed in the direction which Martin, B., gave to the jury in *Reg.* v. *United Kingdom Electric Telegraph Co.* Crompton, J., says (6 L. T. N. S., at p. 379): "My brother Martin laid down two propositions . . . upon the subject of the first proposition he says: 'In the case of an ordinary highway, although it may be of a varying and unequal width, running between fences on each side, the right of passage or way *primâ facie*, unless there be evidence to the contrary, extends to the whole space between the fences, and the public are entitled to the use of the entire width of it as a highway, and are not confined to the part which may be metalled or kept in order for the more convenient use of carriages or foot passengers.' That seems to us to be a very proper direction. An objection was made to it in two ways by Mr. O'Malley. It was said that that would apply to cases where there is a highway open to a considerable greensward or land which may be inclosed by the lord of the manor if connected with the waste, or by the landowner if it belongs to the landowner, and that the direction to the jury would take in, a place of that kind which is really not part of a highway. But I own it strikes me that my brother Martin guards carefully against that. He speaks of an ordinary highway as running between fences, and he says that *primâ facie* that is to be taken as a highway. . . . The proposition is confined to the case of an ordinary highway running between fences, though it may be of varying and unequal width. That is the principle of *Rex* v. *Wright*, 3 B. & Ad. 681, which is a very strong case, and the principle is also laid down in several other cases which are referred to in *Rex* v. *Wright*. Taken altogether, I think it comes to this, that *primâ facie* when you look at a highway running between fences, unless there is something to show the contrary, the public have a right to the whole and are not confined to the metalled part of it."

Counsel on behalf of the plaintiff argued that considerable doubt as to whether this proposition applies to the case of a road bounded by irregular fences was raised in *Neeld* v. *Hendon Urban District Council* and also in *Countess of Belmore* v. *Kent County Council*. Now, is this really so? In *Neeld's case* the land in question formed part of the waste of the manor, and it was separated from the road by a ditch. It was held both by the Court of Queen's Bench and by the Court of Appeal that there was evidence to rebut the presumption; and whether the presumption existed or not in the case of a road bounded by irregular fences was not determined. In the Court of Queen's Bench, Channell, J., referring to *Reg.* v. *United Kingdom Electric Telegraph Co.* (*Limited*), says (81 L. T. N. S., at p. 406): "The result of that decision seems to me to be that where there is a high road running between two fences at some distance away from the part of the high road that is usually used, a question of fact arises whether those are the fences or boundaries of the high road. If that be so, this decision comes to little or nothing more than that the action of the highway authorities in metalling a particular part of the road does not limit the rights of the public to that part. That is a very clear proposition, and it is by no means clear that on this question the judges ever intended to go beyond that point. . . . Of course it is a question of degree in each case whether or not there is a substantial piece of waste, and then comes the question whether the fences between the enclosed land and the waste were put up with any reference to the highway or whether they were put up where they are for some other reason. I am inclined to think that in each case that question ought to be decided before any question of presumption with regard to the space which in fact may be found to exist between the fences. . . . Consequently it seems to me that before considering the question of presumption you must first consider whether the fences in existence were put up in reference to the highway and are fences or boundaries of the high road in the sense in which Crompton, J., used the expression in *Reg.* v. *United Kingdom Electric Telegraph Co.*, or whether they are simply boundaries separating the enclosed land from the waste." He then goes on to consider the facts and circumstances, including the fact that the land formed part of the waste of the manor, and concludes that if the case had been decided in 1874 there would have been great doubt, but since that date acts of ownership had taken place to rebut the presumption, and he therefore decided against the highway authority. In the same case in the Court of Appeal Lord Russell, L.C.J., says (81 L. T. N. S., at p. 409): "Their suggestion is that because the road has hedges on either side the whole space between those hedges is part of the highway; and in support of that argument they relied upon the case of *Reg.* v. *United Kingdom Electric Telegraph Co.* . . . It seems to me very difficult to give assent to such a

general proposition as this, that, under all conditions where you find a metalled road bordered by unmetalled margins, and beyond the margins by hedges, there is an invariable presumption that all the space between the hedges is highway. . . . That would depend to a great extent, I think, on many other circumstances—such, for instance, as the nature of the district through which the road passes, the width of the margins, the regularity of the line of the hedges, and the levels of the land adjoining the road. These are all circumstances which should be taken into account before any presumption of law can arise as to the width of the highway." Smith, L.J., at p. 409, accepts the statement of the law laid down by Crompton, J., in *Reg.* v. *United Kingdom Electric Telegraph Co.*, and Williams, L.J., at p. 410, agrees that if any presumption arose in that case, it was amply rebutted by the evidence, and doubts whether any "presumption can be said to arise in the case of a road going across the uninclosed waste of a manor." Here I am not dealing with waste of a manor, but *primâ facie* the fences were erected on either side of the road to separate land not dedicated to the public from land dedicated. The mere existence of fences by itself would not be sufficient to raise the presumption; the real question is, are the fences to be taken as having been put up as the boundary of the highway? *Primâ facie* the fence is the boundary of the highway unless some other reason can be found to rebut the presumption. In *Countess of Belmore* v. *Kent County Council*, as in *Neeld's case*, the court held acts of ownership had been exercised which were inconsistent with public rights. Cozens-Hardy, J., referring to *Neeld* v. *Hendon Urban District Council*, says ([1901] 1 Ch., at p. 878): "Now, applying the principles laid down by the late Lord Chief Justice, I think there is no presumption of dedication up to the old fence, or that, if there is any presumption, it is rebutted by the surrounding circumstances and by the evidence." Now am I to say that a fence forming two sides of a triangle was *primâ facie* made as a boundary to the highway? I recur to the facts. It is true the fences are irregular and that here the strip of land contains some 1,600 square yards. But I have great difficulty in finding any other reason for the erection of the fence originally unless it was intended to be the boundary of the highway, and it is impossible for me to account for its existence upon any other theory. Therefore I think, on the merits, the defendants are right in saying that the presumption exists, and I hold, therefore, that the triangular strip forms portion of the highway.

I must also have decided in the defendants' favour on the point raised under section 1 of the Public Authorities Protection Act, 1893. In 1904 the plaintiff erected a fence separating the strip from the road, and on the 11th of July the highway authority entered upon the land and destroyed the fence. On the 23rd of July the plaintiff complained to the rural district council, and the latter wrote a letter asserting their claim on behalf of the public. The writ in this action was issued in February, 1905, more than six months after the removal of the fence by the district council.

By section 1 of the Public Authorities Protection Act, 1893, it is provided that "Where . . . any action, prosecution, or other proceeding is commenced in the United Kingdom against any person for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority . . . the action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect, or default complained of, or in case of a continuance of injury or damage, within six months after the ceasing thereof."

In this case the only act complained of by the plaintiff is the pulling down of the fence, and that is expressly alleged in paragraph 5 of the statement of claim. Now, the mere assertion of a right did not by itself afford a good cause of action, the only act which gave the plaintiff a legal cause of action was the pulling down of the fence, and therefore I think section 1 of the Public Authorities Protection Act, 1893, applies. Ord. 25, r. 5, enables the court to make a declaration of right without granting any other specific relief, but there must be a good cause of action before the court can make the declaration, there must, in fact, be a good cause of action to justify the action being brought at all. I hold, therefore, that this action is barred by section 1 of the Public Authorities Protection Act, 1893, and there will, therefore, be judgment for the defendants with costs as between solicitor and client as provided by section 1 (*b*).

Solicitors for the plaintiff, *Duffield, Bruty, & Co.*

Solicitors for the defendants, *Kingsford, Dorman, & Co.*, for *W. & F. Gregson*, Southend-on-Sea.

K. B. Div.
(Lord Alverstone, L.C.J., and Wills and Darling, JJ.) — Oct. 25.

STANBURY v. EXETER CORPORATION. (*a*.)

Local government—Diseases of Animals Acts—Inspector appointed by local authority—Sheep detained by inspector on suspicion of having sheep-scab — Negligence of inspector—Liability of local authority—Principal and agent—Sheep-scab Order, 1898, *Arts.* 2,14—*Diseases of Animals Act*, 1894 (57 & 58 *Vict. c.* 57), *ss.* 2, 22, 35 (*xiii.*).

A veterinary inspector, who was appointed by a local authority under the Diseases of Animals Act, 1894, *for the purpose of carrying out the provisions of that Act and the orders of the Board of Agriculture made thereunder, detained a ram offered for sale in a market belonging to the plaintiff under a mistaken suspicion that it was suffering from scab. In doing so the inspector was guilty of negligence, and the plaintiff was caused a loss.*

Held, that the local authority were not liable to make good the loss so occasioned to the plaintiff, because the order of the Board of Agriculture in question, under which the inspector purported to act, imposed the duty on the inspector, and not upon the local authority.

Appeal by the plaintiff from a decision of the county court judge at Exeter.

One Heath, the veterinary inspector appointed on the 7th of February, 1900, by the defendants, who, it was admitted, were the local authority within the meaning of the sections and order quoted, had on what turned out to be a mistaken suspicion that it was suffering from sheep-scab detained a ram the property of the plaintiff, who had suffered damage thereby, and had brought an action against the defendants as being the employers or principals of Heath, against whom he alleged negligence.

The county court judge held that Heath was not the servant or agent of the local authority (the defendants) appointed by them to perform duties imposed upon them by the Act, but was appointed to perform duties imposed on him by the Act; and the defendants were therefore not liable for his negligence

(*a*.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

out the soil to form the gutter. As to the fences bounding the strip on two sides, looking at the map it is possible to conjecture that the strip of land once formed an ancient close with the land on the other side of the road, and that the road cut this close into two parts. But it appears from the evidence that the fences in the field on the other side of the road are not of the same nature as the fences bounding the strip on two of its sides, therefore I cannot hold that the road was made over an existing close.

As to the mode in which the land has been used at various times, it appears to have been used by the tenants for several purposes: They have from tim to time placed clamps of manure upon it, but alwe it seems, nearer to the fence than to the road; have also grazed cattle, and perhaps sheep, r but the sheep do not appear to have been r fact the user as to grazing seems to ha was same as on all parts of the roadside we upon the road; they have used it as a mea their own officer going to and from the road to the of the Diseases of east corner of the fence; in or Agriculture may threshed and the resultant subject and and on one occasion whe the following going on in an adi and regu- wheels for the use of a diseased for a few days. section 2 of the Act of 1894 inconsistent with t execute and enforce this Act to public rights Board of Agriculture so far as to rebut the pr or enforced by local rely. In th every local authority if establi be executed 35 inspectors as they think notion o so many that a execution and enforcement of hurd full powers of control and roa inspector so appointed by them. oc that at least one veterinary v Under their statutory made the Sheep-scab Order of 1898 (dated the 13th of September, 1898), under which the inspector purported to act, the material provisions of which are as follows: Section 2. "An inspector of a local authority on receiving in any manner whatsoever information of the supposed existence of sheep-scab or having reasonable ground to suspect the existence of sheep-scab . . . shall put in force and discharge the powers and duties conferred and imposed on him by or under the Act of 1894 and this order." It is submitted that section 14 of the order, which directs the seizure of an infected or suspected animal exposed for sale to be dealt with as provided in the order by the inspector "or other officer appointed by them in that behalf," shows that the duty is not cast on the inspector, but on the local authority, and they therefore are liable for his negligence.

Clavell Salter, K.C., and *J. A. Hawke*, for the defendants.—The corporation appointed the inspector as directed by the Act, and it is not suggested that they appointed an unqualified man or that there was any negligence on their part, and consequently they can only be held liable if it were shown that Heath was acting as their servant in doing the negligent act complained of. A consideration of the Act and of the Sheep-scab Order makes it clear that the inspector was not exercising any statutory duty imposed on the corporation, and therefore no question of any delegated authority by them can arise which might render the defendants liable. There are no English authorities directly deciding this question of delegated authority, but it has been considered in America. In *Mackay* v. *City of Buffalo*, 7 Hun. Rep. New York Sup. Ct. 401, it was held that police officers were not the servants or agents of the police committee so as to render the city authority by whom the police were appointed responsible for a wrongful discharge of duty. True, part of a highway. Bu the acts of its servants brother Martin guar (a) to perform a duty speaks of an ordir or (b) where it exercises fences, and he s e of *respondeat superior* has taken as a hi rdinarily, Heath would come confined to t e classes, but for the purpose of between f ep he is not under the control of unequal y by the express terms of the order. *Wrigh* o, because if the local authority had and to seize an infected animal his duty c been to disobey such a direction and to execute the duty imposed upon him Order of the Board of Agriculture to with the animal as therein provided. section 35 (3) of the Act of 1894 "the board [of Agriculture] on being satisfied on inquiry that an inspector of a local authority is incompetent, or has been guilty of misconduct or neglect, may, if they think fit, direct his removal, and thereupon he shall cease to be an inspector." In *Garlick* v. *Knottingley Urban District Council*, [1904] 2 Loc. Gov. Rep. 1345, it was held that inasmuch as the power given to the local authority by section 121 of the Public Health Act, 1875, to destroy infected articles was not exerciseable by the medical officer of health on his own initiative, no claim for compensation for articles a medical officer had without the authority of his board directed to be destroyed could be made against the local authority under section 308 of the Act.

Forsyth v. *Caurieff and Corporation of Toronto*, 20 Ont. Rep. 478, was also cited.

Lord ALVERSTONE, L.C.J.—In my opinion the county court judge was quite right and has drawn a proper distinction, although his judgment requires amplification. If this was an ordinary case of delegation to an agent by a corporation or local authority of their statutory duties which necessarily must in many cases be delegated to inferior agents to carry out, the ordinary rule, *respondeat superior*, would apply. The corporation would be liable in such case, for it must be assumed, as it was throughout the argument, that Heath was guilty of negligence in doing the act complained of by the plaintiff. The case seems to me analogous to that of a policeman, who, appointed by a local authority, nevertheless has statutory duties to perform independent and wholly apart from duties imposed on a local authority. On the other hand, duties are often imposed on local authorities that in fact would have to be performed by some officer to whom they would be delegated. In the present case, however, under section 35 of the Diseases of Animals Act, 1894, the local authority had only to appoint the inspectors who were to carry out the Act and the orders made under it, and it is not unimportant to observe that the Board of Agriculture have expressly reserved power to themselves under section 35 (3) of removing such an inspector from his office if on inquiry they are satisfied that he has been guilty of a breach of duty. Section 14 of the Sheep-scab Order, 1898, imposes on the inspector appointed by the local authority the duty of seizing, removing, and detaining sheep affected with or suspected of being affected with this disease. He is bound to obey that order independently of any authority given him as inspector when appointed by the local authority. The question has arisen whether the local authority is liable when in the execution of the duty imposed on him by the order the inspector seized an animal negligently? In my opinion the local authority is not liable. Heath was not an agent in that which he did of the local authority. He was not appointed to perform duties imposed on the local authority, but to perform duties imposed on himself as an inspector appointed under

ote relied on the words in the order ppointed by them in that behalf." ink, refer to other duties which local authority by the order, and v be performed by someone else osed by the next paragraph order cited dealing with the from sheep-scab. For the appeal must be dismissed

opinion. The par- the performance of ion did not exist until of Agriculture was made. no question of delegation of spector, because the order does not ne local authority or require them to ne duty which is imposed on the inspector. ase is almost analogous to that of a police officer appointed by a watch committee of a borough, and nobody has ever heard of a corporation being made liable for the negligence of a police officer in the performance of his duties, although the watch committee has to appoint, control, and remove the police officers. The reason is to be found stated in Beven on Negligence (2nd ed., vol. 1), pp. 388-9, quoted during the argument. For these reasons I think the decision of the county court judge was right and that the corporation are not liable.

DARLING, J. — I agree. The inspector was appointed under sections 2 and 35 of the Diseases of Animals Act, 1894, and section 35, sub-section 3, provides that the Board of Agriculture may remove any inspector of a local authority who is incompetent or has been guilty of misconduct or neglect without consulting the local authority in the matter. The question whether the local authority are liable depends upon whether the negligent act done by the inspector purported to be done by virtue of corporate authority or by virtue of something imposed as a public obligation to be done, not by the local authority, but by an officer whom they were ordered to appoint. The particular things which the inspector did here were things which the corporation themselves could not do, and they were not in fact doing them. They had to carry out the Act, and had to do that by appointing an officer. When that officer was appointed he was to be guided by instructions given to him, not by the local authority, but by the Board of Agriculture. The inspector could say to the local authority that, although they appointed him, his duty was to carry out the instructions of the Board of Agriculture. There was an order of the board directing the inspector what he was to do, and it is the doing of that which the board ordered him to do that is said to have given a cause of action against the corporation in this case. Now, it is worth noticing that this statute contemplates two kinds of inspectors. The Board of Agriculture are to appoint inspectors who are to administer the Act over a wider area than the limited area controlled by the inspector appointed by the local authority, and no one would contend that an action would lie against anyone but the inspector for the acts of an inspector appointed by the board. Why, then, should the corporation be liable for the acts of an inspector appointed by them? The inspector appointed by the board is bound to act as the board direct him. That is exactly the position of the inspector appointed by the corporation, who is bound to do as the board direct him, and can be dismissed by the board. These were not acts done by a servant of the corporation, or under their authority, but were acts of a public nature done by a public officer appointed by the corporation, as directed by the statute.

Appeal dismissed.

Solicitors for the appellant, *Stow, Preston, & Lyttelton*, for *Friend & Tarbet*, Exeter.

Solicitors for the respondent, *Geare & Willis*, for *A. Dunn*, Exeter.

K. B. Div. (Lawrance, J.) April 3, 1905.

PRINCE v. HAWORTH. (a.)

Contract—Probate action—Costs to be paid out of the estate—Legality of contract.

A plaintiff in a probate action entered into an agreement with the two defendants (one of whom was an infant) that whichever of the two wills in dispute was established the costs of both parties to the suit as between solicitor and client should be paid out of the estate, whether the court so ordered or not. At the trial the defendant succeeded, but the court refused to sanction the agreement on behalf of the infant defendant and ordered the plaintiff to pay the costs of both parties to the suit. The plaintiff thereupon brought an action upon the agreement against the adult defendant to recover the costs which the plaintiff had been ordered to pay in the probate action.

Held, that the above agreement was not void as being against the policy of the law in that it intended to affect the administration of justice, and that it was enforceable as against the defendant, who was sui juris.

Action tried before Lawrance, J., without a jury.

J. A. Hamilton, K.C., and *R. V. Bankes*, for the plaintiff.

St. John Leslie, for the defendant.

The facts of the case and the arguments used are fully set forth in the judgment.

Cur. adv. vult.

LAWRANCE, J.—This case was tried before me as a short cause in December last. The facts are as follows: A testator died having left two wills dated respectively on consecutive days, the 3rd of March and the 4th of March, 1903. Under the later will the plaintiff claimed as residuary legatee, and under the former the defendant claimed the estate as executor and trustee for an infant as beneficiary. Proceedings were taken in the Probate Division to establish the validity of one or the other of these wills. In the course of these proceedings the following agreement was made between the plaintiff on the one part and the defendant and the infant (Rebecca Clegg) of the other: "We hereby agree that, whether the will dated the 3rd of March, 1903, or the will dated the 4th of March, 1903, is upheld on the trial of this action that the costs as between a solicitor and his client of the plaintiff and of the defendants Thomas Haworth and Rebecca Clegg shall be paid out of the estate of deceased, whether the court so orders or not. Dated the 20th of February, 1903. William Prince, plaintiff. Thomas Haworth, Rebecca Clegg, defendants. James Clegg, guardian for defendant R. Clegg." In the probate action the court pronounced in favour of the earlier will. On an application made the court refused to sanction the agreement on behalf of the infant beneficiary, and directed that the plaintiff should pay the costs of the defendant and the infant.

(a.) Reported by ALAN HOGG, Esq., Barrister-at-Law.

The plaintiff now claims a sum of £327 15s. 6d., his costs as between solicitor and client caused in and about the proceedings. The defendant refuses to pay, on the ground that the agreement was and is void, as being against the policy of the law in that it tends to affect the administration of justice. In support of this contention the case of *Egerton* v. *Earl Brownlow and Others*, 4 H. L. Cas., at p. 163, was cited, and as instances of the general principle that such agreements are void I was referred to *Thomas* v. *Wainwright*, 6 Bing. N. C. 174, a case of fraudulent preference in a composition with creditors, and *Lound* v. *Grimwade*, 37 Ch. D. 605, a case of an agreement made to suppress or to colour certain incidents in a criminal prosecution. It appears to me that none of these authorities really touch the present case. If all parties to the present agreement had been *sui juris*, can anybody doubt that they might have made it? Either party might then have charged or mortgaged his interest, such as it was, in the fund; he might even have conveyed it absolutely either to the party on the other side or to anybody else. There is a broad distinction between an agreement which tends to divert the course of justice and prevent it reaching the goal and an agreement which merely regulates the rights of the parties after the course of justice has reached its proper goal. It is clear that an agreement of the latter kind is not, merely as such, void; if it were every judgment of a court of justice would operate as a restraint in alienation of the property recovered. Then is there any special prohibition against a successful claimant to a fund or estate agreeing to pay out of a fund or estate if and when recovered by him the costs of the unsuccessful claimant? It is said that ord. 65, r. 14*a*, makes such an agreement invalid. That rule provides that the costs occasioned by any unsuccessful claim or unsuccessful resistance to any claim to any property shall not be paid out of an estate unless the judge otherwise orders. But that is merely a rule of practice indicating what order shall under ordinary circumstances be made in proceedings before the court; it does not in any way affect the conduct of the parties after the order of the court has been made. In other words, it is quite consistent with the judge's order directing the costs to be paid by the parties that one party shall agree to pay the other party his costs, and to pay them out of what fund he pleases. I come, therefore, to the conclusion that if the parties to this agreement were all of age there would be nothing to prevent them from making this agreement. The difficulty is caused by the fact that one of the persons who signed the contract is an infant, and it is contended that without the other person he the defendant cannot in fact perform his promise to pay the plaintiff's costs out of the estate. But when an action is brought against a person for breach of contract to do an act it is not generally an answer to say that he is unable to do it; the mere inability of the defendant to perform his contract specifically is immaterial to the question of his liability to the plaintiff for non-performance except in cases where his promise is conditional upon his ability to perform it. I do not think that the promise of the defendant in the present case was subject to any such condition.

Probably the liability of either party was conditional upon one or the other of the two wills being upheld, and if neither party succeeded in establishing the will under which he claimed, the agreement as to payment of costs would not bind either. But I cannot see that this agreement was subject to any other condition. If the plaintiff had succeeded in establishing the will of the 4th of March, I cannot doubt that he would have been liable under the agreement to pay the defendant's costs, and I can see no reason why the liability of the defendant who has succeeded should be limited by any conditions which are not reciprocal on both sides. It cannot be suggested that his liability was intended to be conditional upon the infant being jointly liable with him because on a matter of law he must be taken to have known that the infant was incapable of binding herself by an agreement such as this. A promise by two persons to pay a sum of money is in law a promise that they or one of them will pay it, and one of them may be sued upon it; his only right is to apply by summons to have the other joined as defendant, which has not been and could not be done in this case, as the co-contractor is an infant. It appears, therefore, that the defendant has promised for good consideration that the plaintiff's costs shall be paid out of the fund. He cannot perform this promise. The promise is not conditional upon the happening of an event which has not happened. The result is that, on the authority of *Bradley* v. *Heath*, 3 Sim. 543, he is liable, and there must be judgment for the plaintiff for the amount claimed.

Judgment for the plaintiff.

Solicitor for plaintiff, *J. C. Jackson*, for *Steele & Steele*, Burnley.

Solicitors for defendants, *Shaw, Tremellen, & Co.*, for *Broughton & Broughton*, Accrington.

Liverpool Assizes. (Walton, J.) March 27; Aug. 11; Nov. 13.

MORAN, GALLOWAY, & CO. v. UZIELLI. (*a*.)

Insurance (Marine)—Insurable interest—Constructive total loss—Policy on disbursements—Advances for "necessaries"—Admiralty Court Act, 1840 (3 & 4 *Vict. c.* 65), *s.* 6.

The plaintiffs, who had made advances for "necessaries" within the meaning of 3 & 4 *Vict. c.* 65, *s.* 6, *caused themselves to be insured "at and from Vancouver . . . and/or places in the United Kingdom, and for thirty days in port after arrival . . . upon any kind of goods . . . and upon the body . . . of and in . . .* The Prince Louis *. . . on disbursements against the risk of total and constructive total loss of ship only." The perils insured against included perils of the seas. During the insured voyage the vessel received such damage from perils of the seas as to amount to a constructive total loss, the cost of repairing her exceeding the value of the ship when repaired. The plaintiffs collected the freight, having a lien on it for advances, and placed it to the credit of their account with the shipowners. The freight thus retained was insufficient to repay the plaintiffs the whole amount of their advances. The plaintiffs had no lien or charge upon the ship.*

Held, that, so far as the plaintiffs' claim for disbursements was a claim for necessaries within 3 & 4 *Vict. c.* 65, *s.* 6, *the plaintiffs had an insurable interest to the extent of the unsatisfied balance of the advances. A creditor of a shipowner who has advanced money for the necessary disbursements of the ship has an insurable interest in the debt due to him by the shipowner for such necessaries. Such a debt carries with it the legal right to seize the ship in an action* in rem. *The debt is different from ordinary debts, as the law gives to a creditor for necessaries a kind of security which ordinary creditors do not possess. When the ship is at sea the creditor for necessaries has a real interest in its safety.*

(*a*.) Reported by W. T. TURTON, Esq., Barrister-at-Law.

Action tried at the Liverpool Assizes.

The plaintiffs' claim was for a total loss under a policy of insurance on disbursements against the risk of total and constructive total loss of the ship *Prince Louis*.

Pickford, K.C., and *Keogh*, for the plaintiffs.

Carver, K.C., and *Llewelyn Davies*, for the defendants.

The facts and argument appear in the judgment.

March 27, 1905.—WALTON, J., delivered the following considered judgment: In this case the plaintiffs' claim is under a marine policy dated the 2nd of June, 1902, subscribed by the defendants for a sum of £500. The terms of the policy in so far as they are material for the purposes of this case are as follows: "Be it known that Moran, Galloway, & Co., as well in their own name as for and in the name and names of all and every other person or persons to whom the same doth may (or) shall appertain in part (or) in all doth make assurance and cause themselves and them and every of them to be insured lost or not lost at and from Vancouver and/or Puget Sound or any ports and/or places in the United Kingdom and for thirty days in port after arrival however employed upon any kind of goods and merchandizes and also upon the body, tackle, apparel, ordnance, munition, artillery, boat, and other furniture of and in the good ship or vessel called the *Prince Louis*, the said ship, &c., goods and merchandizes, &c., for so much as concerns the assured by agreement between the assured and assurers in this policy are and shall be valued at"—that is printed; then these words are written: "On disbursements against the risk of total and constructive total loss of ship only." The perils insured against included perils of the seas. *The Prince Louis* was a foreign ship, which at the date of the policy and at the time of her constructive total loss belonged to a company which, as I understand, was a foreign single ship company, though my judgment does not depend upon this latter assumption. The plaintiffs were the agents for the ship in this country. Some of the members of the firm own shares in the company which was the owner of *The Prince Louis*, but it was not contended that this was material for the purposes of this case. The plaintiffs, as ship's agents, had during the years 1900, 1901, and 1902 made advances for the ship's disbursements, and at the date of the policy and of the alleged loss the shipowners were indebted to them in a considerable amount on account of such advances. Some of the advances were made for the purposes of the voyage covered by the policy, but a large part of the advances had been made before the commencement of such voyage, and for other purposes. The defendants have admitted that the advances were in fact made, and were made for the purposes mentioned in the plaintiffs' account.

The question arose at the trial whether the advances were "necessaries" within the meaning of the Admiralty Court Act, 1840 (3 & 4 Vict. c. 65), s. 6, and whether at the date of the policy and the loss the plaintiffs were entitled to recover the amount owing to them on account of such advances by an action *in rem* in the Admiralty Division. This question was reserved. For the purposes of this judgment, I assume that at the date of the policy and of the loss the owners of *The Prince Louis* were, and still are, indebted to the plaintiffs, first on account of disbursements, and secondly on account of disbursements which were for "necessaries" within the meaning of 3 & 4 Vict. c. 65, s. 6. *The Prince Louis* loaded under charter a cargo of timber at Vancouver in April, 1902. She sailed with such cargo on the insured voyage on the 1st of May. She arrived in Cardiff Roads on the 24th of November, and docked for discharge on the 25th of November. Her cargo was all discharged by the 18th of December, and the freight thereon was earned and paid to the plaintiffs as agents for the owners of the ship. She removed to another berth to receive stiffening and a cargo of coals under a fresh charter, and received her stiffening on the 20th of December. The loading was not proceeded with, and, by reason of two survey reports, dated respectively the 12th of January and the 23rd of January, 1903, and a specification, dated the 24th of January, 1903, it was found that the cost of repairing her would exceed the value of the ship when repaired. The condition of the ship, as found by such surveys, was due to straining in bad weather and perils of the sea between the 1st of May and the 24th of November, 1902. It was admitted that the ship did become a constructive total loss in consequence of damage which she received at sea during the voyage in question. It was admitted that the plaintiffs were entitled to collect the freight, and had a lien upon it for the amount owing to them for advances. The plaintiffs received and retained the freight, and placed it to the credit of their account against the shipowners. The plaintiffs had no lien or charge of any kind upon the ship. The defendants admit that the plaintiffs had an insurable interest in disbursements in so far as there was a lien for them upon the freight, but no further; they admit that such interest was insured by the policy, but say that, inasmuch as the freight was received by the plaintiffs, there was no loss. The plaintiffs contend that independently of their lien upon the freight they had an insurable interest to an amount equal to the value of the ship in respect of what was owing to them for disbursements, whether secured by any charge or lien on the ship or not; that such interest was insured by the policy, and inasmuch as there is still a considerable sum owing to them after giving credit for the freight received, they have suffered a loss in respect of which they are entitled to be indemnified under the policy.

Before proceeding further, I may point out that, in the case of an ordinary shipowner's policy on disbursements, no questions arise such as have to be considered in the present case. In such cases the disbursements represent expenditure by the shipowner either on his ship or for the purpose of earning his freight, and such policies are in the nature of insurances of the shipowner, either upon his ship or upon his freight. And even in cases of insurances effected after the Admiralty Court Act, 1840, and before the decision of the Court of Appeal in *The Heinrich Björn*, 33 W. R. 719, 10 P. D. 44, effected by the ships' agents as in the present case on disbursements for necessaries supplied to a ship, it was not likely that any such question as I have now to consider would arise. For it was commonly supposed before the decision in *The Heinrich Björn* that the Admiralty Court Act, 1840, had given a maritime lien for necessaries (see, for instance, Williams and Bruce's Admiralty Practice (2nd ed., 1886), p. 183); and if there was a maritime lien, there was an insurable interest. Since *The Heinrich Björn*, decided in 1885, the question which I have now to decide has not, so far as I know, been considered or decided in any case which has come before our courts. This, however, may be to some extent due to what I believe is a common practice of insuring disbursements "under honour" policies upon which no action can be brought.

The question which has to be determined in this action is whether the plaintiffs have lost by perils of the sea anything in which they had at the time of loss an insurable interest; and, if so, what was the amount of such loss. In the first place, it is

convenient to consider whether the plaintiffs had any insurable interest. In dealing with this question, a further question sometimes arises, whether the interest of the assured was sufficiently described in the policy; but no such question arises in the present case. The plaintiffs' interest was in respect of their advances, and it has been admitted that such interest is sufficiently described in the policy as "disbursements"; and this description is perhaps a little amplified by the words which follow—that is to say, "against the risk of total and constructive total loss of ship only." I may add that this admission which was made before me in chambers did not involve an admission that the plaintiffs had an insurable interest. What, then, was the plaintiffs' interest? They clearly had an interest in the debt which was due to them on account of their disbursements; or, in other words, in their legal right as creditors of the shipowners. But this legal right was in no sense dependent on the safe arrival of the ship. It remained the same whether the ship was lost or not. It was not, and was not capable of being, exposed to the perils insured against. It was never at risk under the policy. It was not lost. As was said by the court in *Stainbank* v. *Fenning*, 11 C. B. 51, at p. 89, "A mere debt . . . for repairs and disbursements could not legally be made the subject of an insurance." I think, therefore, that the fact that the plaintiffs were interested in the debt merely as a debt did not give them any insurable interest. What other interest in respect of their disbursements had the plaintiffs? They had a charge or lien on the freight; but this they have not lost; on the contrary, it has been fully satisfied. The plaintiffs, however, contend that they had an interest, not merely in freight, but in the ship itself as the practical security for the payment of what was owing to them by the shipowners. They say that the ship was, after the freight was exhausted, if not the only, at all events the principal, asset of the shipowners, and that the recovery of the debt owing to the plaintiffs for their advances was in fact dependent on the safe arrival of the ship. It was not proved that the recovery of the debt was in fact dependent on the safe arrival of the ship. There was no evidence before me to show that the debt may not still be recoverable from the shipowners. The plaintiffs' case in this respect cannot be put higher, I think, than this, that the recovery of the debt was rendered less certain and more difficult by the loss of the ship. Assuming that in this sense the recovery of the amount due for disbursements was dependent on the safe arrival of this ship, did this give to the plaintiffs, who had no charge or lien of any kind on the ship at the time of the loss, an insurable interest under the policy? As was explained by Lawrence, J., in the opinion delivered by him in the House of Lords in *Lucena* v. *Craufurd*, 2 Bos. & P. N. R. 269, at p. 302, an interest which is not in the nature of a property legal or equitable in the things exposed to maritime perils may still be insurable. "Where," says the learned judge, "a man is so circumstanced with respect to matters exposed to certain risks or dangers as to have a moral certainty of advantage or benefit but for those risks or dangers he may be said to be interested in the safety of the thing. To be interested in the preservation of a thing is to be so circumstanced with respect to it as to have benefit from its existence, prejudice from its destruction." He then proceeds to show that it is no valid objection to these propositions that the interest is liable to be affected by other matters than the perils insured against; and he sums up his opinion upon the question in these words: "It seems to me that the contract of marine insurance may extend to protect every kind of interest that may subsist in, or be dependent upon, things exposed to the dangers to which maritime adventures are subjected; and I am not aware that by the laws of this country it has been reduced within narrower limits." It is unnecessary to cite cases to show that this opinion of Lawrence, J., has always been accepted as a correct statement of the law. If it stood alone and without further explanation, it seems to me that the plaintiffs might have good grounds for contending that, as creditors of a single-ship company, they had an interest dependent on the safety of the company's ship; an interest just as insurable as the interest of a creditor in the life of his debtor. But I think that in the latter part of the same opinion Lawrence, J., himself indicates clearly that the words "interest dependent upon things exposed to the dangers to which maritime adventures are subjected" require further definition. In *Lucena* v. *Craufurd*, the assured were commissioners, whose duty it was under a statutory commission to take charge of Dutch vessels and cargoes "which had been or might thereafter be detained in or brought into the ports of the United Kingdom." Before the commission was issued, certain Dutch vessels and their cargoes had been seized by order of the British Government for the purpose of being brought to this country. After the commission was issued the commissioners insured these ships and their cargoes. The ships with their cargoes were lost before arrival in this country, and the commissioners brought an action upon the policy. Under these circumstances, Lawrence, J., after stating the general principles in the words which I have read, expressed his opinion that, as the purpose and object of the commission was only to take care of the Dutch property after its arrival in England, and the commissioners till then had not any power to interfere with it, and could not in their character of commissioners suffer any damage by a loss happening before they had any concern in the ships or goods, they could not be said at the time of the loss to have had any insurable interest. The same view was adopted by Lord Eldon, Lord Erskine, and apparently by Lord Ellenborough, the noble lords who heard the appeal. In the words of Lord Eldon (at p. 323): "Expectation, though founded upon the highest probability, was not interest, and it was equally not interest whatever might have been the chances in favour of the expectation." Without citing later cases it is sufficient to say that, in my opinion, the result of the authorities is that, although an interest to be insurable is not necessarily a right, legal or equitable in, or charge upon, the property or arising out of the ownership of the subject-matter exposed to the risks insured against, and although any interest may be insured which is dependent on the safety of the thing exposed to such risks, still it must in all cases at the time of the loss be an interest legal or equitable, and not merely an expectation, however probable. In so far as the plaintiffs' claim depends upon the fact that they were ordinary unsecured creditors of the shipowners for an ordinary unsecured debt, I am satisfied that it must fail. The probability that if the debtor's ship should be lost he would be less able to pay his debts does not, in my judgment, give to the creditor any interest, legal or equitable, which is dependent upon the safe arrival of the ship. In such a case all that the creditor has, all that he can lose by the loss of the ship, is an expectation. I do not think that the creditor of a shipowner has an insurable interest in all the shipowners' property which is exposed to maritime risks This appears to me to be assumed by the court in the case of *Stainbank* v. *Fenning*, which I have already cited; and as far back as in the second edition of Arnould on Marine Insurance, published

in 1857, I find an American case cited, apparently with approval, in which it was decided that "advances for repairs of ship give no insurable interest in the ship unless when secured by a lien by law or contract" (p. 329).

But a further, and to my mind much more difficult, question remains to be considered. It is said that the plaintiffs in the present case had more than an expectation, because they had the right under the Admiralty Court Act, 1840, to proceed *in rem* for the recovery of the amount owing to them. I assume, for the purposes of this judgment, that the disbursements in question were made for necessaries within the meaning of the Act At the date of the policy and at the date of the loss the position of the plaintiffs was this. They had advanced moneys for the necessaries of *The Prince Louis*. The ship was at sea on her voyage to Cardiff. The plaintiffs had a right which entitled them immediately after the arrival of the ship at Cardiff to arrest her under process; and by so doing, in the language of Dr. Lushington in *The Volant*, 1 W. Rob. 383, cited by Fry, L.J., in delivering the judgment of the Court of Appeal in *The Heinrich Björn*, to obtain "security for prompt and immediate payment." If the ship was lost, the right to obtain this security on *The Prince Louis* was gone. Was this a real risk which underwriters may be asked, in consideration of an adequate premium, to undertake? And if they do undertake it, is the contract a binding contract? There is no doubt, to my mind, as to the reality of the risk. The foundation of the rules as to insurable interest is that the contract of marine insurance is essentially a contract of indemnity. Unless the assured is exposed to a real loss by the perils insured against, the contract is not a contract of indemnity, but is a mere wagering contract, and cannot be enforced. I am satisfied that a contract such as I have indicated, and such as is contained in the policy now in question (in so far as it extends to cover the plaintiffs' interest in respect of necessaries), is not a wagering contract, and is a contract by which the plaintiffs were protected from the risk of a real loss. I agree with what is said by the authors of the Digest of the Law of Marine Insurance, Mr. Chalmers and Mr. Owen, at p. 9 of the edition of 1901, and I borrow their language: "The definition of insurable interest has been continuously expanding, and *dicta* in some of the older cases which would tend to narrow it must be accepted with caution." I fully appreciate the argument founded upon the decision of the Court of Appeal in *The Heinrich Björn*, 10 P. D., at p. 54: "The arrest of a vessel under the statute"—that is, 3 & 4 Vict. c. 65—"is only one of several possible alternative proceedings *ad fundandam jurisdictionem;* no right in the ship or against the ship is created at any time before the arrest; it has no relation back to any earlier period; it is available only against the property of the person who owes the debt for necessaries; and the arrest need not be of the ship in question, but may be of any property of the defendant within the realm. The two proceedings"—the Lord Justice is speaking of proceedings where there is a maritime lien, and proceedings where there is only a right to arrest *in rem ad fundandam jurisdictionem*—"the two proceedings, therefore, though approaching one another in form, are different in substance; in the one case the arrest is to give effect to a pre-existent lien, in the other, the arrest is only one of several alternative modes of procedure, because, to use the language of Dr. Lushington in *The Volant*, 'it offers the greatest security for obtaining substantial justice in furnishing a security for prompt and immediate payment.'" But this decision comes only to this, that there is no maritime lien, no charge upon the ship for necessaries. But there may, as I have shown, be an insurable interest without any such charge of lien. It is no sound answer to the plaintiffs' contention upon this point to say that the plaintiffs' right to obtain a security on the ship might be defeated by perils other than those insured against. This difficulty is dealt with by Lawrence, J., in *Lucena* v. *Craufurd*, 2 Bos. & P. N. R., at p. 303. I think there is a distinction between the position of a creditor for an ordinary debt who has no right to arrest the property of his debtor except after judgment, under a writ of execution, and the position of the plaintiffs in this case. To hold that there was an insurable interest in this case will not offend against the principle of the rules as to insurable interest, or against any decision of our courts. To hold that there was no insurable interest would, I think, be to impose an unnecessary fetter upon business, which seems to me very ordinary and reasonable business, in no way tainted by the vice of wagering or gaming. Therefore I hold that, to the extent to which the plaintiffs' claim for disbursements was a claim for necessaries within 3 & 4 Vict. c. 65, s. 6, they had an insurable interest. There remains the question whether there was any and what loss, and that may involve an investigation of facts, and further argument on questions of law. Those questions are still open.

On the 11th of August, 1905, the following considered judgment was delivered:

WALTON, J.—In this case the plaintiffs claim upon a marine policy underwritten by the defendants, by which the plaintiffs caused themselves to be insured at and from Vancouver and/or Puget Sound to any ports and/or places in the United Kingdom and for thirty days in port after arrival however employed in the good ship or vessel called *The Prince Louis*, and by the terms of the policy it was expressed to be upon disbursements against the risk of total and constructive total loss of ship only; and the plaintiffs allege that the vessel became a constructive total loss, and they claim the amount for which the policy was underwritten by the defendants—that was the sum of £500. It was a policy for £500 on disbursements against the risk of total and constructive total loss of the ship only. The facts were to some considerable extent admitted. The defendants in their defence expressly admitted that *The Prince Louis* loaded under charter a cargo of timber at Vancouver in April, 1902; that she sailed with such cargo on the insured voyage on the 1st of May; arrived in Cardiff Roads on the 24th of November, and docked for discharge on the 25th of November. Her cargo was all discharged by the 18th of December, and the freight thereon was earned and paid to the plaintiffs as agents for the owners of the ship. She moved to another berth to receive stiffening and a cargo of coals under a fresh charter, and received her stiffening on the 20th of December. The loading was not proceeded with, and by reason of two survey reports dated respectively the 12th of January and the 23rd of January, 1903, and a specification dated the 24th of January, 1903, it was found that the cost of repairing her would exceed the value of the ship when repaired. The condition of the ship as found by such surveys was due to straining in bad weather and perils of the seas between the 1st of May and the 24th of November, 1902.

The admission amounts to this, that the ship did become a constructive total loss during the voyage upon which the disbursements were insured, and that she became a constructive total loss, and therefore the loss occurred some time before the 24th of November, 1902.

Now, the first question that arose in this case was

whether the plaintiffs had any insurable interest; and after argument and consideration I have already held that a creditor of the shipowner who has advanced money for the necessary disbursements of the ship has an insurable interest in the debt due to him by the shipowner for such necessaries. I have held that such a debt carries with it the legal right to seize the ship in an action *in rem*, and is in this respect different from ordinary debts, as the law gives to a creditor for necessaries a kind of security which ordinary creditors do not possess. When the ship is at sea the creditor for necessaries has a real interest in its safety.

Having already decided that if the plaintiffs had a good claim for necessaries at the date of the loss they had an insurable interest, it becomes necessary to consider whether they in fact had such a claim, and if so, whether they have suffered any loss by the loss of the ship.

Now, the plaintiffs' accounts show disbursements made by them for various purposes up to the end of 1902—that is to say, up to the 31st of December, 1902, amounting to £5,433 6s. 4d., but of that £5,443 it is admitted by the plaintiffs that £245 8s. 7d. were for things which were not necessaries. It further appears that some of the disbursements constituting the £5,433 were made after the date of the loss, and those amount to £74 11s. 10d. Deducting those two items, which taken together amount to £320 0s. 5d., from the £5,433 6s. 4d., it leaves £5,113 5s. 11d. for disbursements made before the date of the loss, and which are alleged by the plaintiffs to be moneys advanced or spent for necessaries. But again there must be a deduction made because before the loss certain sums amounting to £868 5s. 3d. had in fact been received which reduced the debt owing for necessaries at the date of the loss to £4,245 0s. 8d.; therefore we have this claim by the plaintiffs, that they had advanced moneys for necessary disbursements of the ship to an amount of £4,245 0s. 8d. Well, a considerable discussion took place before me, and argument as to whether a very large number of items which were included in this balance of £4,245 0s. 8d. should not be struck off the claim on the ground that they could not be treated as necessaries in respect of which the creditor would be entitled to proceed *in rem*. Just leaving that point over for the moment—I shall have to deal with it in a moment—it may be convenient to consider how far the plaintiffs have been able, notwithstanding the constructive total loss of the ship, to avail themselves of the security—I use the word security, not perhaps in a technical sense, but in a sense which may be sufficiently understood without further explanation—how far they have been able to avail themselves of their security upon the ship and freight as things have happened; and I find that they have been able to avail themselves of that security, notwithstanding this constructive total loss of the ship to the amount of £2,800—that is, the freight received plus the proceeds of the sale of the damaged ship. There was some controversy as to the exact amount, but that is the figure which I find as accurately as I can arrive at it—£2,800.

Well, if that be so, the next question is whether the plaintiffs had a claim for necessaries at the date of the loss which exceeded that sum of £2,800, because if they had no claim for necessaries properly so called at the date of the loss for an amount exceeding £2,800 it is obvious that they have not suffered any loss.

I have gone through the very numerous items in the plaintiffs' account making up the £4,245. I have gone through them or made them up to a larger amount, £5,433, and in my judgment at any rate a very considerable sum must be taken from that amount. I have come to the conclusion that all the payments made for insurance premiums must be taken off. That seems to be the latest decision on the subject in the case of *The Andre Theodore*, which was a decision of the President of the Admiralty Court, which is reported in 21 L. T. Rep. 158. The insurances amount to £499 18s. 5d., I think, from the statement which has been supplied to me by the plaintiffs. That has to come off. Then there is another item for commissions and brokerage. I do not think they can be treated as necessaries. It seems to me that they simply were the remuneration or part of the remuneration, probably the principal part of the remuneration, which the plaintiffs received as the general managers of the vessel *Prince Louis*. They had the full and absolute control and management of that ship, which belonged to a foreign single ship company, but the plaintiffs were the agents, not only in this country, but, as I understand, they were agents with ample authority to manage the business of that ship wherever she was on behalf of the single ship company. They had complete control. I may have a word to say about that in a moment, but I mention the fact here; and amongst other things they had to manage the business of the ship, the chartering and the collecting of the freights, and the insuring and all the business of the ship; and their remuneration or part of their remuneration, I think their principal remuneration, was the money which they received by way of commission and by way of brokerage, and that, I think, must be deducted. There are a number of other items, many of them very small items, but I may mention some of the larger ones which I have taken off. There is £246 15s. 8d. which is a payment made for coal short delivered at Rhyl. I do not think that can be treated as a necessary. There is a smaller item, £26 5s. due to Bureau Veritas. There are some other smaller items; there is £204 19s. 9d., for instance, it is commission on estimated freight £204 19s. 9d. in *The Vancouver*. I have taken that off; and there are some other items. The result is this, that substantially after deducting all those amounts from the £4,245 there is really nothing left over and above this figure of £2,800, which the plaintiffs have actually received on account of the security which they had upon the ship and upon the freight. It is, of course, extremely difficult to arrive at an exact figure; for instance, there is an item of interest, which is a substantial item of £277. That of course would have to be accurately adjusted; and if the amount of the disbursements is reduced the amount of interest would have to be reduced. That interest continued up to the 31st of December, whereas the loss occurred in the latter part of November, so there would be little more than a month's interest to come off in any case. Then the interest would have to be reduced. There are other items, but I think it is sufficient for me to say that substantially there has been no loss, or if there has been a loss the amount recoverable would be such a mere fraction of the amount claimed that it would really make no difference in the result of this case; and to arrive at the matter exactly would involve going into inquiries, and I think further evidence as to many of these items, which would cost a great deal more than the result would justify.

What other points are there left for me to decide? I think there are one or two points which were argued, and upon which I think I ought to express an opinion. In the first place it is necessary to observe this is not a valued policy. In my judgment it is an open policy for £500. I quite appreciate the argument that being a policy on disbursements it may be said to be a policy on money, and that you do not

value money. Money does not require valuation, it values itself. I think that the same argument might apply, indeed I have heard it applied, to insurance on freight, which is very analogous for many purposes to this insurance. Having regard to the underwriting customs and rules that have been laid down and to the decisions of the courts, I think it must be treated as an open policy. If it is an open policy, it is an insurance for £500 on such disbursements as the plaintiffs had at risk at the time of the loss; and if the disbursements being necessaries amounted, we will say, to £2,800, then on the policy for £500 the plaintiffs in respect of any loss would only be able to recover that proportion measured by the ratio between £500 and the total interest at peril—namely, the £2,800. That rule seems to be perfectly established in all classes of marine insurance. It is not necessary to cite authority for it, because it is so perfectly clear and so perfectly well understood. It is stated, for instance, merely to take the statement of it in Chalmer and Owen's Digest of the Law of Marine Insurance, which contains a number of propositions purporting to be a complete statement of the law upon marine insurance. It is stated in this way in section 68: "Where there is a loss recoverable under the policy the insurer, or each insurer if there be more than one, is liable for such proportion of the measure of indemnity as the amount of his subscription bears to the value fixed by the policy in the case of a valued policy or to the insurable value in the case of an unvalued policy," and the result is that even if the debt owing for necessaries, that is the plaintiff's claim for necessaries, did by some small sum exceed the £2,800 which they have received, the plaintiffs would be entitled to recover in respect of that only a small fraction represented by the proportion of £500 to £2,800, or rather to the amount, whatever the amount of the necessaries was, exceeding the £2,800. I do not think there is any other point with which it is necessary for me to deal. If any question arises as to the details, there may be liberty to apply.

Upon the action generally the judgment will be for the defendant with costs; judgment for the plaintiffs as to the question of insurable interest, and I give liberty to apply in case either of the parties desire that I should express my judgment more fully about any particular item, but I do not think it is necessary for any purpose.

On the 13th of November, after further argument, an order was made that costs were to be costs in the action, and leave was given to the defendants (if necessary) to give notice of cross-appeal as to costs.

Solicitors for plaintiffs, *Walker, Son, & Field*, for *Weightman, Pedder, & Weightman*, Liverpool.

Solicitors for defendants, *Parker, Garrett, Holman, & Howden.*

Court of Appeal.

From K. B. Div. (Vaughan Williams, Stirling, and Moulton, L.JJ.) — Feb. 1.

GOLDSCHMIDT *v.* OBERRHEINISCHE METALLWERKE. (*a.*)

Practice — Receiver — Equitable execution — Judgment debtor a foreigner resident abroad—Debts due to judgment debtor within jurisdiction—Special circumstances —Rules of Supreme Court, ord. 45, *r.* 1; *Appendix B., Form* 25—*Judicature Act,* 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-section* 8.

The plaintiff recovered judgment for a sum of money against the defendants, who were a foreign company incorporated and resident abroad. The plaintiff applied for a receiving order of the debts due and accruing due to the defendants by customers in England, whose names were set out in an affidavit made by the plaintiff. In that affidavit the plaintiff stated that the defendants had no place of business in this country, and no assets or property here which could be taken by any ordinary process of execution; that the only assets here were the debts due or becoming due to them from their customers in this country; and that he was informed by some of the customers that the defendants had, since the judgment, taken steps to obtain payment of their debts, and that he believed that the defendants intended to collect all the moneys due to them in England and thus to defeat the judgment. The plaintiff stated that he could not apply for a garnishee order to attach the debts due to the defendants, because he did not know which customers owed money nor the amount of their debts, if any.

Held, that there were special circumstances in the case which enabled the court to appoint a receiver.

Appeal from an order of Channell, J., in chambers.

The action was brought for an account of the commission due to the plaintiff as the sole agent of the defendants in Great Britain, and for payment of the amount found due. At the trial of the action judgment was given for the plaintiff for an amount to be ascertained upon an account to be taken by an official referee, and the costs of the action. The taxing-master, before the account was taken, proceeded to tax the costs of the action, and at the request of the plaintiff's solicitor he gave an *interim* certificate that he had allowed the sum of £250 on account of the plaintiff's costs. The plaintiff thereupon applied at chambers for the appointment of a receiver of the debts and sums of money due and owing and thenceforth becoming due and owing to the defendants by persons and firms who were customers of the defendants in this country. The plaintiff made an affidavit in support of the application, in which he stated that the defendants were a limited liability company incorporated and carrying on business at Mannheim, in Germany, and had no place of business in this country, and no assets or property here, which could be taken in execution by a *fi. fa.* or any ordinary process of execution; that the only assets which they had in this country were the debts due and owing and which would become due and owing to them by persons and firms to whom they had supplied goods; that an exhibit to the affidavit contained a list of the persons or firms to whom, as he (the plaintiff) was informed and believed, the defendants had supplied goods; that he was informed by several of the above-mentioned persons that the representatives of the defendant company who had attended the trial in London had since the judgment called upon those persons to obtain payment of their accounts, and the plaintiff believed that it was the defendants' intention to collect all the moneys due to them in England, and to change the name of the company, so preventing him from obtaining the fruits of his judgment. Channell, J., refused to appoint a receiver.

The plaintiff appealed, and notice of the appeal was served on the defendants, but they did not appear.

It was stated that though the plaintiff knew who were the customers of the defendants in Great Britain, he did not know which particular customers

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

owed any debts to the defendants, or the amount of their respective debts, if any, and could not therefore make an affidavit necessary to found garnishee proceedings against any particular debtor, as required by ord. 45, r. 1, and Appendix B, Form 25.

A. Powell, K.C., and *C. Tindale Davis*, for the plaintiff.—Unless the plaintiff can get the appointment of a receiver there will be no remedy available to him. The defendants have no assets in this country on which execution can be levied. The plaintiff cannot obtain an order under ord. 45, r. 1, attaching debts due to the defendants in this country because he cannot in the affidavit in support of that application give the name of any creditor who owes money to the defendants nor the amount of the debt, as required by Form 25 in Appendix B to the rules. Nor can the plaintiff get discovery in aid of execution, under ord. 42, r. 32, by examining the defendants as to whether any and what debts are owing to them, because they are foreigners resident abroad. If a receiver is appointed he can send notice to all the defendants' customers here directing them to pay to him any debts which are owing or accruing. In this way alone can those debts be reached. Special circumstances may render it just or convenient within section 25, sub-section 8, of the Judicature Act, 1873, to appoint a receiver: *per* Fry, L.J., in *Manchester and Liverpool District Banking Co.* v. *Parkinson*, 37 W. R. 264, 22 Q. B. D. 173, at p. 177. There are special circumstances here, especially in view of the fact that the defendants are endeavouring to collect the debts and so to deprive the plaintiff of the fruits of his judgment. The order for a receiver ought therefore to be made.

The defendants were not represented.

VAUGHAN WILLIAMS, L.J.—In my opinion there are sufficient special circumstances in this case to enable us to make an order for the appointment of a receiver, which a litigant is only entitled to if he can show that the circumstances are such as to make it practically, I will not say impossible, but very difficult, to get the ordinary remedy by execution. In *Manchester and Liverpool District Banking Co.* v. *Parkinson* Fry, L.J., said: "I do not say that there would have been no jurisdiction to appoint a receiver under that section, if there had been special circumstances in the case rendering it just or convenient to make such an order. It may be, for instance, that an order could be made for appointment of a receiver to hold property liable to execution, to prevent someone making away with it, or to get in debts, where under particular circumstances it was a more convenient mode of procuring satisfaction of the judgment than the usual process of attachment." In my judgment this case falls within those words for two reasons. It is a case where the appointment of a receiver is necessary to get in debts, and also to prevent the defendants making away with the debts, because upon the affidavit before us it seems likely that this foreign company will withdraw the moneys owing to them from execution in this country unless a receiver is appointed. There are, therefore, special circumstances here which justify us in making this order.

STIRLING and MOULTON, L.JJ., agreed.

THE COURT made an order appointing the plaintiff receiver of the debts without security until he had collected £300, with liberty to apply for an extension of the order if and when the amount found due to him under the judgment should be increased.

Appeal allowed.

Solicitor for the plaintiff, *James W. Browne.*

From Chan. Div. (Vaughan Williams, Stirling, and Cozens-Hardy, L.JJ.) } Nov. 2, 3, 6, 7, 8.

In re STUCLEY.

STUCLEY *v.* KEKEWICH. (*a.*)

Vendor and purchaser — Assignment of personalty— Unpaid purchase-money — Vendor's lien—Reversionary interest—Interest—Statute of Limitations.

A vendor's lien for unpaid purchase-money extends to personalty and is not limited to real estate, and extends not only to principal money but to interest from the time that the equitable lien comes into existence; and as regards personalty there is no Statute of Limitations which applies to such a claim for interest.

Davies *v.* Thomas, 49 *W. R.* 68, [1900] 2 *Ch.* 462, *and* Mellersh *v.* Brown, 38 *W. R.* 732, 45 *Ch. D.* 225, *followed.*

This was an appeal from the decision of Farwell, J.

The plaintiff in the action, Edward Arthur George Stucley, is one of the two surviving sons of the late Sir George Stucley and Lady Elizabeth Stucley, the other being the present baronet, Sir William Lewis Stucley, one of the defendants.

In 1873 the plaintiff, who was then at Cambridge, became involved in financial difficulties, and for the purpose of raising money mortgaged certain reversionary interests under his parents' marriage settlements and his mother's will.

With the view of freeing the plaintiff from these difficulties and disincumbering the reversionary interests and of preventing him at the same time from incumbering them in the future, the father, Sir George Stucley, in January, 1874, paid off the whole of the plaintiff's liabilities, and the said mortgages were transferred to the father, and it was declared that the mortgaged premises should thenceforth stand charged in his favour with the amount paid to liquidate the plaintiff's debts.

At the same time the plaintiff executed a deed, dated the 31st of January, 1874, assigning to his father a reversionary legacy of £5,000, to which he was entitled under his mother's will, subject to his father's prior life interest for the sum of £1,500, as therein expressed, but no sum of money was then or thereafter actually paid to the plaintiff under this deed.

At the date of that deed the father was in the position of sole trustee of the legacy of £5,000, the fund representing it being in his legal control.

Immediately after these transactions the plaintiff went to Australia, where he remained until his father's death in March, 1900.

He now claimed that the deed of assignment of the legacy of £5,000 should be declared void on the ground that it was never intended to be an absolute assignment for valuable consideration, but constituted, with the other documents, a single transaction, the sole object of which, as between his father and himself, was that his debts should be paid, his father taking security for the money to be so expended, and that it should be put out of the plaintiff's power further to incumber his various reversionary interests.

The plaintiff claimed alternatively a declaration that he was entitled to a lien on the fund representing the £5,000 for the £1,500 as unpaid purchase-money.

The defendants, as respectively trustees and executors of Sir George Stucley, and Sir Lewis Stucley, his eldest son, defended the validity of the deed.

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

The question was whether the transaction should, in the circumstances, be treated as one of mortgage only.

At the conclusion of the arguments before Farwell, J., on the 4th of November, 1904, his lordship reserved judgment, in order that the parties might, if possible, arrive at some amicable settlement.

This, however, was not done, and on the 14th of February last his lordship delivered his judgment, dismissing the action with costs. In the course of his judgment his lordship found as a fact that the father took the assignment in consideration of the £1,500, though his lordship had no sort of doubt that the sum was not taken as cash and was never intended to be, the very last thing that the parties intended at that time being to trust this young man with 1,500 sovereigns; but by some blunder or oversight they did not treat the assignment, as it was intended to be treated, as a payment of a claim due to the father. Accordingly the principal sum due to the father from the son must be reduced by that £1,500. Further than that his lordship did not see that the plaintiff was entitled to any relief at all, and he therefore dismissed the action with costs.

From that decision the plaintiff appealed.

Jenkins, K.C., and *G. Lawrence*, for the appellant.

Upjohn, K.C., and *Vaughan Hawkins*, for the respondents.

G. Lawrence replied.

The following cases were cited in the course of the argument: *Mellersh* v. *Brown*, 38 W. R. 732, 45 Ch. D. 225; *Smith* v. *Hill*, 9 Ch. D. 143, 26 W. R. Dig. 146; *In re Hancock*, 59 L. T. 197; *In re Lake's Trusts*, 63 L. T. 416, 39 W. R. Dig. 112; *London and Midland Bank* v. *Mitchell*, 47 W. R. 602, [1899] 2 Ch. 161; *Davies* v. *Thomas*, 49 W. R. 68, [1900] 2 Ch. 462; *Levy* v. *Stogdon*, [1898] 1 Ch. 478, 46 W. R Dig. 173; *Toft* v. *Stephenson*, 7 Hare 1, 5 De G. M. & G. 735; *Alexander* v. *Newman*, 2 C. B. 122; *Rose* v. *Watson*, 12 W. R. 585, 10 H. L. Cas. 672; *Munns* v. *Isle of Wight Railway Co.*, 18 W. R. 781, 5 Ch. App. 414; *Shaw* v. *Foster*, 20 W. R. 907, 5 H. L. Cas. 321; and *Machreth* v. *Symmons*, 15 Ves. 329.

VAUGHAN WILLIAMS, L.J., referred to the facts, and the claims in the action, and continued: Farwell, J., dismissed the action, being of opinion that the evidence on the trial was not strong enough to override the plain words of the deed of the 31st of January, 1874; but although dismissing the action, he does not expressly deal with the claim for a declaration of a lien in favour of the plaintiff, E. Stucley, as an unpaid vendor. I agree with the findings of fact of the learned judge, and with his conclusion in respect of the other claims. It was not really contended that there ever was a payment in cash by Sir George to his son of £1,500, the receipt of which is acknowledged by the receipt indorsed on the deed. The executors cannot find any trace of this sum ever having been paid either in cash, or in account, or by agreed appropriation. In fact, counsel for the respondents admitted that they could not argue that, as cash, that sum had, in accordance with the receipt indorsed, been paid, and Farwell, J., in his judgment takes the same view. The question therefore arises whether the plaintiff Edward Stucley is not, as unpaid vendor, entitled to the declaration of lien he claims on this reversionary legacy assigned by him to his father, and which continued reversionary down to the death of the father.

Two points were made by counsel for the respondents as against this claim. One was that the doctrine of the lien of an unpaid vendor does not apply to a sale of personal property. The other is that, although the expression is frequently used that equity gives the unpaid vendor "an interest" in the subject-matter of sale to the extent of the purchase-money owing to him, yet that expression is merely figurative; and that the unpaid vendor here is not entitled to all the remedies which accrue to the owner of an express charge, to enforce payment out of the reversionary legacy of the sum charged and interest.

With regard to the first point, *Davies* v. *Thomas* is a sufficient authority that the vendor's lien for unpaid purchase-money extends to personal property. That was a case in which the principle of a vendor's lien for unpaid purchase-money was held applicable to a share of the proceeds of a sale of leaseholds under a trust for conversion directed by the will of a testator. Lord Alverstone there says: "But, even if the thing sold had been simply a claim to receive a share of the money arising from the realization of the leaseholds, I think the unpaid vendor would have been entitled to a lien upon the share which he sold." And although Rigby, L.J., stated that there was another way in which the case might be disposed of without going carefully into the question of a vendor's lien, he did not dissent from the view taken by Lord Alverstone. The case is, in my opinion, an express authority that a vendor's lien for unpaid purchase-money extends to personal property. Having regard to the express decision in that case, I do not think it is at all necessary to do more than follow that decision of the Court of Appeal; but an examination of the authorities, to my mind, shows that the principle affirmed in that case—namely, that the lien of an unpaid vendor applies to personal property—is by no means a new principle affirmed there for the first time.

As regards the second point, the case of *Rose* v. *Watson* shows that the lien extends not only to principal money, but also to interest from the time that the equitable lien comes into existence; and *Munns* v. *Isle of Wight Railway* shows that the right which the owner of an express charge possesses to have the charge raised by a sale or mortgage of the property charged extends to a lien arising under the general principles of equity, such as a vendor's lien.

Now, in the present case, an unpaid vendor is claiming a declaration of lien for the purpose of enforcing the undoubted interest he possesses to have his unpaid purchase-money paid out of the subject-matter of the assignment in question. It was suggested that, although he might have had a lien which he could have enforced—and enforced by obtaining an order of the court for a sale or mortgage—yet this right did not extend to payment of interest for the whole period since the date on which the purchase-money ought to have been paid; and an attempt was made to contend that the right to interest can only be enforced with regard to arrears of interest for which an action can be brought without being obnoxious to the Statute of Limitations. In my judgment the authorities clearly show that this is not so. Of course, in the case of a sale and purchase of land, the express provisions of section 42 of the Real Property Limitation Act, 1833, apply, but that section has no application to a case of personalty; and, in my opinion, the authorities show that, in the case of a lien on personal property which is the subject-matter of a sale, not only does that statute not apply, but there is no Statute of Limitations which has any application at all. The first case in which, in my judgment, the state of the law was recognized is *Smith* v. *Hill*, where it was held that a mortgage of a reversionary interest in a sum of money forming part of a testator's residuary personal estate was unaffected by section 42 of the statute, notwithstanding that such sum was invested

on mortgage of real estate. But the case which, to my mind, comes nearer to the present is *Mellersh* v. *Brown*, a decision of Kay, J., as he then was. The head-note to that case is this: "A mortgage of reversionary interests in personal estate contained a covenant by the mortgagor for payment of the mortgage money with interest at 5 per cent. on a specified day; but there was no provision for payment of any subsequent interest. No interest was ever paid. Fourteen years after the date of the mortgage an action was brought for foreclosure and the usual decree was made. Held, that redemption could only be allowed on payment of interest at 5 per cent. for the whole period of fourteen years." If it is true that the unpaid vendor has this equitable lien on the personal property, the subject-matter of the sale, for his unpaid purchase-money, and if it is true—and I have already said that in my opinion it is true—that the remedy for enforcing that lien is the same as where there is an express charge, then it follows that in such a case there is no Statute of Limitations which will prevent the vendor from recovering that purchase-money, together with the whole of the interest from the time the purchase-money ought to have been paid.

In my judgment the result is that the plaintiff Edward Stucley is entitled to enforce his remedies against the fund representing the reversionary legacy for obtaining the £1,500 unpaid purchase-money, together with interest, from the date of the assignment, which I suppose should be at 4 per cent. It is not necessary that we should work out the figures now; but the result is that, to a substantial extent, the plaintiff has succeeded in this action, though the largest part of the plaintiff's claim is a claim in which he has failed. As to the costs, in the circumstances it seems to me that justice will best be done in this case by directing that there shall be no costs either below or on appeal.

STIRLING, L.J., said that in his opinion there was upon the evidence no real ground for the contention that the deed of the 31st of January, 1874, ought to be treated as a security only. His lordship continued: In the circumstances of this case I have come to this conclusion, that the sum of £1,500, which was expressed to be the consideration money for the purchase of this reversionary interest, was not paid by the father in any shape whatever, and therefore that the plaintiff Edward Stucley is, as regards that sum of purchase-money, in the position of an unpaid vendor of that reversionary legacy. The question, therefore is whether he is entitled, as an unpaid vendor, to a lien upon the legacy.

In the case of *Shaw* v. *Foster* the relation subsisting in the eye of a court of equity between a vendor and a purchaser of leasehold property is thus stated by Lord Cairns: "The vendor was a trustee of the property for the purchaser; the purchaser was the real beneficial owner in the eye of a court of equity of the property, subject only to this observation, that the vendor, whom I have called the trustee, was not a mere dormant trustee, he was a trustee having a personal and substantial interest in the property, a right to protect that interest, and an active right to assert that interest if anything should be done in derogation of it. The relation, therefore, of trustee and *cestui que trust* subsisted, but subsisted subject to the paramount right of the vendor and trustee to protect his own interest as vendor of the property." So that the unpaid vendor is there treated as having an "interest"—"a personal and substantial interest"—in the property he has sold. Again, in *Rose* v. *Watson*, which was the converse case—namely, a case in which the purchaser had paid part of his purchase-money under a contract for sale, and then declined to complete—Lord Cranworth says: "There can be no doubt, I apprehend, that when a purchaser has paid his purchase money, though he has got no conveyance, the vendor becomes a trustee for him of the legal estate, and he is, in equity, considered as owner of the estate. When, instead of paying the whole of his purchase-money, he pays a part of it, it would seem to follow, as a necessary corollary, that, to the extent to which he has paid his purchase-money, to that extent the vendor is a trustee for him; in other words, that he acquires a lien, exactly in the same way as if upon the payment of part of the purchase-money the vendor had executed a mortgage to him of the estate to that extent." Those last words seem to be very material to the argument which has been addressed to us.

Now, here a case has occurred which has occurred frequently before—that a vendor has executed a conveyance, upon the face of which it is expressed that he has received the purchase-money, and there is an indorsement on the conveyance accordingly. It has long since been decided by *Mackreth* v. *Symmons* that, although the conveyance contains a statement upon the face of it that the purchase-money has been paid, and a receipt for the money is indorsed on the deed, yet, if the money has not in fact been paid, the vendor's lien will prevail, not only against the purchaser, but also against all persons claiming under him with notice that the purchase-money has not been paid. Such, then, is the position defined by the authorities as regards a sale of real estate. In my opinion *Davies* v. *Thomas* is an authority that the doctrine is not limited to the case of a sale of real estate, but extends, at any rate in some cases, to a sale of personal estate and to all cases in which the property sold is of such a nature as that the court will decree specific performance of the contract for the purchase of it. In my opinion, therefore, the plaintiff here is to be treated as having an interest in him in the nature of property in the subject-matter of this sale—namely, in the £5,000 legacy purporting to be assigned by this deed of assignment. If, then, he has an interest in the nature of property, he is entitled to enforce that interest. It makes, in my opinion, no difference whether the interest arises from a lien given him by a court of equity or whether it arises from an express charge or from an express assignment by way of mortgage. As Lord Cranworth said in *Rose* v. *Watson*, the right or interest acquired under the lien is the same as if a mortgage had been executed for the amount unpaid. So it appears to me. The plaintiff, the unpaid vendor here, is in the same position as if, immediately after the transaction in which purchase-money was not paid, his father had executed to him a charge upon this equitable reversion for the sum unpaid.

That being so, there is no Statute of Limitations which applies to the case of a person coming to recover an interest in personal property such as the fund here, the reversion in which has now fallen in. In my opinion, the observations of Kay, J., in *In re Hancock, Hancock* v. *Berrey*, apply to the present case. The learned judge there pointed out that in the case before him, which was an assignment of a reversionary interest by way of mortgage, the Statute of Limitations would not apply; and he proceeds as follows—and this meets a considerable part of the argument that has been addressed to us: "But then it is said—or at least this is the only way in which the argument could possibly be put, as it seems to me—the debt to secure which this assignment was made is barred, or rather the right to sue to recover the debt is barred; and that therefore the mortgagor has some right to recover back the share he has assigned. Is

that so? For example, let us try it by the most concrete instance one can put. Suppose the assignee of this reversionary interest in personal property had commenced an action against the trustees claiming to have the share handed over to him. Of course he need not make the assignor a party. He had nothing to do but prove his assignment, and the trustees would have had no answer whatever; they must have handed it over. Then could the mortgagor have maintained successfully a suit to prevent their handing it over? On what ground? Suppose he had brought an action saying, 'True, I did assign this; true, the reversion fell in so lately as October, 1887; but I seek to restrain the trustees from handing over that reversion to my assignee, because I say that the debt to secure which I made the assignment is barred.' What Statute of Limitations or any other statute would enable him to maintain an action like that? There is no Statute of Limitations which destroys the debt. The Statute of Limitations only destroys the remedy of the creditor. The creditor could not sue the mortgagor upon the covenant, because then he would be met by the Statute of Limitations which bars the action. The mortgagee says, 'I do not want to sue anybody; all I want is to have this mortgage property, which is mine, handed over to me.' How it can be kept from him I cannot conceive." All that applies, with very slight variations, to the present case. The position of the plaintiff's father was that of sole trustee and executor of the will under which the plaintiff claims, and in that capacity he had the fund under his control. He, of course, had notice of the assignment to him and of the fact that he had failed to pay the purchase-money. That brings the case almost directly within *Davies* v. *Thomas*. In that case Rigby, L.J., after pointing out that the trustees of the will at the time of the mortgage (which was of a reversionary share of the proceeds of leaseholds directed to be sold) held the property upon certain trusts, and that at the time of the sale of the mortgagor's interest the trustees held the property in the condition of leaseholds, and that subsequently to the assignment to the purchaser they sold the leaseholds, and then held the proceeds in trust for the persons entitled to it, proceeded as follows: "What was the position of the trustees? David Lewis, the purchaser, was throughout the solicitor who acted for the trustees as well as the solicitor for the plaintiff, who was the vendor. . . . It would, in my opinion, be impossible for the trustees to say that they had not in equity constructive notice of the purchase by their solicitor of the mortgaged property, and of the fact that he had not paid the whole of the purchase-money. It was their duty to administer the trust fund produced by the sale of the leasehold property—a fund which was in their hands subject to the trusts of the will. Could they in favour of their solicitor ignore the rights of the vendor and say that they were not concerned with him, but were concerned only with their own solicitor who had purchased the mortgaged share from him? If a court of equity had been administering the fund, it would have inquired into the facts, and finding that the purchaser had not paid the purchase-money, it would have held that it was its first duty to see that the mortgagee, and through him the mortgagor, had been satisfied before handing over the purchased share to the purchaser. The court would have had no difficulty in doing that. And, in my opinion, the trustees are bound to do that which the court would have done had it been administering the fund." So here, the fund was under the legal control of the father in his capacity of trustee and executor. If the court had been administering the fund, and had found that the trustee of this fund had, on purchasing the reversionary interest in it, failed to pay his purchase-money, the court would have had no difficulty in enforcing the right of the unpaid vendor.

I am therefore of opinion that the plaintiff has a lien for the unpaid sum of £1,500 entitling him to payment of that sum, together with interest at 4 per cent. from the date of the purchase. This is in accordance with *Smith* v. *Hill* and *Mellersh* v. *Brown*.

It appears that the legacy in question formed a moiety of a sum of £10,000 originally secured by a Mersey and Irwell Navigation bond. According to the evidence of the solicitor to the defendants, that bond has been sold, and the money has been invested on other security. The fund having been under the control of Sir George Stucley, not only the bond itself, but also the security substituted for it, became liable to the plaintiff's lien.

As to the defendants' contention that the plaintiff's claim is too late, in my opinion, having regard to the circumstances of the case, the plaintiff's demand is not a stale one, and he is not on that ground deprived of the right he now seeks to enforce. It appears to me, therefore, that on this part of the case the plaintiff succeeds.

COZENS-HARDY, L.J.—I am of the same opinion, and I have very little to add. I agree entirely with all that Farwell, J., said upon that part of the case to which his decision was directed. With regard to the point as to the right of the plaintiff to a lien for his unpaid purchase-money, but for the elaborate argument we have heard upon that part of the case I should have thought it was scarcely arguable. To my mind it is impossible to doubt that this assignment must be treated as what it purports to be—that is, as an assignment by way of absolute sale. I cannot rely upon parol evidence of a transaction which happened thirty years ago. I think we are bound to take all the documents relating to that transaction as they stand; and one of those documents is an assignment upon the purchase by the father from the son of the latter's reversionary legacy of £5,000 in consideration of the sum of £1,500. The part of that transaction which it is now important to consider is that the £1,500 purchase-money was never paid by the father to the son. That being so, it is said that the vendor has, according to well-settled principles, a lien upon the property which he sold for the purchase-money which has never been paid. It is quite settled that a vendor's lien is not a mere personal equity, and that it really creates a charge upon and an interest in the property sold, in the same manner as if that charge had been created by writing. One cannot illustrate that better than by reference to the old law of mortmain, under which the purchase-money for land contracted to be sold by a testator, but in respect of which he had the usual vendor's lien at his death, was not available for satisfying charitable legacies. The reason was that that lien was an "interest in land," for a vendor's lien on the sale of land is recoverable by statute as being an incumbrance on the land.

It has been argued that a vendor's lien is limited to land and does not extend to personal estate. There is the distinct authority of the Court of Appeal in *Davies* v. *Thomas* to the contrary; and, that being so, I do not think it necessary to go back to the earlier authorities, or to discuss the principles upon which those authorities were decided. I see no reason in principle why the doctrine should not apply to every case of personal property in which the courts of equity assume jurisdiction over the subject-matter of the sale. Then, if there is in this present case the right to a vendor's lien, as I am of opinion that there

is, over this personal estate which was sold, there is no Statute of Limitations which applies, and there is no answer to the claim for interest from the date at which the right to interest arose—that is, from the date of the deed.

Again, the purchaser, Sir George Stucley, was in the position of sole trustee of the fund, the reversionary interest in which was the subject-matter of the sale and purchase. He was also entitled to the income of the fund during his life, and by reason of his purchase he became entitled to the reversion in that fund, but subject to the vendor's lien. His representatives cannot, merely because the fund is now in possession and no longer reversionary, say that that lien is destroyed. In my opinion, that lien is imposed upon the fund which was in the father's hands, and is now in the hands of his representatives. Accordingly there must be an order for payment to the plaintiff of the £1,500 out of the fund, together with interest at 4 per cent. from the date of the purchase, with liberty to apply.

Appeal allowed.

Solicitors, *Witham, Roskell, Munster, & Weld; Moon, Gilks, & Moon*, for *Battishill & Houlditch*, Exeter.

From K. B. Div. (Vaughan Williams, Stirling, and Cozens-Hardy, L.JJ.) July 28, 31; Aug. 11, 1905.

In re HAMILTON, YOUNG, & CO. *Ex parte* CARTER. (*a.*)

Bankruptcy—Banker—Advance to merchants—Letters of lien on goods bought with advance—Bills of Sale Act, 1878 (41 *&* 42 *Vict. c.* 31), *s.* 4—*Bills of Sale Act,* 1890 (53 *&* 54 *Vict. c.* 53)—*Bills of Sale Act,* 1891 (54 *&* 55 *Vict. c.* 35)—*Bankruptcy Act,* 1883 (46 *&* 47 *Vict. c.* 52), *s.* 44.

Where bankers advanced money to traders for the purpose of paying for goods, and the traders gave the bankers letters of lien thereon, it was held, on the bankruptcy of the traders, that the letters were "documents used in the ordinary course of business as proof of the possession or control of goods," and so, being within the exceptions of section 4 *of the Bills of Sale Act,* 1878, *need not be registered under the Bills of Sale Acts. It was also held that the Bills of Sale Acts,* 1890 *and* 1891, *had no bearing on the case. It was further held that goods covered by the letters of lien and sent by the traders to certain manufacturers before sale by the traders, and which were claimed by the bankers before the bankruptcy, were not "at the commencement of the bankruptcy in the possession, order, or disposition of the bankrupts" as "the reputed owners thereof" within section* 44 *of the Bankruptcy Act,* 1883.

This was an appeal from a judgment of Bigham, J., on a special case stated in bankruptcy.

The facts showed that the debtors were merchants whose course of business was to purchase goods in Manchester for shipment to and sale in Calcutta. The money which paid for the goods was advanced to them by a bank on the security of a letter of lien accompanied by the receipts of a bleaching firm who were to prepare the goods for shipment. The letter was to the following effect: "As security for the advance we hold on your account and under lien to you the undermentioned goods in the hands of ——. . . . These goods when ready will be shipped to Calcutta, and the bills of lading duly indorsed will be handed to you. . . ."

On the 14th of July, 1903, the bank became aware that the borrowers were in difficulties, and thereupon wrote to the bleachers whose receipts were held by them, requesting them to hold the goods specified in the receipts to their order, and they also wrote to the borrowers notifying them of their action. Previously to this date no notice of the letter of lien had been given to the bleachers.

On the 24th of July, 1903, the borrowers sent out letters to their creditors stating their insolvency, and they were adjudicated bankrupt on the 15th of August, 1903.

The questions submitted for the opinion of Bigham, J., were: (1) Whether such of the goods described in the letters of lien as were in the hands of the bleachers on the 24th of July, 1903, were at that time subject to any lien by the bank. (2) Whether the bank on the 24th of July, 1903, was entitled to any lien on any of the goods mentioned in the letters of lien which were not in the bleachers' hands on that date but could be traced as being then in the hands of the borrowers at their warehouses or at the docks. (3) Whether the bank was, on the 24th of July, 1903, entitled to any lien on any of the goods which on that date or later were in the hands of the bleachers or of the borrowers or at the docks, and which were claimed by the bank.

It was held by Bigham, J., that the letters of lien were not bills of sale within the Bills of Sale Act, 1878, but were within the exceptions of section 4 thereof, and that therefore they did not require registration, and that the goods were not in possession, order, or disposition of the borrowers with the bank's consent, and he accordingly decided the foregoing questions in the bank's favour.

The trustee in bankruptcy appealed.

Danckwerts, K.C., and *E. W. Hansell*, for the appellant, cited *Newlove* v. *Shrewsbury*, 36 W. R. 835, (1888) 21 Q. B. D. 41; *Furber* v. *Cobb*, 35 W. R. 398, (1887) 18 Q. B. D. 494; *R.* v. *Townshend*, (1884) 15 Cox C. C. 466; *Edwards* v. *Edwards*, 24 W. R. 713, (1876) 2 Ch. D. 291; *Ex parte North-Western Bank*, 21 W. R. 69, L. R. 15 Eq. 69; *Tennant* v. *Howatson*, (1888) 13 App. Cas. 489, 36 W. R. Dig. 206; *In re Watson & Co*, [1904] 2 K. B. 489; *Sharman* v. *Mason*, [1899] 2 Q. B. 679. They contended that the letters of lien were bills of sale and should have been registered; that they were not within the exceptions of section 4 of the Bills of Sale Act, 1878, and that the goods were within the possession, order, or disposition of the borrowers with the consent of the bank within section 44 of the Bankruptcy Act, 1883.

J. A. Hamilton, K.C., and *Schiller*, for the respondents, cited *William Brandts, Sons, & Co.* v. *Dunlop Rubber Co.*, [1905] A. C. 454; *Ex parte North-Western Bank; Ex parte Conning*, L. R. 16 Eq. 414; and *Merchant Banking Co. of London (Limited)* v. *Spotten*, Ir. Rep. 11 Eq. 586. They argued that the transaction was one in the ordinary course of business, and therefore within the exceptions of section 4 of the Bills of Sale Act, 1878.

Hansell replied.

Cur. adv. vult.

Aug. 11.—VAUGHAN WILLIAMS, L.J.—This is an appeal from the judgment of Bigham, J., upon a special case, and I think that judgment should be affirmed, and the appeal dismissed with costs. From the statement in the special case with reference to the practice of Hamilton, Young, & Co. and the bank with respect to the letters of lien, it appears that the whole conduct of the business of preparation and shipping was left in the hands of Hamilton, Young, & Co., and that there was nothing in the shipping

(*a.*) Reported by HENRY STEPHEN, Esq., Barrister-at-Law.

documents identifying the goods mentioned in the bleachers' receipts accompanying the letters of lien. The result of the practice detailed in the special case seems to be that in respect of the matter of preparation and shipment of the goods, the management and direction of these goods for the purpose of bleaching, dyeing, and shipping, until the bills of lading were handed over, rested entirely with Hamilton, Young, & Co.; and that no property other than by way of lien or charge would pass to the bank until the bills of lading were handed over, but that the bank had in equity a right to an injunction restraining Hamilton, Young, & Co. from doing anything inconsistent with their holding the goods on account of the bank and under lien to the bank. The bank had also such rights as the possession of the bleachers' receipts might give them, but there is nothing in the case to show that the bleachers would have given up the goods to the bank on the production of the receipts. On the 24th of July, 1903, just before the failure of Hamilton, Young, & Co., the goods to which the National Bank now asserts a claim may be, as I understand the case, divided into three categories—(1) goods the subject of letters of lien which were lying at the bleachers, or at the warehouse of Hamilton, Young, & Co.; (2) goods the subject of letters of lien which were not in the hands of the bleachers, but could be traced as being then in the hands of Hamilton, Young, & Co. at their warehouse, or were at the dyers or packers or the docks; (3) goods not the subject of letters of lien which on the 24th of July were in the hands of the bleachers or of Hamilton, Young, & Co., or at the packers or the docks, and which are claimed by the bank. All the three questions in the special case should be answered in favour of the bank. I am of opinion that such of the goods described in the letters of lien as on the 24th of July, 1903, were in the hands of the bleachers were subject to a lien or charge in favour of the bank. In the same manner I think that the bank was entitled to a lien or charge on the goods mentioned in the letters of lien, which on that date could be traced as in the hands of Hamilton, Young, & Co. at their warehouses, or were at the dyers or packers or the docks. I think that questions 1 and 2 should be answered in favour of the bank, because I think that the letters of lien, with the accompanying receipts, are not bills of sale because they come within the exception in section 4 of the Act of 1878, being documents "used in the ordinary course of business as proof of the possession or control of goods." That such documents as the letters of lien, with the accompanying receipts of those in actual possession, are documents used in the ordinary course of business I have no doubt; but the question is whether such documents "are used as proof of the possession or control of goods" within the meaning of the exception. I think, however, that these documents were in the ordinary course of business used as proof of possession or control of these goods. The documents are records of a bargain creating a lien or charge in favour of the bank, and declaring that Hamilton, Young, & Co. hold the goods specified in the respective letters on account of the bank and under lien in the hands of the persons therein named, and as such would be bills of sale but for the fact that they fall within the exception. But I think they do fall within the exception, and I think that the documents are not the less intended as proof of control, within the meaning of the exception, because the goods thus held by Hamilton, Young, & Co., or their bailees, the bleachers, packers, and others, were to be dealt with by Hamilton, Young, & Co. at their discretion in the preparation for shipment to the East. The control of the bank, in my opinion, continued all along. The bank would, on the strength of these documents, at any time have been entitled to an injunction restraining Hamilton, Young, & Co., if they had attempted to take the goods out of the control of the bank, by dealing with them for a purpose other than that of preparation for shipment, and shipment to the East. I do not think it makes any difference on this point whether the goods happened to be held by Hamilton, Young, & Co., on account of the bank and under lien to the bank in the warehouse of Hamilton, Young, & Co., or in the hands of the bleachers and others who had given receipts to Hamilton, Young, & Co. Then comes the third question, whether the bank on the 24th of July, 1903, were entitled to any other goods which at the said date were in the hands of bleachers, packers, or others, or of Messrs. Hamilton, Young, & Co.—*i.e.*, goods other than those mentioned in letters of lien with receipts attached. I think that, except in one case, the bank is entitled to these goods, because the title of the bank does not arise under a document void as a bill of sale, and the bleachers to whom notice was sent, in all cases except one, attorned to the bank before the act of bankruptcy of Hamilton, Young, & Co. Our attention has been called by Stirling, L.J., to the Bills of Sale Acts of 1890 and 1891. Our attention was not called to those statutes during the argument. But having regard to their provisions I wish to say something concerning them. In section 4 of the Act of 1878, after the definition of a bill of sale there are certain exceptions, which, I may observe, equally existed in the prior Bills of Sale Act of 1854. Now, amongst those exceptions are these: "Transfers of goods in the ordinary course of business of any trade or calling, bills of sale of goods in foreign parts or at sea." Now, without going in detail into the very few and very short provisions in these two statutes of 1890 and 1891, it may be said generally that the effect of these two statutes was to extend to instruments dealing with imported goods prior to their deposit in a warehouse, factory, or store, with a view to being reshipped for export or delivery to a purchaser not being the person giving or executing the instrument, the exception which already existed in the Act of 1878, "bills of sale of goods in foreign parts or at sea." In the Act of 1854 there were no provisions such as exist in section 4 of the Act of 1878, which, to put it shortly, included in bills of sale documents in respect of which an equitable charge had been given. Under that Act of Parliament the case of *Ex parte North-Western Bank, In re Slee* was decided, and in that case it was held that under the Act of 1854 a letter of hypothecation, by which a factor and warehouse keeper pledged certain wools in his possession to his bankers to secure an advance, constituted a good equitable charge which did not require registration, the advance and charge having been made in the ordinary course of business. Now, that decision was based upon these documents not being within the definition of a bill of sale at the commencement of the section. Then followed the alteration contained in the Act of 1878, and that retained the exceptions contained in the Act of 1854. Under those circumstances the real question in this case is, What was the effect of the extension by the Act of 1878 of the definition of a bill of sale so as to make it cover an equitable charge. Now, in my judgment one thing at all events is perfectly plain, that, whatever might be the effect of the extension of that definition, it is quite clear that the exception applied as much to the extended definition as it did to the definition as it existed in the Act of 1854. The case of *Ex parte North-Western Bank, In re Slee*, was dealt with in an Irish case.

Merchant Banking Co. of London v. *Spotten* in 1877, also before the Act of 1878. But if the judgments in those two cases are looked at, and the expressions of the judges considered, although the documents in question were held not to be bills of sale because they did not fall within the definition, it is plain from the judgments that both courts thought that the scope of the Act of 1854 was not to avoid, as bills of sale, documents used in the ordinary course of business by merchants for the purpose of proof of possession or control of goods. Under those circumstances we have to consider here whether these documents were intended to be proof of possession and control of the goods in question. Now, Bigham, J., has arrived at the conclusion, as appears from his judgment, that these documents described in the letters of lien were intended both as proof of possession and also as proof of control. I am not saying that this is not so, but I prefer to take the simpler case of whether they were used as proof of possession of the goods. I cannot doubt myself that business people in Manchester would all so regard them; but still that will not do, unless according to a proper construction of the words these documents, with the surrounding circumstances, were intended as "proof of possession or control" within the meaning of the exception in the Act of 1878. Now, for one moment I will deal with the case apart from the statements in the special case as to what was the practice of the bank and Hamilton, Young, & Co. with reference to the preparation of the goods by dyeing, bleaching, and otherwise making preparation for shipment; and if one takes the case apart from that practice I am of opinion that these documents were intended as proof of possession or control. Then does it make any difference that the bank allowed Messrs. Hamilton, Young, & Co. to exercise their discretion as to those steps which necessarily had to be taken before the goods could be made ripe for realization by them; goods, it must be remembered, which by the very terms of the letters of lien remained, from the moment of the giving of those letters, goods held by Hamilton, Young, & Co. on behalf of the bank? In my judgment the fact that the bank had this lien, and had these goods held for them by Hamilton, Young, & Co., does not prevent the giving of the letters of lien, coupled with the receipts, being, according to the ordinary practice of bankers, proof of possession or control by these people. Then with regard to the two statutes to which I have referred I see no reason why they in any way interfere with the conclusion which I have already arrived at; and, as I agree with Bigham, J., in his view as to the question of order and disposition, I think that the judgment of Bigham, J., should be affirmed, and this appeal dismissed with costs.

STIRLING, L.J.—On the first two questions raised by the special case, which relate to goods comprised in letters of lien, I think it right to state that I doubt whether the letters of lien are either "transfers of goods in the ordinary course of business of a trade or calling" or "documents used in the ordinary course of busines as proof of the possession or control of goods" within the meaning of section 4 of the Bills of Sale Act, 1878. That doubt is independent of the two statutes of 1890 and 1891, though it is not lessened by the terms of those statutes. Nevertheless, as my brethren agree in the view taken by Bigham, J., to whose opinion on mercantile documents of such a character as this case deals with, I attach very great weight, I think I ought not to differ from them. I should add that my doubt does not extend to the third question. I think that the attornment, before the commencement of the bankruptcy, of the bleachers and other persons with regard to the goods to which that question relates, created a change in the legal possession of the goods which cannot be referred to any document invalid as a bill of sale, for the simple reason that there is no letter of lien which refers to any of those goods. I also think that, even if there had been a letter of lien in the same terms as those which relate to the other goods, I should have had difficulty in coming to the conclusion that the dealing just before the commencement of the bankruptcy was a performance of, or to be referred to, an agreement contained in such letter. However, there is in fact no such letter, and the question does not arise. Whether the latter transaction is bad as a fraudulent preference I think it is not open to us to consider, because no such question is raised by the special case.

COZENS-HARDY, L.J.—I agree that this appeal must be dismissed, and for the reasons assigned by Vaughan Williams, L.J. The general policy of the Bills of Sale Act, 1878, was not to interfere with ordinary business transactions. In so far as they might be hit by the general words in the definition of a "bill of sale," they are taken out by the express exception. I think the letter of lien, coupled with the deposit of the bleachers' receipt, was a "document used in the ordinary course of business as proof of the control of goods" within the meaning of section 4 of the Act of 1878. It enabled the bank to prevent the bankrupts by injunction from dealing with the goods in any manner inconsistent with the arrangement contemplated by the parties, an arrangement which would result in the handing over of bills of lading when the goods were ready for shipment to Calcutta. It thus gave the bank a "control" of the goods. This disposes of the first and second questions. As to the third question, I think the attornment of the bleachers gets rid of all difficulty. Mr. Hansell sought to argue that the title of the bank could be impeached on the ground of fraudulent preference. But no such question can arise on this special case. And nothing decided by us on this appeal will in any way preclude the raising of the issue of fraudulent preference in proceedings properly directed to that issue.

Solicitors, *Chester & Co.*, for *Bullock, Worthington, & Co.*, Manchester; *Sanderson & Co.*

High Court of Justice.

Chan. Div. } Dec. 4, 5.
Kekewich, J. }

MACMILLAN & CO. (LIMITED) AND SMITH, ELDER, & CO. v. DENT & CO. (a.)

Copyright—Letters—Publication after death of author—Restraint of publication—Copyright Act, 1842 (5 & 6 *Vict.* c. 45), s. 3.

Under section 3 *of the Copyright Act,* 1842, *the copyright in a book published after the death of the author belongs to the proprietor of the author's manuscript from which such book shall be first published.*

Held, that the proprietor of the author's manuscript means the proprietor of the piece of paper that is written upon.

S. E. & Co. purchased from S. the exclusive right to publish certain letters written by C. Lamb; S. was a

(a.) Reported by R. FRANKLIN STUBBING, Esq., Barrister-at-Law.

descendant of the person to whom the letters were sent. S. E. & Co. published these letters in a book, and also gave an exclusive licence to M. & Co. to publish them. Subsequently J. M. D. & Co. purchased the actual letters from S. and published them also.

Held, that S. E. & Co. had acquired the copyright in the letters, as they were the assignees of S., who had the right to publish them under section 3 of the Copyright Act, 1842; that S. E. & Co. were the proprietors of the author's manuscript from which their book was first published, and that J. M. D. & Co. accordingly had no right to publish the letters.

Witness action.

This was an action for an injunction to restrain the defendants from publishing and selling any book which contained sixteen letters written by Charles Lamb to Robert Lloyd between the years 1798-1810, and so infringing the copyright of the plaintiffs Smith, Elder, & Co.

These letters were discovered in an old box, and were in the possession of a Mr. and Mrs. Steed, Mrs. Steed being a descendant of a member of the Lloyd family. Messrs. Smith, Elder, & Co., on the 5th of March, 1895, entered into an agreement with Mr. and Mrs. Steed by which they acquired the exclusive right to publish these sixteen letters for £250, and accordingly they had the loan of the letters for that purpose. In 1898 Smith, Elder, & Co. published these sixteen letters in a book called Charles Lamb and the Lloyds, and they were registered as the proprietors of the copyright in these letters.

In 1899, the plaintiffs Macmillan & Co. (Limited), being about to publish a new edition of Canon Ainger's Charles Lamb, obtained from Smith, Elder, & Co. a licence to publish these letters in consideration for £25. At the same time Smith, Elder, & Co. agreed not to give to any other publisher the right to publish these letters.

In 1902 the defendants J. M. Dent & Co. applied to Smith, Elder, & Co. for permission to publish these letters, which permission Smith, Elder, & Co. refused to grant, as they had already granted an exclusive licence to Macmillan & Co.

In 1903 J. M. Dent & Co. having heard of the existence of some original letters of Charles Lamb, entered into negotiation for the purchase of them, when it appeared that they were the letters in question. Dent thereupon purchased from Mr. and Mrs. Steed the sixteen letters, together with some other letters, for £250. Dent was informed by the Steeds of the assignment of the copyright in them to Smith, Elder, & Co., and the receipt given by Mr. Steed was expressed to be given for the letters and also for any rights which he might still have therein.

At the end of 1903 J. M. Dent & Co. published an edition of Charles Lamb's letters which contained these sixteen letters. Macmillan & Co. and Smith, Elder, & Co. thereupon commenced the present proceedings, in which Smith, Elder, & Co. claimed to be the registered proprietors of the copyright in these sixteen letters, and they, and Macmillan & Co. as their licensees, asked for an injunction to restrain the defendants J. M. Dent & Co. from printing, publishing, and selling any book which infringed their rights in the letters in question.

Charles Lamb by his will dated the 9th of October, 1830, devised and bequeathed all his property of every kind whatsoever to Thomas Moor Talfourd, of the Middle Temple, and Charles Ryle, of East India House, in trust to be disposed of in the purchase of an annuity or annuities, or in any manner in their discretion, for the sole benefit and use of his sister Mary Lamb, provided that if from her advanced age or otherwise his trustees should not think fit to dispose of the whole of the property, then after payment of her debts and funeral expenses the trustees should have power to dispose of the residue in any manner she should, if of sound mind, appoint, and in default of appointment to pay the residue to Emma Isola if living, and if dead then to her lawful children.

Charles Lamb died on the 27th of December, 1834, and his will was proved by both of the executors; and Mary Lamb died in 1847 without having exercised the power of appointment.

Emma Isola married Edward Moxon and died intestate on the 2nd of February, 1891, and letters of administration were granted to her son, A. H. Moxon.

On the 31st of January, 1905, A. H. Moxon, at the instigation of the defendants, J. M Dent & Co., took out letters of administration *cum testamento annexo de bonis non* to the estate of Charles Lamb, and on the 7th of February he assigned all his rights, whatever they were, in the sixteen letters in question to the defendants, J. M. Dent & Co.

The grant of the letters of administration to the estate of Charles Lamb and the assignment by Moxon to J. M. Dent & Co. were subsequent to the commencement of the proceedings in the present action.

The defendants, J. M. Dent & Co., by their defence and notice of objection, denied that the plaintiffs Smith, Elder, & Co. were the proprietors of the copyright in the sixteen letters in question; they alleged that there was no subsisting copyright in the said letters, or that if such copyright was subsisting the proprietor thereof was the legal personal representative of the late Charles Lamb, the writer of the said letters, or the defendants as his assigns.

Section 3 of the Copyright Act, 1842, provides that the copyright in every book which shall after the passing of this Act be published in the lifetime of its author shall endure for the natural life of such author, and for the further term of seven years commencing at the time of his death, and shall be the property of such author and his assigns; provided always that if the said term of seven years shall expire before the end of forty-two years from the first publication of such book the copyright shall in that case endure for such period of forty-two years; and the copyright in every book which shall be published after the death of its author shall endure for the term of forty-two years from the first publication thereof, and shall be the property of the proprietor of the author's manuscript from which such book shall be first published or his assigns.

Scrutton, K.C., and *R. A. Wright*, for the plaintiffs, Macmillan & Co. (Limited) and Smith, Elder, & Co.—The copyright in these letters belonged to Smith, Elder, & Co. for forty-two years from the time when they were first published. The Copyright Act, 1842, s. 3, made an alteration in the law. Prior to that Act the copyright belonged to the author and his assigns after publication, whether the publication took place during the lifetime of the author or after his death. But the Legislature made a distinction between the two cases and said that if publication took place in the lifetime of the author the copyright belonged to the author and his assigns, but that if publication took place after the death of the author the copyright should belong to a different person, viz., the proprietor of the author's manuscript from which such book was published. In section 11 of the International Copyright Act, 1886, the expression "author" was defined in the case of a posthumous work as meaning "the proprietor of the manuscript of such work and any person claiming through him." Further, in section 16 of the Copyright Act, 1842, a

distinction was drawn right through the section between the "author" and the "first publisher" of a book. The case turned upon the meaning of the phrase "proprietor of the author's manuscript" in section 3 of the Act. In *Oliver* v. *Oliver*, 10 W. R. 18, 11 C. B. N. S. 139, it was held that the receiver of a letter who had handed it back to the sender had sufficient property in the paper upon which it was written to entitle him to maintain an action for detinue against the sender for it. It was true that the author of the letter had the personal right to stop any publication of the letters during his lifetime, but notwithstanding that right and subject to it the receiver of the letter was the proprietor of the manuscript of the letter. There could not be a joint property in both the author and the receiver in the manuscript, otherwise the receiver would not have the right, which he had, to destroy the letters. If "proprietor of the author's manuscript" meant the proprietor of the right of publishing there would have been no necessity for the second part of section 3 of the Act, which was inserted to show that after the author's death the person entitled to the copyright was the owner of the actual piece of paper upon which the letter or book was written, and it was to be the "author's manuscript" to prevent any possibility of several copies being in existence of the same work, the owners of which might claim the right. By this means a lengthy inquiry as to who was the legal personal representative of the deceased author in order to ascertain who had the right to publish was obviated. It was decided in *Maclean* v. *Watson*, 20 Sc. Ses. Ca., 2nd ser., 1154, that the owner of an unpublished manuscript, although not the author of it, acquired copyright in it by first publishing it: see also *Walter* v. *Lane*, 48 W. R. 218, [1899] 2 Ch., at p. 770, 49 W. R. 95, [1900] A. C., at p. 548. In *Hopkinson* v. *Lord Burghley*, 15 W. R. 543, 2 Ch. App. 447, where the question was whether the defendant could refuse to produce letters from a stranger, Turner, L.J., put it, "The writer of a letter trusts the receiver with the letter, and he must take the consequences of its being in his possession. . . . If the sender of a letter wishes to restrain the receiver from showing it to any other person he must file a bill for that purpose. Unless that is done the property is in the receiver." [KEKEWICH, J.—Lord Cairns puts it much more accurately.] Smith, Elder, & Co. having bought the right of publishing from the owner of the manuscript of the letters, they have acquired the copyright in the letters.

Danckwerts, K.C., and *Sebastian*, for the defendants, J. M. Dent & Co.—The right of publishing these letters remained in the personal representative of Charles Lamb; it ought to have passed under the residuary bequest to Emma Isola, but it never did pass, and therefore the plaintiffs could not have any rights through the Steeds. [KEKEWICH, J.—Must I not assume at this distance of time that the executors of Lamb assented to the bequest, and that therefore this right did pass in the residuary bequest, and that the letters must be held to have passed into the rightful possession of the Steeds.] What the defendant acquired from the Steeds was only the actual pieces of paper, as the copyright remained in the personal representative. The writer of a letter retained such a right in it that he could prevent it being printed and published, and it was a well-settled principle of law that the manuscript remained the property of the writer and not of the receiver. In *Pope* v. *Curl*, 2 Atk. 342, Lord Hardwicke said that the receiver had only a special property possibly in the paper, but that that did not give a licence to any person whatsoever to publish letters to the world, for at most the receiver had only a joint property with the receiver. In *Gee* v. *Pritchard*, 2 Swanst. 402, Lord Eldon held that the jurisdiction to restrain the right of publication was founded in a right of property in the writer. He laid down the proposition that by sending the letter the writer had given for the purpose of reading, and in some cases of keeping it, a property to the person to whom it was addressed, yet that the gift was so restrained that *ultrà* the purposes for which the letter was sent the property was in the sender; and in *Thompson* v. *Stanhope*, Amb. 737, Lord Apsley, L.C., held that the widow of Lord Chesterfield's son had no right to print the letters which Lord Chesterfield wrote to his son without the consent of Lord Chesterfield or his executors: see also *Duke of Queensberry* v. *Shebbeare*, 2 Eden. 329. It has been recognized that there was a right of property in the sender of letters since the time of Lord Hardwicke. In *Oliver* v. *Oliver* the right of property recognized in the receiver was only a limited one, so that he could recover the actual paper. In *Earl Lytton* v. *Devey*, 54 L. J. Ch. 293, 33 W. R. Dig. 106, Bacon, V.C., laid down that the property in the letters remained in the person to whom they were sent. The right to retain them remained in the person to whom they were sent; but the sender of the letters had still that kind of interest if not property in the letters that he had a right to restrain any use being made of the communication which he had made in the letters so sent by him. North, J., in *Labouchere* v. *Hess*, 77 L. T. 559, 46 W. R. Dig. 68, expressed a doubt as to the person in whom the property in the paper was vested. [KEKEWICH, J.—Could the writer of the letter publish it against the wish of the receiver?] Upon principle he could. It was within the right of the author to say whether there should be publication or not. In *Caird* v. *Sime*, 36 W. R. 199, 12 App. Cas. 326, where the question arose as to the publication of oral lectures without the consent of the lecturer, Lord Halsbury, L.C., laid stress upon the fact that an author had a proprietary right in his unpublished literary productions. It was to this right that the section referred and not to the ownership of the piece of paper. The paper itself had no value in itself, only the literary composition that was upon it had any value, and the whole point in the case was in whom was the proprietary right in the literary composition of these letters. All the judges when they spoke of the property being in the sender were referring to the proprietorship in the literary composition. The statute applied equally to letters as to other compositions. "Proprietor of the author's manuscript from which the book was first published" must mean more than the proprietor of the paper. It must refer to the proprietor of the composition in whom the right of publishing was vested, and that upon the cases must be some one other than the receiver. In all the meanings of "manuscript" which were given in the dictionaries the emphasis was laid on that which was written on the paper rather than on the paper itself. The first part of the section gave the copyright to the author in respect of a work published in his lifetime. The object of the second part of the section was to protect the proprietary right in the literary composition after the death of the author, and there was no reason why such right should not go to the personal representative of the author. It was quite immaterial, so far as the section was concerned, by whom the publication in fact was made. The unlawful publication of letters could not give any right at all as against those persons who had the right. The receiver of a letter could not publish it without the consent of the writer, and after his death without the consent of his personal representative,

and the statute had not made any difference to the common law in this respect. The Steeds, although they possessed the letters, in so far as they were the owners of the pieces of paper, had not the right to publish them, because they were not the proprietors of the author's manuscript. The plaintiffs at the time they published the letters were not the proprietors of the pieces of paper, and therefore the Act could not have been complied with.

Scrutton, K.C., in reply.—The question was not, who had the common law right, but to whom the Legislature has given the right, and the words of the section could have but one meaning—directly a work was published the common law right was gone. It was clear from the definition given to "assigns" in section 2 that the assignment might be both before and also after publication. What could be assigned, therefore, was the interest to be derived from the publication which might have already taken place. The Legislature, in deciding that the copyright in a book published after the death of the author should be the property of the proprietor of the author's manuscript from which such book should first be published, must have meant the physical thing, and could not have referred merely to the right. Legislature intended to give the copyright to a different person under the second part of the section from the person who took under the first part. The defendants' contention would give the right to the same person.

KEKEWICH, J.—This is an extremely difficult question, and perhaps a satisfactory solution of it can only be obtained by a decision of the ultimate Court of Appeal, but having carefully considered it and looked at the cases to which I was referred, I see no reason for thinking that my opinion would be any better for being postponed. I therefore purpose to say what conclusion I have arrived at, in the hope that my remarks may assist the parties in obtaining elsewhere a complete solution of the question which is raised.

The plaintiffs claim the right of publication in certain letters of Charles Lamb which are many years old, and they say that they have purchased that right from a gentleman and lady named Steed, who were in possession of the letters up to some ten years ago. It seems to me that as there is no suggestion that those persons obtained those letters by theft or otherwise improperly, I must assume at this distance of time from the date of the writing of the letters that they were in rightful possession of the letters. What that implies is really the question to be decided, but I begin with tracing the letters to rightful possession. There is no doubt that the Steeds assigned their rights, whatever those rights were, as regards the publication, to the plaintiffs. The plaintiffs have vested in them any right of publication which Mr. and Mrs. Steed could pass. If they are entitled to publication—if they have a right of publication—then, of course, they are entitled to restrain every person who is not entitled to publish, and that raises the question whether the defendants are entitled to publish. The defendants claim also through the Steeds, and in addition through the administrator of Charles Lamb. Now as regards their title through the Steeds it is obviously a defective one, because the Steeds had already assigned everything that they could assign to the plaintiffs, and nothing was left for them to assign to the defendants, and they were perfectly conscious of that, since they only purported to confer on the defendants such rights, if any, as remained in them.

As regards their other title I confess I do not understand how the administrator of Charles Lamb, at the present day, can have any property whatsoever in these letters of any kind or description, even on the assumption that a right of property did vest in Charles Lamb at the date of his death and could pass by his will. It is not competent for me to decide on the present occasion what the meaning of Charles Lamb's will is, or whether such property as he had in the letters passed by that will. But whatever property passed it cannot, it seems to me, now be vested in the defendants, as it could not have vested in the administrator of Charles Lamb when these letters of administration were granted only the other day. But I thought it right to say that, because it may be that a question of that kind will arise.

The defendants decline to prove their title. They say: "All we have to do is to show that the plaintiffs have no title, and if we satisfy the court that the plaintiffs have no title, then, of course, they cannot restrain us. It matters not to us or the court whether we have a title or not." That is a perfectly proper view for the defendants to take, if they are so advised to take it. It is the view they do take, and therefore I will not pursue that subject any further. All I have to consider is the bare question, not whether the right publication is vested in the plaintiffs as between them and the defendants, but whether it is vested in the plaintiffs abstractedly, so that they have a good title. That question depends entirely on the proper construction to be placed on a few lines, indeed a few words, in the third section of the Copyright Act, 1842 (5 & 6 Vict. c. 45). It is not easy to understand, but in order to understand it one must, of course, have in one's mind, and present before one's eye, the common law as it stood at the date of the Act of Parliament.

Now about the common law; up to a certain point there is no doubt whatever on that. I have been referred to a large number of cases beginning with, I believe, the first—it is always quoted as the first—*Pope* v. *Curl*, 2 Atk. 342, decided by Lord Hardwicke. Probably one or two would have sufficed, and, indeed, I venture to say, as the observation which I made to Mr. Scrutton in opening the case indicated, that no reference to any case at all was really necessary. But I certainly shall not refer to many of them.

I have said that the common law is perfectly clear up to a certain point, and I use that expression advisedly, because I think the point is a limited one, and there is a great deal of doubt about the common law beyond that. Mr. Danckwerts referred me, among other cases, to *Caird* v. *Sime*, 36 W. R. 199, 12 App. Cas. 326, which is an important case in the House of Lords arising out of the publication—touching the right of publication—of lectures on Moral Philosophy delivered by Dr. Caird. The case is very much concerned with the peculiar circumstances connected with the delivery of lectures, and all the judges who took part in the decision go into those circumstances, and the dissenting judgment of Lord Fitzgerald is extremely instructive as regards lectures delivered as those were, as distinct from letters or books or other manuscripts. Mr. Danckwerts quoted largely from the judgment of the present Lord Chancellor, but to my mind, the precise position is more accurately stated as regards language by Lord Watson on p. 343. He says: "The author of a lecture on Moral Philosophy or on any other original composition retains the right of property in his work which entitles him to prevent its publication by others until it has by consent been communicated to the public." He calls it "a right of property in his work." The Lord Chancellor in his judgment calls it a "proprietary right in his unpublished literary productions." In many of the other cases the presiding judge has used the expression "the rights of property." I think the phrase "proprietary right" is

peculiar to the judgment of the Lord Chancellor in *Caird* v. *Sime*. But some other judges have used a different expression and called it a joint property, that is, a right in the author of the letter—I am talking of a letter—jointly with the sender. Bacon, V.C., so late as 1884 in the case of *Earl of Lytton* v. *Devey*, 54 L. J. Ch. 293, said "the property in the letters remains in the person to whom they are sent." But it is obvious from his judgment that he perfectly understood there was a right of property in the sender, and he no doubt was speaking there of the property in the letters as the property in the paper with the writing upon it—the actual physical thing and nothing more—and that no doubt is in the person to whom the letter is sent. It has been decided that he can maintain an action of detinue for it by reason of the right of property in the physical thing. To that point, it seems to me, the law is perfectly clear. Beyond it, I will not say it is obscure, but I think there is very little light. What the right of property is and how it ought to be defined, none of the judges seem to me to tell us. To read again Lord Watson's words, "it is a right of property in his work which entitles him to prevent its publication by others." That is the right of property. What other privileges it gives him, how otherwise you can spell out the right of property, I am unaware. I do not think there is any judgment anywhere which helps at all; even the numerous judgments—numerous according to the manner of the particular judge—in *Gee* v. *Pritchard*, 2 Swanst. 402, which are extremely instructive, do not, as far as I have studied them, really give us any guide to determine what the right of property is beyond this, that it entitles the author or the composer to prevent its publication by others. I need not go beyond that on the present case. It is sufficient for me to say that according to the common law the writer of a letter, notwithstanding that he has sent it to somebody else, and that that somebody else has a right to the physical thing, retains a peculiar right of property in it which entitles him to prevent its publication by others.

Now, that being the common law, what does the statute mean? The section is divided into two parts, and the division into two parts is to my mind the origin of the puzzle. The first part of the section deals with a book which is published in the lifetime of its author, and a book includes a letter. I need not go back to the authority on the point, because it is assumed all through this argument and it is common ground that "book" does includes a letter. It was contested in one case, but held at once without hesitation that a book must include a letter. "The copyright in every book or letter which after the passing of this Act is published in the lifetime of its author shall endure for a certain time and shall be the property of such author or his assigns." Then, having enacted that, the Legislature goes on to deal with the case of a copyright in a book which has been published after the death of its author, and it does not say what it would have been extremely easy to say in plain language, that the copyright in that book shall remain in the author or his assigns or his legal personal representatives. I am not professing to frame the words in which it could have been enacted, but no difficulty would have been entertained by any reasonably experienced draughtsman in saying in plain and unmistakeable language that the copyright belongs to those who claim through the author, whether by assignment—which would include, of course, a bequest—or as legal personal representative, if that had been the intention of the Legislature. I think it is fair to conclude that the Legislature did not intend that. But what does it intend? That it shall be the property of the proprietor of the author's manuscript. I will not go further for the moment. I do not think it necessary to consult dictionaries to understand what the meaning of the word "manuscript" is. Manuscript, of course, means that which is written by the hand, that in the case of a letter would be the actual letter written by the writer with his own pen or pencil. I have no doubt that in these days the court would have no difficulty in extending that to a typewritten letter. It might even, I think, without difficulty extend it to a printed letter if the writer had himself used a private printing press. I have no doubt, also, that if the writer of the letter, instead of using his own hand, used that of an amanuensis to whom he dictated the letter, that would be a manuscript within the meaning of this Act. I go further and say that if the writer wrote out the letter with his own hand and then had a copy made of it in order to send it away, and made that really the original letter though in truth it was more a copy than an original, that that might be a manuscript. But it seems to me it must be that which proceeds from the writer as his own work in the first instance, and that must be, I think, the author's manuscript. It is not the manuscript made by somebody else for the author for the purpose of really constructing an original letter, Also "manuscript" must mean, I think, that which filled the place of the manuscript in the ordinary sense, that is to say, the letter written by the author's own hand. If it was the one original letter which he intended to be the original, then that is the author's manuscript. Take the case of a man sending a letter and keeping a copy of it. I do not know that it is necessary to decide it, but I should think the letter sent, and not the copy kept, would be the author's manuscript. So far there seems to be little difficulty in understanding what the Legislature meant. But then comes the question of who is the "proprietor of the author's manuscript." If we can ascertain who the proprietor of the author's manuscript is, then there is no difficulty in determining what the statute means, because it says it shall be the property of the proprietor, not that the proprietor shall have a qualified proprietary right—it is not qualified in any way, it is not that he shall have the property jointly with anyone else, but it shall be his property, and the Legislature being, of course, cognizant with all the decisions of the common law, must be taken to have meant the property as being the exclusive property of the proprietor. Now who is the proprietor of the author's manuscript? According to the common law, as I have already said, there are two proprietors of the letter who can bring detinue for it—that is, he who is entitled to the physical thing, and the writer of the letter, who has that peculiar right of property which entitles him to prevent publication by others. Did the Legislature here intend to perpetuate any notion of that kind in the proprietor of the author's manuscript? It seems to me, having regard to the division of the section into two parts, which I have already called attention to, and to the care of the Legislature not to repeat in the second part, as it might have done in slightly different language, the first part, it must be that the proprietor of the author's manuscript means the proprietor of the physical thing, that the manuscript here is the thing written—the actual paper on which the writing is, and the writing on it. That seems to me to be the only legitimate construction which I can place upon the words "the proprietor of the manuscript." I will leave out "author's manuscript" now because I have said enough about that. That seems to me to be what the Legislature said, and the result, then, is that that belongs to the person to whom it is sent, and as I

have said already, I have no reason to doubt in this case, and I think I ought to assume, that Mr. Steed and his wife were the proprietors of those letters—that is, of the manuscript. There can be no question of the fact that it was from that manuscript the book was first published. The letters were sent to Messrs. Smith, Elder, & Co. in order that they might be published, and the publication was from those original letters, and by the assigns of Mr. and Mrs. Steed. I put to Mr. Scrutton, when replying, a question about the meaning of "assigns" there, and he endeavoured to convince me that the right interpretation of the section was that the assigns had the right of publication. I do not think that is the strict construction of the section. "The proprietor of the author's manuscript from which such book shall be first published," which is put parenthetically, "and his assigns," must, I think, mean the assigns of the author's manuscript; but the point is not essential to my decision. Messrs. Smith, Elder, & Co. were the assigns of the author's manuscript, and in my view they fill that position. The result is, it seems to me, that I must come to the conclusion that the Legislature intended that the persons in that position, Mr. and Mrs. Steed, having these letters rightfully in their possession, were entitled to publish them themselves, or to hand them over, or otherwise, to Messrs. Smith, Elder, & Co., and to give them the right of publication, and that that having been done, nothing remained in Mr. and Mrs. Steed which they could have passed to anyone, except, of course, the right to the letters themselves. That they retained, and that they can part with. The right of publication, it seems to me, was gone. There will be a declaration that the right of publication of these particular letters is vested in the plaintiffs Messrs. Smith, Elder, & Co.

Solicitors, *Cheston & Sons; Surr, Gribble, & Oliver*, for *S. Hosgood*, Pershore.

Chan. Div.
Swinfen Eady, J. } Dec. 9.

In re POLLOCK.
POLLOCK *v.* POLLOCK. (*a.*)

Settled land—Tenant for life—Devise to widow until re-marriage for maintenance of widow and children—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *ss.* 2 *and* 58.

A testator gave real estate to trustees upon trust for his wife during widowhood for the benefit and maintenance of herself and her children.

Held, that the widow had the powers of a tenant for life under the Settled Land Act, 1882, *s.* 58.

In re Theaker's Settled Estates (*quoted in Wolstenholme's Conveyancing and Settled Land Acts, 9th ed., p.* 332) *followed.*

Adjourned summons.

A testator, William Pollock, by his will dated the 30th of March, 1886, devised a piece of copyhold land and a fully-licensed public-house thereon as well as other property to his trustees upon trust for his widow "during her widowhood for the benefit and maintenance of herself and our dear children and the proper bringing up of the latter."

There was a further provision that the trustees should permit the widow to carry on the business of the public-house personally.

The widow carried on the business personally from 1886 to 1901, when it was leased by the trustees for a term now expiring. It was now desired to sell the public-house, and this summons was taken out by the eldest son of the testator to determine whether the testator's widow, under the terms of the will, was a tenant for life of his real estate under the Settled Land Acts, or whether she, together with her children (to whom also the remainder was limited subject to the interest of the widow), made up the tenant for life under the Acts.

Stuart Deacon, for the plaintiff.

W. H. Cochran, for the widow, contended that in so far as there was a charge in favour of such of the children as required maintenance she was in the position of a tenant for life with an incumbered estate and had the powers given by the Settled Land Act, 1882, s. 2, sub-section 7. As to her interest ceasing on re-marriage, a widow who had an interest during widowhood had the powers of a tenant for life under section 58, sub-section 1 (vi.), of the Act. The only authority for this, however, was the unreported case of *In re Theaker's Settled Estates* (1898), decided in chambers, mentioned in Wolstenholme's Conveyancing and Settled Land Acts (9th ed.), p. 332.

W. D. Rotch, for other defendants.

SWINFEN EADY, J., said: I will follow the decision In *In re Theaker's Settled Estates*. There will be a declaration that the widow has the powers of a tenant for life under section 58, sub-section 1 (vi.), of the Settled Land Act, 1882, and I direct a sale as asked by the summons.

Solicitors, *Radcliffe-Smith & Co.*, Liverpool.

Chan. Div.
Joyce, J. } Dec. 14, 15.

In re GORRINGE, DECEASED.
GORRINGE *v.* GORRINGE. (*a.*)

Will—Construction—Gift to issue of deceased children—Son dead at date of will leaving children—Substitutional gift.

A testator by his will, after giving certain legacies to the children of a deceased son, A. W., gave the residue of his estate upon trust "for all or any of my children (except one son R.) who shall be living at my death." This clause was immediately followed by a proviso that in case "any one or more of my children (other than R.) shall predecease me, leaving any child or children living at my death, then such child or children of my deceased child (other than R.) shall take, and if more than one in equal shares, the share which his, her, or their parent would have taken if such were living and over the age of twenty-one at my death."

Held, that the words "shall predecease me" must be read in their strict grammatical sense, and that the children of A. W., who was dead at the date of the will, did not take under the proviso.

Originating summons raising questions on the construction of the will of Richard Gorringe.

By his will dated the 27th of July, 1898, the testator bequeathed the following pecuniary legacies among others: "To Mary Ann Mahlstedt (formerly Gorringe), the wife of — Mahlstedt, of Melbourne, Australia, £300; to Flory Gorringe, £300; to Kirk Gorringe, £300; to Alfred Gorringe £400. And in case any of the four last mentioned legatees (children of my deceased son Alfred William Gorringe) shall at

(*a.*) Reported by C. H. CARDEN NOAD, Esq., Barrister-at-Law.

(*a.*) Reported by R. FRANKLIN STUBBING, Esq., Barrister-at-Law.

the time when his or her legacy would otherwise become payable be under the age of twenty-four, and in the case of a female unmarried, I direct that his or her legacy shall be invested by my trustees in any investment hereinafter authorized and that the whole or any part of the income shall during such time as such legatee shall be under the age of twenty-four and in the case of a female unmarried be applied by my trustees at their absolute discretion for or towards the maintenance, education, advancement, or benefit of such legatee either directly or by paying the same to his or her parent or guardians or guardian without seeing to the application thereof, and that any surplus income shall be accumulated by the investment thereof and the resulting income as an addition to the capital of such legacy, but with power to my trustees to apply any such accumulations in any subsequent year or years for the maintenance, education, advancement, or benefit of the legatee."

The testator also bequeathed to his son Richard Pown Gorringe a legacy of £200 and also an annuity of £50 a year during his life with this proviso, "And whereas I am ignorant of the residence or whereabouts of my said son Richard Pown Gorringe, I expressly declare and direct that in case no communication either personally or by letter shall be received from my said son by my executors within three years after my death the legacy of £200 and the annuity of £50 hereinbefore respectively bequeathed shall both lapse as if my said son had predeceased me and shall fall into my residuary estate."

The testator bequeathed all the residue of his estate and effects both real and personal unto his trustees upon trust that they should sell and convert and should stand possessed of the same "in trust for all or any of my children or child (other than and except the said Richard Pown Gorringe) who shall be living at my death, and being a son or sons attain the age of twenty-one years or being a daughter or daughters attain that age or marry under that age, and if more than one in equal shares. Provided that in case any one or more of my children (other than the said Richard Pown Gorringe) shall predecease me leaving any child or children living at my death then such child or children of my deceased child (other than the said Richard Pown Gorringe) shall take, and if more than one in equal shares, the share which his, her, or their parent would have taken if such parent were living and over the age of twenty-one at my death."

The testator died on the 9th of April, 1905, having had nine children, three by his first wife—viz., Mary Ann Twigg; Alfred William, who died in 1887, before the date of the will; and Richard Pown Gorringe, who took no interest in the residue. The testator also had six children by his second wife—viz., Thomas James Hamilton, Charles Richard, Isabel Walmisley, Ellen Matilda Gallagher, Elizabeth, and Caroline Tatty.

The testator's will was duly proved by the executors thereof.

Alfred William Gorringe, who died in 1887, left five children, four by his first wife, who were each left a pecuniary legacy by testator's will, and a child by his second wife.

This summons was taken out by the executors and trustees of the testator to determine whether the children of Alfred William Gorringe were entitled to participate in the testator's residuary estate and to what extent having regard to the fact that the said Alfred William Gorringe not only predeceased the testator, but was also dead at the date of the will.

Younger, K.C., and *Ryland*, for the trustees of the testator's will, stated the facts.

Waggett, for Thomas James Hamilton Gorringe, a son of the testator.—The children of a deceased child who is dead at the date of the will can not come in and take under this residuary bequest. In all the cases the distinction is drawn that where there is an intention that the gift should be substitutional, the issue of a child dead at the date of the will do not take under such a direction; but where there is a gift to a class with a direction that if any shall die in the testator's lifetime the issue of such child shall take the share their parents would have taken if living, such gift amounts to an independent gift to the issue, and the children of a deceased child who is dead at the date of the will, will be admitted to take. In *Loring* v. *Thomas*, 9 W. R. 919, 1 Dr. & Sm. 497, the whole stress was laid on the intention. In the present case the testator gave legacies to four children of Alfred, and the will also contains a recital of the death of Alfred. Therefore when in the bequest of the residue he uses the expression "in case one or more of my children shall predecease me" he must mean those children who were then living at the time when he made the will. The testator is dealing with his own children, about whom he knows all the facts.

Hughes, K.C., and *A. Adams*, for Mrs. Gallagher, Miss Elizabeth Gorringe, and Miss Caroline Gorringe, daughters of the testator, who had obtained leave to attend the proceedings.—The gift of the residue is "to all or any of my children who shall be living at my decease," and the words in the proviso refer to exactly the same class; the words in the proviso really mean the same thing as if they had been "my said children." [JOYCE, J.—The testator has said Alfred is dead, and then he refers to "any child who shall predecease me"; can it be said, therefore, that he is referring to Alfred in the proviso?] The case is governed by *Christopherson* v. *Naylor*, 1 Mer. 320, the rule in which is stated in Hawkins on Wills. There the bequest was to the children of A. living at the testator's decease, but if any children of A. should die in the testator's lifetime the legacy thereby intended for such child or children so dying was given to their issue, and it was held that the issue took only in the way of substitution and that the issue of a child dead at the date of the will could show no object of substitution and were therefore excluded. There the substitution takes place before the members of the primary class are ascertained, but it takes place only as regards those who at the date of the will had the capacity of becoming members of the class. What is said in *Loring* v. *Thomas* as to the words "shall die" cannot apply to the present case, because the words "shall predecease me" cannot refer to a child who is already dead when the words are used. If the expression had been "my said children" the children of a deceased child dead at the date of the will would clearly be excluded.

Waugh v. *Waugh*, 2 My. & K. 41, and *In re Musther*, *Groves* v. *Musther*, 43 Ch. D. 569, 38 W. R. Dig. 212, were also cited.

Petersen, for Mrs. Twigg, a daughter of the testator who had also obtained leave to attend the proceedings, adopted the previous arguments and cited *In re Offiler*, *Offiler* v. *Offiler*, 83 L. T. 758, 49 W. R. Dig. 204, where Buckley, J., held that the words "brothers and sisters" in the second gift must have the same meaning as in the first gift—viz., "the brothers and sisters living at my death." This decision governs the present case. In *Loring* v. *Thomas* the only substitutional gift was to the grandchildren of a child who was living at the date of the will. In this case there can be little doubt that the testator intended to benefit the children of a child who could take under the will.

W. F. Hamilton, K.C., and *G. F. Hart*, for Mrs. Walmisley, a daughter of the testator.—It is clear that the testator intended to make a different provision for the children of Alfred than for the rest, as he gave legacies to them, but made no such provision for any of the other children. The words "children who shall predecease me" cannot include a child who was dead at the date of the will.

Badcock, K.C., and *L. F. V. Fildes*, for Mrs. Mahlstedt, a daughter of the testator's son Alfred William Gorringe, who was dead at the date of the will.—The present case falls within the decision of *Loring* v. *Thomas* and the gift to "the children of a child who shall predecease me" is an independent gift and not a substitutional gift as in *Christopherson* v. *Naylor*. The children "who shall be living at my death" in the gift of residue are quite a different class from the children who shall predecease me in the proviso. The words "shall predecease me" do not denote futurity but they refer simply to the fact of death and must be read in the sense of shall be dead at the date of the testator's death. No words can be pointed to in the will which denote that the testator intended to exclude the children of a deceased child. The gift of a small legacy to a few of the children of a deceased child is no reason why all the children of a deceased child should be deprived of their parent's share in the residue. The gift to the children of a deceased child is wide enough to include the children of Alfred, and therefore they ought to be included, especially as the testator knew how to cut a child out altogether as he did in the case of Richard. In *Hannam* v. *Sims*, 2 De G. & J. 151, Knight-Bruce, L.J., held that the words "shall happen to die" included the case of a brother named in the will, but dead at the date of it and that his children took under the will the same interest as they would have done if their father had died in the interval between the deaths of the testator and the testator's wife—a conclusion, he added, consonant in his opinion with principle alike and numerous precedents. In the case of *In re Chapman's Will*, 32 Beav. 382, where there was a proviso that in case any nephew or niece shall die in my lifetime leaving children living at my decease such children should be entitled to the share which their deceased parent would be entitled to, Sir J. Romilly, M.R., held that the expression was vague and was often used in the sense of shall be dead at the time of my death, and admitted the child of a deceased niece who was dead at the date of the will to stand in her mother's place. In *In re Woolrich, Deceased, Harris* v. *Harris*, 27 W. R. 49, 11 Ch. D. 663, where the gift was original and not substitutional, it was held the words "shall die" must be read and construed as equivalent to "shall have died" or "shall be then dead," and they were not limited to death after the date of the will. *Christopherson* v. *Naylor*, 1 Mer. 320, is distinguished on the ground that there the gifts to the children of deceased nephews and nieces were substitutional gifts, and that if the nephews and nieces could not have taken neither could their children, but in the present case the gift in the proviso is not a substitutional gift, but an independent one, the objects under the proviso taking not by way of substitution for their parents in the bequest of the residue, but under a substantive gift to themselves: Hawkins on Wills, p. 249. In *Tytherleigh* v. *Harbin*, 6 Simon 329, the children of a predeceased child were held entitled to take. [JOYCE, J.—The words in that case were "as shall be then dead," not "shall predecease me," as here, therefore that case has nothing to do with the present case.] In *Coulthurst* v. *Goddard*, 18 Beav. 421, the gift was to the children of A. A (deceased) then living, and the issue then living of any child of A. A. dying in the lifetime of the niece, such issue to take the parent's share, and the Master of the Rolls held that the issue of a child of A. A. who died before the date of the will were entitled. [*Etches* v. *Etches*, 3 Dr. 447, was also referred to.] In *Loring* v. *Thomas*, 1 Dr. & Sm. 497, the Vice-Chancellor puts the very case as here of a recital in the will that a certain child is dead, and the words in that case on p. 499, "who shall be living at my decease and who shall live to attain the age of twenty-one years" are exactly the same as in the present case. There was a gift to a class, and then a separate gift to the children of those who shall die in the lifetime of the testator, and it was held that must be read as "shall have died." The Vice-Chancellor points out that "it is a question of intention whether the testator intended to include or exclude the issue of the predeceased children, and the solution of the question depends on the language the testator has used in directing such representation or substitution. He may use language of such restricted import as to be inapplicable to any children but such as were living at the date of the will. But if he uses language so wide and general as to be no less applicable to a predeceased child than to a child living at the date of the will, then the direction as to such representation or substitution must be held to embrace both." And he goes on to illustrate the point by referring to circumstances which are exactly in point in the present case. [JOYCE, J.—That circumstance does not apply, and therefore the argument drawn from it, and upon which the Vice-Chancellor based his decision, does not apply.] Where words are used which are wide and general enough to admit a certain class they ought to be admitted to share. The only case that conflicts with this view is *Waugh* v. *Waugh*, 2 My. & K. 41, but Kindersley, V.C., in *Loring* v. *Thomas*, considered that case was overruled. It is not referred to at all in Hawkins on Wills, and only cited as a doubtful authority in Jarman on Wills and Theobald on Wills.

Waggett, in reply.—If a class is to be admitted owing to the wide and general language which has been used the intention must be gathered from the language of the whole will, and not of a particular clause. The children in the proviso must mean the same as in the gift of the residue—viz., those living at the date of the will with the exception of Richard. There are not in the present will the words which Kindersley, V.C., in *Loring* v. *Thomas*, uses in his hypothesis on p. 512. The testator does in the proviso recite that Alfred is already dead, and therefore the argument based on that hypothesis does not apply. Another argument upon which Kindersley, V.C., based his decision was that the words "shall die in my lifetime" must be construed to refer to the fact of death without regard to the question whether the death occurred before or after the date of the will, otherwise the words "shall live to attain the age of twenty-one years" must be equally construed to refer only to a future attainment of twenty-one years, so as to exclude a child of a deceased child who had attained twenty-one before the date of the will. But such an argument would not apply to the present case, where the circumstances are different. The question, as Kindersley, V.C., said on p. 523, is really one of intention, whether the testator intended to make the gift by way of substitution of the issue only of those who were living at the date of the will or to include the issue of any predeceased child; and, of course, this intention can only be taken from the language of the will.

JOYCE, J.—In my opinion no case has been cited to

me in which the terms of the will were identical or even very similar to those in the present case. Now, if we look at the will, the testator begins by providing for all the children of his son Alfred, and he particularly mentions that his son Alfred is dead, so that the death of Alfred is present to his mind and there is no reason for saying that he was forgetful or ignorant of it. He then goes on to deal in rather a peculiar manner with his son Richard, the reason being, no doubt, that he was ignorant of his son's whereabouts, having had no communication with him for some time, and so the gift is not to take effect unless his son communicates with his executors; and then there is a gift of the residue upon trust "for all or any of my children (other than and except the said Richard Pown Gorringe) who shall be living at my death and being a son or sons attain the age of twenty-one years or being a daughter or daughters attain that age or marry under that age, and if more than one in equal shares." Of course the testator did not intend Alfred or Alfred's family to take anything under that gift at all events. He then goes on to say: "In case any one or more of my children (other than the said Richard Pown Gorringe) shall predecease me, leaving any child or children living at my death, then such child or children of my deceased child (other than the said Richard Pown Gorringe) shall take, and if more than one in equal shares, the share which his, her, or their parent would have taken if such parent were living and over twenty-one at my decease." Now, as it has been pointed out, he is dealing with his own children, about whom he knows the facts. It is quite true that the words, taken by themselves, might include the children of Alfred if we are to read the words "shall predecease me" not in their strict grammatical meaning, but in a looser or more general way as "shall be dead." That would be a very peculiar way of providing for them, and, in my opinion, upon reading the whole of the will, the testator intended what he said according to the strict meaning of the words. The case of *Loring* v. *Thomas*, 1 Dr. & Sm. 497, which was relied upon on behalf of the children of Alfred, shows that words which in strictness are words denoting futurity may be construed as applying to the past, but it does not say that there is a rule that they shall be so construed, but as Kinderaley, V.C., says, it is always a question of intention which is to be gathered from the words of the will. The Vice-Chancellor said, at p. 510: "When a testator directs that issue shall represent or stand in the place of or be substituted for a deceased child and take the share that their parent would have taken if living, he may intend such representation or substitution to apply only to the case of a child dying subsequently to the date of his will and before the time of his own death; or he may mean it to extend also to the case of a child who was already dead at the date of the will." What I have to ask myself is whether the testator in this provision intended to include the children of Alfred who was dead at the date of the will, and who he knew was dead, and for whose children he had provided; or whether he intended to include only the children of a child who should die after the date of the will but before the death of the testator. I am clearly of opinion that he did not intend to include the children of Alfred who was already dead, but that he intended what the will says if construed strictly. I should add that the considerations which determined the decision of Kinderaley, V.C., in *Loring* v. *Thomas* are entirely wanting in the present case.

Solicitors, *Lumley & Lumley; Bridgman, Willcocks, Rowland, Hill, & Bowman; Schultz & Son; Guscotte, Wadham, & Co.*

Court of Appeal.

From K. B. D. (Collins, M.R., and Romer, L.J., and Barnes, P.) — Dec. 21.

LOGAN v. BANK OF SCOTLAND AND OTHERS. (a.)

Practice — Stay of proceedings — Parties resident in Scotland — Cause of action arising in Scotland — Vexatious and oppressive and abuse of process of court to bring action in England.

The plaintiff in an action to recover damages for misrepresentation was a person domiciled and resident in Scotland. The defendants were a bank incorporated in Scotland, the treasurer of the bank, who was domiciled and resident in Scotland, another person resident in Scotland, and a person resident in England. All the transactions which gave rise to the alleged cause of action took place in Scotland, all the witnesses resided in Scotland, and all the documents relating to the matters in question were in Scotland. The defendant who resided in England was a merely nominal defendant, and did not enter an appearance to the action.

Held, that it was vexatious and oppressive and an abuse of the process of the court to bring the action in England rather than in Scotland, and that the action ought to be stayed.

Appeal from an order of Phillimore, J.

The plaintiff was a schoolmaster who resided at Inverary, in the county of Argyll, and was a domiciled Scotsman.

The defendants were the Bank of Scotland, Sir George Anderson, who was the treasurer of the bank, Robert Young and James Scott.

The action was brought to recover £50 damages for alleged misrepresentations in a prospectus of a company called James Young & Son (Limited). The company was incorporated in Scotland to take over the business of the firm of James Young & Son in Scotland.

The Bank of Scotland were the bankers to the company, and their name appeared as such on the prospectus.

The plaintiff had subscribed and paid for five £10 preference shares in the company.

The Bank of Scotland was a Scottish corporation, incorporated in 1695 by an Act of the Parliament of Scotland, with its head office in Edinburgh, and it had a large number of branches in Scotland, and only one in England—namely, in London.

The defendant Sir George Anderson resided in Scotland. The defendant Young appeared also to reside in Scotland. The defendant Scott resided in London.

Service of the writ of summons on the Bank of Scotland was effected by serving it in London on the manager of the London branch of the bank.

The bank applied to have the service set aside, but the court refused the application: see 53 W. R. 39, [1904] 2 K. B. 495.

Neither Young nor Scott appeared to the action.

The bank and Sir George Anderson, having appeared, applied at chambers for an order to stay the action, on the ground that it was vexatious and oppressive and an abuse of the process of the court to bring the action in England instead of in Scotland.

The master stayed the action, but Phillimore, J., reversed the order.

The bank and Sir George Anderson appealed.

Rufus Isaacs, K.C. (*A. M. Bremner* and *S. C.*

(a.) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

Agnew with him), for the appellants.—The action is brought by a domiciled Scotsman in respect of matters which arose entirely in Scotland. The real substantial defendants are the Bank of Scotland, which is a Scottish corporation, and the treasurer of the bank. The defendant Scott is merely a nominal defendant. Every fact in connection with the case arose in Scotland, all the witnesses are there, and the books of the bank are there. The object of bringing the action here rather than in Scotland must be to vex and embarrass the bank and to put pressure upon them to pay something to get rid of the claim. At any rate the balance of convenience is against allowing the action to proceed here. The court has inherent jurisdiction to stay an action in this country which it is vexatious and an abuse of the process of the court to bring here. It has been expressly laid down in the Scottish courts that the balance of convenience is a matter to be taken into consideration in such cases: *Williamson* v. *North-Eastern Railway Co.*, 11 Rettie, 596; *Longworth* v. *Hope*, 3 Macpherson 1049. The principle which underlies the Scottish decisions is the same principle as governs the English authorities: *Metropolitan Bank* v. *Pooley*, 33 W. R. 709, 10 App. Cas. 210; *Haggard* v *Pélicier Frères*, [1892] A. C. 61, 40 W. R. Dig. 137; *McHenry* v. *Lewis*, 31 W. R. 305, 22 Ch. D. 397; *Stephenson* v. *Garnett*, 46 W. R. 410, [1898] 1 Q. B. 677; *Watkins* v. *North American Land and Timber Co.* (*Limited*), 20 Times Law Reports, 534; *Cookney* v. *Anderson*, 11 W. R. 628, 31 Beav. 452.

He also cited the American case of *Collard* v. *Beach*, 81 Hun. App. Div. N.Y. 582, 93 Hun. App. Div. N.Y. 339.

Colam (*Eric Dunbar* with him), for the respondent.—It is not a sufficient argument for staying this action to show that there is a balance of convenience in favour of the plaintiff proceeding in the Scottish court. This is not like a case where the court has to consider the balance of convenience as between two places of trial both of which are within the jurisdiction. The plaintiff alleges a good cause of action, and that cause of action is not itself frivolous or vexatious. Foreigners are allowed to sue foreigners in our courts on causes of action arising outside the jurisdiction. As the plaintiff chooses to bring his action in this country, the court will not decline to entertain it. In the cases of *Metropolitan Bank* v. *Pooley* and *Haggard* v. *Pélicier Frères* it was clear that there was no cause of action whatever other than a frivolous cause of action. In *Peruvian Guano Co.* v. *Bockwoldt*, 31 W. R. 851, 23 Ch. D. 225, it was laid down that the test is not the balance of convenience, but whether injustice, which means irreparable injustice, would be caused by allowing the action to proceed. The Scottish cases cited by the other side were not in accordance with the English law.

He also cited *Thornton* v. *Thornton*, 34 W. R. 509, 11 P. D. 176.

Cur. adv. vult.

Dec. 21.—BARNES, P., read the following judgment: This is an appeal from an order of Phillimore, J., rescinding an order of Master Macdonell staying all proceedings in the action against the defendant bank and Sir George Anderson, on the ground that the same is vexatious and oppressive and an abuse of the process of the court.

The action is brought against the defendant bank and Sir George Anderson as treasurer of the bank, and Robert Young and James Scott, in respect of certain alleged misrepresentations in a prospectus of a Scottish company, issued on the 1st of March, 1899, on which the name of the defendant bank appeared as the company's bankers. The bank and Sir George Anderson say that they took no part in the promotion of the company and were not in any way concerned in the preparation or issue of the prospectus except that the bank acted as the bankers of the company, and that they had no reason to believe, and did not, and do not now believe that the prospectus contained any false or misleading statement. The action is purely a Scottish action, and all the transactions which give rise to the alleged cause of action took place exclusively in Scotland; all the parties to the action reside in Scotland, with the exception of the defendant Scott, who appears to reside in London. The plaintiff is a schoolmaster, who resides at Inverary, in Argyllshire, and is a domiciled Scotsman. The bank is a Scottish corporation incorporated under an Act of Parliament in Scotland in the year 1695, and they have their head office in Edinburgh and numerous branches at various places in Scotland. The only branch of the bank outside Scotland is in London, and the writ of summons in this action was served on the bank there. But the London branch appears to have taken no part and was not concerned in any of the matters in question in this action. Sir George Anderson resides in Scotland and is a domiciled Scotsman. He states that he has appeared without objecting to the jurisdiction of the court, because of his official connection with the bank. The defendant Young, who appears to reside in Scotland and to be a Scotsman, was made bankrupt in the Court of Session in Scotland about the 11th of August, 1899, but appears to have obtained his discharge in March, 1904, and to have been again made bankrupt in the said court about the 16th of May, 1905, and is still undischarged. He has not entered an appearance in this action. The defendant Scott was adjudicated bankrupt in the London Bankruptcy Court on or about the 14th of June, 1902. His discharge was subsequently suspended for two years from the 19th of November, 1902, and he is still undischarged, and it appears to be clear that he is not a substantial defendant in this action. He appears to have been appointed a director of James Young & Sons (Limited), as representing the interests of a sister, who was the widow of James Young, a former partner in the firm of Young & Sons; he was resident in Scotland, but he seems now to be a clerk in some office in the City. He has not appeared to the action.

The cause of action alleged in the statement of claim appears to arise out of the fact that the plaintiff, as he alleges, in March, 1899, applied for and was allotted five preference shares of £10 each in a company registered in Scotland, called James Young & Sons (Limited). That application was made and was received in Scotland. It is clear from the affidavits in this case that all the circumstances upon which the plaintiff relies in the statement of claim took place in Scotland and not elsewhere, and that all the evidence with reference thereto will have to be obtained from Scotland. The company was registered in Scotland in the early part of 1899, having been formed to acquire, as it afterwards did the business of a Scottish firm of contractors, Messrs. James Young & Sons, Edinburgh. The business of that firm was carried on exclusively in Scotland, and, as appears from the prospectus of the company, the whole of the assets acquired from the firm were situated in Scotland, and all contracts to be taken over by them were for works to be executed in Scotland. The firm had been for many years customers of the defendant bank, and the banking accounts of the firm, and afterwards of the company, were kept at the head office of the bank in Edinburgh. The company went into voluntary liquidation in September,

1899, and an order was made directing the company to be wound up under the supervision of the court on the 25th of October, 1899. All the books and documents of the company are in the hands of the liquidator in Edinburgh. If this action be fought out, it is obvious that it will involve calling a large number of witnesses, all of whom reside in Scotland, and none in England, and the production of numerous books, documents, and papers relating to the matters in question in Scotland, about the production of which there might be considerable difficulty having regard to what is stated in the affidavit of Sir George Anderson, and also probably a consideration of Scottish law as affecting the rights and liabilities of the respective parties, and it is perfectly clear that a case of this kind ought, if possible, to be tried in Scotland, and that the inconvenience and difficulty placed upon the defendants in conducting the case in England would be so great as to put a great oppression upon them if they were obliged to produce and keep their witnesses and documents, &c., in London during the time such a trial as that which would take place would last. In fact, the inconvenience would be so great and the expenses so heavy as to be utterly out of proportion to the insignificant sum involved in this action. The action appears to be brought by the plaintiff alone nearly five years after the winding-up order, and, although it is suggested in the affidavit of Mr. Campbell, the plaintiff's solicitor, that he is law agent for a large number of shareholders in James Young & Sons (Limited), he does not venture to suggest that any one of those shareholders is assisting the plaintiff in this action or ready to be bound by its results, or that in any way the present is a test action brought on behalf of a number of shareholders.

The defendants make this motion practically upon the grounds stated in Sir George Anderson's affidavit, where he urges that no legitimate advantage can accrue to the plaintiff from prosecuting this action in England while there is an appropriate tribunal in Scotland, and that he believes that the plaintiff has not brought the action in England *bonâ fide* for the purpose of obtaining justice, but vexatiously and solely for the purpose of harassing the defendant bank under cover of asking justice, and in the hope that the bank rather than incur the trouble and expense of trying the action in England, may be induced to pay something in order to get rid of an unfounded claim. This suggestion is denied by the plaintiff, who, according to his affidavit, puts forward this suggestion, that the defendant Scott is in England, and that the plaintiff desires to have the matters in dispute settled in one action in England, where he can make Scott and the other defendants all parties, and that Scott is not a mere nominal defendant. With regard to this last point it is to be noticed that Scott is, as I have already observed, an undischarged bankrupt and has not appeared, and has stated that he does not intend to deliver any defence in the action although the statement of claim has been delivered to him, and the bank say that Scott is not a substantial defendant at all.

Now first, with regard to the law applicable to the case, there seems, after a discussion of the case in court by counsel, to be substantially little dispute between them as to the state of the law in this country. An American and certain Scottish cases were cited which seem to carry the law further in those countries than can be found in any reported case in this country. In the first of those cases, *Collard* v. *Beach*, where an action had been brought in the State of New York by a resident of the State of Connecticut against another resident of that State, the court declined to exercise its jurisdiction and to try the case unless there were special circumstances shown. The court appears principally to have decided the case upon the ground that the court would not allow its time to be taken up with the burden and expense of trying actions in that court which ought to be brought in other jurisdictions where the home courts of the litigants were open; in other words, they appear to have declined jurisdiction because of the inconvenience to an already overworked court which the case would cause. In the Scottish cases of *Longworth* v. *Hope* and *Williamson* v. *North-Eastern Railway Co.*, it is stated that the courts in Scotland will allow the plea of *forum non conveniens*, and at first sight those cases seem to suggest that a mere question of inconvenience would be sufficient to cause the court of Scotland to decline to exercise its jurisdiction, but, having regard to the judgment of Lord Deas in the first of those cases, it would seem that the inconvenience which the courts would consider would be an inconvenience which would give the party endeavouring to avail himself of the court's jurisdiction an unfair advantage over his opponent; for he says, "It is a valuable discretion which is vested in every court not to exercise its jurisdiction if there are grounds for holding that by an exercise of that jurisdiction the defender who objects to it will be put to unfair advantages which he would not be subjected to in another accessible and competent court." And I should gather that the Scottish courts would scarcely object to allow a case to be tried unless they felt satisfied that injustice would be done by allowing it to proceed in their own court. In some cases in England the doctrine of *forum conveniens* is to be met with, as in cases of administration of estates and trusts, of which an instance is to be found in the case of *Ewing* v. *Orr Ewing*, 10 App. Cas. 453; but in that case I notice Lord Selborne, at p. 506, stated that "It appears also that the doctrine of *forum conveniens*, which in England seldom comes into consideration when jurisdiction exists apart from service of process abroad, unless there is an actual competition of suits, is in Scotland carried further, and may prevent the exercise of jurisdiction when the court is satisfied that the suit might have been brought and effectively prosecuted in a more convenient forum, although this may not actually have been done." These remarks were made in a case which is of a class in which it may be necessary to invoke the above doctrine, but no case was cited to this court in which that doctrine has been held to apply to actions of a transitory character such as that in the present case. It may, however, be that there is not really any very substantial difference between the practice in Scotland and that of our courts as expressed by various judges—viz., that the court will interfere to prevent vexatious proceedings which would have the effect of preventing the due administration of justice. Thus Lord Bowen in *McHenry* v. *Lewis* speaks of "the general principle that the court can and will interfere whenever there is vexation and oppression to prevent the administration of justice being perverted for an unjust end." For instance, in this country, where two actions are brought by the same person against the same person in different courts governed by the same procedure, and where the judgments are followed by the same remedies, it is *primâ facie* vexatious to bring two actions where one will lie; and, where two actions are brought, one in this country and one in a foreign country, by the same plaintiff against the same defendant, the bringing of such two actions may be vexatious though not necessarily so; and other cases may be put, for which see the judgments in *McHenry* v. *Lewis* and *Hyman* v. *Helm*, 32 W. R. 258, 24 Ch. D. 531. In my opinion, however, the jurisdiction of the court to stay pro-

ceedings on the ground of vexation should be exercised with great care; indeed, I find that Cotton, L.J., in *McHenry* v. *Lewis*, said: "In the first place, it is a jurisdiction which one ought to exercise with extreme caution. Stopping in the middle of a suit a plaintiff from going on, when he has a right of action as against the defendant, is a jurisdiction which has to be exercised with very considerable caution."

The English courts are freely open to persons foreign to this country seeking to enforce their rights against our corporations, companies, and citizens, in cases in which the courts can properly exercise jurisdiction, but, while I think we ought to be careful not to check this freedom, I am of opinion that we ought not to allow this hospitality to be abused. The difficulties which arise in the exercise of this power of the court do not appear to be so much difficulties in stating the law as difficulties in administering or applying it. The court should, on the one hand, see clearly that in stopping an action it does not do injustice, and, on the other hand, I think the court ought to interfere whenever there is such vexation and oppression that the defendant who objects to the exercise of the jurisdiction would be subjected to such injustice that he ought not to be sued in the court in which the action is brought, and to which he would not be subjected if the action were brought in another accessible and competent court. There are various grounds on which an action may be vexatious. It may be so frivolous that it is obvious that it cannot succeed, and it will be stayed. The facts then show that it is only brought to annoy the defendant, and, in my view, this would not necessarily be answered by the plaintiff stating that he *bonâ fide* believed in his rights, because he might be possessed of a mind which held a distorted view about the matter such as no reasonable man ought to entertain. In other words, it does not appear to me that the question ought to be settled by a mere consideration of what the plaintiff considers his intention, but the court is at liberty to treat him as intending what his act shows. Again, as Sir George Jessel points out in *Peruvian Guano Co.* v. *Bockwoldt*, "The plaintiff not intending to annoy or harass the defendant, but thinking he would get some fanciful advantage, sues him in two courts at the same time under the same jurisdiction . . . that is vexatious, because whatever the intention of the plaintiff may be he cannot get any benefit in that way, and the defendant is harassed by two suits." The case may also be the same, though not necessarily so, where one suit is brought in one country and a second in another by the same plaintiff against the same defendant. There may also be other cases, but all the cases appear to be covered by Lord Bowen's language in the case last mentioned where he says: "Therefore, when that which he"—the plaintiff—"is asking for is frivolous, or sometimes when he is asking for it in a way which necessarily involves injustice, the courts have interfered."

Now, it is true that the courts of this country have not gone so far as to express themselves upon the question of convenience in terms similar to those used in the Scottish cases, though, as I have already noticed, it may be doubted whether there is any substantial difference between the two. Yet it seems to me clear that the inconvenience of trying a case in a particular tribunal may be such as practically to work a serious injustice upon a defendant and be vexatious. This would probably not be so if the difference of trying in one country rather than in another were merely measured by some extra expense; but where the difficulty for the defendant of trying in the country in which the action is brought is such that it is impracticable to properly try the case by reason of the difficulty of procuring the attendance of busy men as witnesses and keeping them during a long trial, and of having to deal with masses of books, documents, and papers which are not in the country where the action is brought, and of dealing with law foreign to the tribunal, it appears to me that a case of vexation in some circumstances may be made out if the plaintiff chooses to sue in that country rather than in that where everybody is and where all the witnesses and material for the trial are. If, for instance, as was put in argument, a dispute of a complicated character had arisen between two foreigners in a foreign country, and one of them was made defendant in an action in this country by serving him with a writ while he happened to be here for a few days' visit, I apprehend that, although there would be jurisdiction in the court to entertain the suit, it would have little hesitation in treating the action as vexatious and staying it. Suppose, again, for instance, that this action had been brought against all the present defendants except Scott, and the bank had been served in this country, where it can be, as it has been in the present case, because it had a branch here, could there be any reasonable doubt but that the plaintiff must be treated as intending to bring a vexatious action and that such action would be stayed? If that were not held, I see no reason why anyone abroad might not sue and be allowed to proceed against a bank which had a branch in this country in respect of transactions all of which had taken place in some other country where the head office of the bank was —*e.g.*, Australia or Brazil—and where the inconvenience of trying the case in this country would be so enormous as practically to work the most serious injustice upon the defendant. The matter is, in this respect, of general importance because so many banks and other mercantile houses which are established in our Colonies and in the United States and other foreign countries have branches here. To a business concern to allow actions to proceed in such circumstances when there is a proper and adequate tribunal in the place where both parties really are, and dealt with each other, and all the evidence is, would be intolerable.

In the present case, apart from this question about Scott, it is difficult to conceive anything more harassing to the defendant bank than to have their officials dragged up to London for a lengthy trial, when the Court of Session is, so to speak, across the way in Edinburgh, and when together with their officials they would have to bring up here and keep away from their business numerous other witnesses with a mass of books, papers, and documents, if they can get them at all, which there seems some difficulty about without orders from the Court of Session as to some of them. All this, to my mind, is not measured by mere expense, and even on the question of expense it is to be pointed out that the cost of trying a case such as that indicated by the statement of claim, which refers to very complicated matters and attacks the character of the bank and Sir George Anderson, is utterly out of proportion to the trumpery amount in dispute; and if the defendants win, one would gather that they would have little prospect of recovering their costs from the plaintiff.

The question then seems to me to resolve itself into this, viz., whether the fact that Scott has been made a defendant and has been served in England makes any difference in the view which the court should take of the case. To my mind it does not, having regard to the special circumstances of the case. Of course it might do so if Scott were a real defendant and it had been necessary to bring one action to join him and the bank in this country;

then the bank might have had to submit. But Sir George Anderson's affidavit describes Scott's position, and the affidavits of the plaintiff and his solicitor do not contain a word to show that Scott was not known to the plaintiff to be an uncertificated bankrupt. Scott is not defending, and could not apparently find any means for doing so. Was he, then, joined because the plaintiff wished to enforce his remedies against him? I feel it impossible to take this view, and, notwithstanding what the plaintiff and his solicitor say in their affidavits, I cannot bring myself to find that in fact the action is *bonâ fide* brought in this country. One other point; it is said by the plaintiff that a judgment against Scott might bar the plaintiff's remedy against the bank, but Mr. Dalziel, the bank's law agent, says that this is not so in Scotland, and, although this is disputed by the plaintiff's solicitor, I prefer to accept Mr. Dalziel's view of the law. He is a Writer to the Signet of thirty-nine years' standing; the plaintiff's solicitor does not appear to possess the same extensive experience. But if there be any doubt on the matter, the point is dealt with by the master's order under which the bank and Sir George Anderson are not to raise any point out of this. Moreover, there is no need for the plaintiff to sign judgment against Scott, and it seems clear he will get nothing if he does. It is further said by the plaintiff that he wishes to get discovery against Scott; but as Scott is not defending, I fail to see how the plaintiff can expect to get any discovery against him which would in any way affect the case.

For these reasons I think that this appeal should be allowed with costs here and below, the master's order restored subject to a slight correction, and the plaintiff left to pursue his remedies against the bank and Sir George Anderson on the other side of the Tweed amid his own countrymen. This involves no hardship upon the plaintiff, but is really to his advantage if his claim is persisted in and fought out; for he can make it at less expense and trouble to himself in Scotland than in England. I think the restored order of the master should be slightly varied by the stay being of the proceedings against the defendant bank and the defendant Sir George Anderson.

COLLINS, M.R.—Romer, L.J., and I have read the judgment which has just been delivered, and we agree with it.

Appeal allowed.

Solicitors for the appellants, *Ashurst, Morris, Crisp, & Co.*

Solicitor for the respondent, *D. W. Drummond.*

From Chan. Div. (Vaughan Williams, Stirling, and Cozens-Hardy, L.JJ.) — Oct. 25, 26.

WRIGLEY *v.* GILL. (*a.*)

Mortgage—Mortgagee in possession—Redemption—Rests—Accounts—Sale of part of the mortgaged property—Proviso for capitalization of interest—Right to compound interest.

A mortgagor who enters into possession and receives the rent of the mortgaged property is not entitled to the benefit of a provision in the mortgage deed for the capitalization of interest in the event of its being in arrear, provided that at the date of the interest becoming due there is in the hands of the mortgagee rent sufficient, after making all proper deductions, for the payment of the interest, even though no appropriation of such rent to payment of interest has ever been made.

Dictum *of* Cotton, L.J., *in* Cockburn *v.* Edwards, 29 *W. R.* 136, *approved, and preferred to that of* Jessel, M.R., *in the same case.*

Judgment of Warrington, J., 53 *W. R.* 334, [1905] 1 *Ch.* 241, *affirmed.*

This was an appeal from a decision of Warrington, J. (reported 53 W. R. 334, [1905] 1 Ch. 241), varying the master's certificate in a mortgagor's action for redemption on a summons by the plaintiff.

The facts were as follows: By a mortgage of the 22nd of October, 1887, certain leasehold properties were subdemised by the plaintiff to a building society to secure £1,000.

On the 8th of October, 1890, and the 4th of July, 1892, further charges for £120 and £60 respectively were given by the plaintiff to the building society on the same security.

On the 13th of March, 1893, by a second mortgage the plaintiff mortgaged the equity of redemption of these properties to secure £200 to the defendant Ann Gill. The mortgagor covenanted to pay the mortgagee interest at the rate of 6 per cent. per annum.

The deed also contained the following proviso: "Provided also and it is hereby agreed that if and so often as any interest due under the covenant hereinbefore contained in this present provision shall be in arrear for twenty-one days after the day appointed for payment thereof, such interest shall be treated as an accession to the capital money hereby secured as on the day on which the same ought to have been paid, and shall thenceforth bear interest payable at the rate and on the days aforesaid, and this security shall extend to such capitalized interest in all respects."

On the 29th of May, 1894, half a year's interest on the defendant's mortgage being over two months in arrear, the mortgagee Gill entered into possession of the mortgaged properties.

On the 16th of June, 1894, the plaintiff paid the interest then due to the defendant, but the latter still remained in possession.

On the 11th September, 1894, the defendant took a transfer from the building society of the mortgage of the 22nd of October, 1887, and the two further charges.

On the 24th of November, 1899, the defendant sold a portion of the mortgaged properties for £250 under the power of sale in the mortgage.

On the 20th of September, 1900, the present action was commenced, the plaintiff claiming redemption of the mortgaged properties with the usual accounts.

The master by his certificate of the 29th of July, 1904, certified that there was due from the plaintiff to the defendant under the second mortgage of the 13th of March, 1893, the sum of £200 for principal and £158 13s. 1d. for compound interest thereon at the rate of 6 per cent. per annum from the 13th of March, 1894, to the date of the certificate. That there was due on the first mortgage and further charges £1,299 8s. 1d. for principal and £642 1s. for simple interest thereon at 5 per cent. from the 11th of September, 1894, to the date of certificate. From these amounts he set off the £250 proceeds of sale thereinafter referred to; he also certified the amount of rents and profits received by the defendant, and that a part of the property had been sold by the defendant on the 24th of November, 1899, for £250, and that this sum had been applied by the defendant in reduction of the principal and interest due under the second mortgage securities.

The plaintiff took out a summons to vary the

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

master's certificate in, among other things, the following particular: "By declaring that no interest having been due under the mortgages mentioned in the said certificate to the defendant at the date when possession of the mortgaged premises was taken by the defendant, only simple interest at the rate of 6 per cent. is payable upon the mortgage dated the 13th of March, 1893."

Warrington, J., varied the certificate in accordance with the summons.

The part of the order appealed from was the following declaration: "The court doth declare that the defendants are only entitled to simple interest at the rate of 6 per cent. per annum on the principal sum of £200 secured by the indenture of mortgage dated the 13th of March, 1893, except that if the rents in the hands of the defendants or any of them were (after deducting the amount of any outgoings except costs properly chargeable against such rents during the half-year hereinafter mentioned, and the interest on the mortgage dated the 22nd of October, 1887, and the further charges dated the 8th of October, 1890, and the 4th of July, 1892, and the indenture of transfer dated the 11th of September, 1894, and interest on the sums expended in repairs accrued for the half-yearly day hereinafter mentioned), neither on any half-yearly day on which, under the said mortgage dated the 13th of March, 1893, interest was payable, nor at any time in the course of twenty-one days subsequent to such half-yearly day, equal to or in excess of the amount payable in respect of such half-year's interest under the mortgage dated the 13th of March, 1893, then the amount by which such rents were less than the amount of such half-yearly interest ought to be treated as an accession to the principal sum of £200, and carry interest at the rate of 6 per cent. per annum."

The defendants appealed.

Rowden, K.C., and *Austen-Cartmell*, for the defendants.—Compound interest is allowed under the proviso that when interest is in arrears for twenty-one days it shall be capitalized. The question is whether interest is in arrear when nothing is paid by the mortgagor, but the mortgagee being in possession receives the rents and profits. The point is really covered by *Union Bank of London* v. *Ingram*, 29 W. R. 209, 16 Ch. D. 53; *Cockburn* v. *Edwards*, 29 W. R. 136, 18 Ch. D. 449; and *Bright* v. *Campbell*, 37 W. R. 745, 41 Ch. D. 388. There was no appropriation by the mortgagee of these rents and profits to the payment of interest. The order appealed from in fact requires that the account shall be taken with half-yearly rests. This is contrary to the practice. A mortgagee cannot be compelled to accept payment in driblets: *Ainsworth* v. *Wilding* [1905], 1 Ch. 438.

Peterson, for the plaintiff.—None of the cases cited really cover the present point. In *Cockburn* v. *Edwards* there is a *dictum* of Jessel, M.R., one way and of Cotton, L.J., the other. It is submitted that the latter should be preferred—*i.e.*, that when a mortgagee in possession has received rents more than sufficient for payment of interest and expenses, interest should not be held to be in arrear merely because there has been no appropriation. The object of a proviso like this is to prevent the mortgagee being kept out of his money, and so long as the money comes to his hands the proviso does not take effect.

Rowden, K.C., replied.

VAUGHAN WILLIAMS, L.J.—This is an appeal from part of the order dated the 24th of November, 1894, and made by Warrington, J., on the further consideration of an action brought by a mortgagor for redemption of the mortgage property. The effect of that order is that the mortgagor is relieved from the burden of capitalization of interest except in the cases therein mentioned. The question for decision depends entirely upon the meaning of the proviso contained in the mortgage deed of the 13th of March, 1893. We have to consider whether on the facts it has been shown that interest has been in arrear for twenty-one days after the days respectively appointed for payment. It has not been suggested that the mortgagor in fact made any payment of the interest as such, but it is said that although he did not make any payment of interest as such, yet that if the mortgagee had in her hands rent which after deducting the ground-rent and other proper outgoings left in her hands a sum sufficient for the payment of the interest, then it cannot be said that within the meaning of the proviso the interest was in arrear. Now, on the authorities cited to us, it cannot be said that the matter is perfectly clear, but our attention has been called to expressions made use of by Jessel, M.R., in *Cockburn* v. *Edwards* which show, I think most clearly, that in his view the fact that the assignee has in his hands rents which after making all proper deduction would be available for the payment of the interest would not of itself be sufficient to prevent the interest from being in arrear. The question in that case did not arise upon a covenant identical with the covenant in this case, but the question was whether a power of sale by the mortgagee had arisen, and that depended upon whether the interest had been three months in arrear according to the terms of the mortgage deed. Jessel, M.R., said: "But was there any interest in arrear? It has been argued that a mortgagee in possession, if he receives rents to an amount more than sufficient to pay the interest, must be taken to have been paid his interest. I cannot accede to that argument. A mortgagee in possession first deducts expenses, and then what remains goes against principal and interest, but till an account is taken there is no set off; there is no appropriation of the rents. This is still clearer if you take the case of a horse. The mortgagee lets it out for hire, he has to pay the expenses of its keep, and you cannot treat his receipts as appropriated to anything till an account is rendered." The learned judge then referred to *Brocklehurst* v. *Jessop*, 7 Sim. 438, and expressed his disapproval of a *dictum* of Shadwell, V.C., in that case to the effect that the receipt of rents by an equitable mortgagee in possession ought *primâ facie* to be taken as payment either of the principal or interest of his debt as the case may be, and the Master of the Rolls went on to say: "The receipt of rents by the mortgagee is not a payment by the mortgagor or by anyone on his behalf. The mortgagee receives rents which are his own, subject, of course, to the right of redemption." The decision of *Cockburn* v. *Edwards* did not essentially turn upon this point, for all the learned judges agreed that in that particular case the accounts showed that there had been such an appropriation of the rents in the hands of the mortgagee that it amounted to a discharge of the interest, so that it was impossible for the mortgagee to say that the interest had been in arrear for the three months, as was necessary to justify his exercise of the power of sale. But Jessel, M.R., did express very plainly his view that if it had been necessary to decide the point the mere fact that the mortgagee had the money in his hands would not have prevented him selling under the power—that is, in other words, that the interest would have been in arrear—that the receipt of rents by the mortgagee did not of itself amount to the payment of interest. But both Brett and Cotton, L.JJ., dealt with the point. Brett, L.J., says: "But was there any interest in arrear? The argument on

behalf of the mortgagee went so far as this, that when a mortgagee is in possession there must be interest in arrear, unless an actual appropriation of interest to the payment of the rents has been made. It is not necessary to decide that point, for we have here accounts which show actual appropriation." It is true that there is no affirmative expression by Brett, L.J., of his view on this question, yet to my mind his words suggest very strongly that this was a length to which he was not prepared to go, and I think it may be taken that he did not agree with the positive opinion of Jessel, M.R. Then Cotton, L.J., said: "Interest was in arrear unless the rent received by the mortgagee can be treated as applied in payment of interest. Now receipt of rents by a mortgagee is not as a general rule equivalent to a payment by the mortgagor. If a mortgagee enters into possession his receipt of rents is not payment of interest by the mortgagor so as to entitle the latter to the benefit of a proviso for reduction of interest on punctual payment, and I quite agree with the remarks of the Master of the Rolls as to the *dictum* in *Brocklehurst* v. *Jessop*. If, however, the mortgagee receives rents which are all along more than sufficient for payment of interest and expenses, so that his account, if he were to render one, would show that there was in his hands at every time a balance applicable to the reduction of the principal, I am not prepared to decide that he can, merely because there has been no actual appropriation of the rents to payment of interest, say that there is interest in arrear within the meaning of the proviso in the power of sale." It seems to me that the learned Lord Justice was saying as plainly as possible that he could not go to the same length as Jessel, M.R., but that he thought that the receipt by the mortgagee of rents available for the payment of the interest would preclude him from saying that the interest was in arrear. It is true that the case actually suggested by Cotton, L.J., was one in which a mortgagee receives rents which are "all along" more than sufficient for payment of interest and expenses, so that the mortgagee's account, if he were to render one, would show him that there was in his hands at every time a balance applicable to the reduction of the principal, and that is not quite the present case, because it is said that here, while in some half years the rents may have been sufficient, in other half years they may not have been sufficient for payment of the interest. But I think it is plain that Cotton, L.J., did not agree with *dictum* of Jessel, M.R. In fact the words which had to be construed in *Cockburn* v. *Edwards*—"in arrear"—were not quite the same as those in a covenant giving a mortgagor the benefit of a reduction of the rate of interest on prompt payment. It may well be that the interest is not in arrear although there has not been in strictness any payment of it by the mortgagor. This has been recognized at common law in an action of replevin, where upon the issue whether rent was in arrear the tenant has been allowed to set off against rent payments made by him which ought properly to have been made by the landlord. In the present case, as in *Cockburn* v. *Edwards*, the question is not one of payment, but whether the interest was in arrear within the meaning of the proviso. In this conflict of opinion between judges of great authority we have to consider which is the proper conclusion in a case like the present. *Primâ facie*, one's mind revolts somewhat against a construction which will give the mortgagee a right to interest upon interest—for that is the effect of capitalization in a case in which he has in his pocket money of the mortgagor available for payment of the interest, and which he, the mortgagee, could use for that purpose if he thought fit to do so. We ought not to put such a construction upon such a proviso unless we arrive at the conclusion that this must have been the intention of the parties. This is not the case of a proviso allowing a reduction of the rate of interest to the mortgagor in case he pays the interest punctually. It is the case of a proviso which, in the event of the default of the mortgagor in paying the interest, gives the mortgagee a right to something beyond that to which he would otherwise be entitled under the mortgage deed, and in my opinion the mortgagee could not within the meaning of this proviso say that interest was in arrear which would cease to be in arrear the moment he chose without any further act by the mortgagor.

It was properly admitted by counsel that the case is one in which it is for the mortgagee to prove that the event upon which he was to obtain this advantage has happened, just as in *Union Bank of London* v. *Ingram* the onus was upon the mortgagor to prove that the event had happened which entitled him to a reduction of the rate of interest. We have, therefore, to consider whether the interest was in arrear in the present case. In *Cockburn* v. *Edwards* it was held there had been an appropriation of the rents to payment of the interest. But it seems to me that we cannot support the judgment of Warrington, J., in the present case unless we are prepared to hold that under such a proviso as we have here the mortgagee will not be entitled to say that the interest is in arrear if while he was in possession he had in his hands on the day appointed for payment of interest, or within twenty-one days afterwards, rents received by him available for the payment of the interest. In my opinion that is the right view. In such circumstances I do not think, but it is not necessary to decide it in this case, that the mortgagee, having in his hands rents available to pay the interest, would be able to relieve himself of the obligation so to apply the money by giving notice to the mortgagor that he had appropriated it to some other purpose, or that he did not appropriate it to the payment of the interest.

In my opinion the judgment of Warrington, J., was right. The meaning is that if the mortgagee has in his hands such an amount of rents as, after deducting all proper outgoings, exceeds or is equal to the interest due, he is not entitled to say that the interest is in arrear. I believe that to be the meaning of the observations of Brett and Cotton, L.JJ., in *Cockburn* v. *Edwards*, and it is that which I adopt.

If after making the proper deductions for outgoings a mortgagee in possession has in his hands money available for the payment of the interest, it cannot, in my opinion, be properly said on the construction of such a proviso as this that the parties intended that the interest should be treated as "in arrear" so as to entitle the mortgagee to compound interest.

I desire to add this: The appellant's counsel suggested that this conclusion would be inconsistent with the opinion expressed by Warrington, J., in the present case, and also by Joyce, J., in *Ainsworth* v. *Wilding*, that a mortgagee is not bound to receive payment of his interest by driblets. That would be a sound observation if the amount of the rents in the hands of the mortgagee were less than that of the interest due, but in my judgment it has no application to a case in which the amount of the rents available exceeds or is equal to the amount of the interest due on the day appointed for payment or within twenty-one days afterwards. In my opinion the decision of Warrington, J., was right, and the appeal must be dismissed.

STIRLING, L.J.—I also am unable to differ from

the judgment of Warrington, J. The question for our decision is whether the mortgagee is entitled to the benefit of a proviso in the mortgage deed which entitles him to compound interest in case the interest on the mortgage debt shall be in arrear for twenty-one days after the day appointed for payment. [His lordship read the proviso.] In order that the mortgagee may obtain the benefit of this proviso he must show that the event mentioned in it has happened—namely, that the interest has been in arrear for twenty-one days. The question is, has it been established that any interest was in arrear for twenty-one days? [His lordship stated the facts, including the accounts directed by the judgment at the trial, and observed that the account No. 2 was a remarkable one and that it must have been inserted either by consent or by some slip which could not now be corrected. His lordship continued:] Warrington, J., has held that at any rate as regards some half years the mortgagee has not shown that the interest was in arrear within the meaning of the proviso. He pointed out that the onus of proving that the interest was in arrear lies upon the mortgagee, and there is no question but that he was right as to that. The learned judge then discussed three cases which had been cited to him—viz., *Union Bank of London* v. *Ingram*, *Bright* v. *Campbell*, and *Cockburn* v. *Edwards*, the latter of which is the nearest to the present case, and having regard to what was said in it by the judges of the Court of Appeal he came to the conclusion that he was at liberty to act on his own opinion, and to decide that the mortgagee had not shown that interest had been in arrear so as to entitle him to compound interest. With that conclusion I agree, and mainly for the reasons given by the learned judge. *Union Bank of London* v. *Ingram* was a decision of Jessel, M.R., upon the construction of a proviso contained in a mortgage for the reduction of the rate of interest (which was 6 per cent.) in case the mortgagor should pay interest at 5 per cent. within forty days after the days appointed for payment. In order that he might claim the benefit of this proviso the event which it had to be shown by the mortgagor had happened was that he had paid the interest within the time limited. The mortgagee had entered into possession and had received the rents of the mortgaged property, and Jessel, M.R., held that this did not amount to payment of the interest by the mortgagor so as to entitle him to the reduction of the rate of interest under the proviso. That decision was followed by Kay, J., in *Bright* v. *Campbell*, but I think with some reluctance.

However, the proviso with which we have now to deal differs both in its nature and in its language. In both those cases the mortgagor was claiming the benefit given to him on his paying interest at 5 per cent. within a certain time, and it was held that he did not discharge the onus of showing that he had done this by showing that the mortgagee had received rents sufficient for the the payment of the interest. In the present case it is the mortgagee who is claiming a benefit under a proviso upon the happening of a certain event—*i.e.*, the interest being in arrear. *Cockburn* v. *Edwards* much more clearly resembles the present case than either of the other two. In that case the mortgage deed was treated as containing a power for the mortgagee to sell the mortgaged property in the event of the interest being in arrear for more than three months. No interest had been actually paid by the mortgagor, but the mortgagee had gone into possession and had received the rents, and the question was discussed whether that was sufficient to prevent the power of sale arising. There was no actual decision of the point, because all the members of the court held on the evidence that there had been in fact an appropriation of the rents to the payment of interest. Jessel, M.R., however, expressed a strong opinion that the receipt of rents by the mortgagee could not of itself be considered as payment so as to prevent the interest from being in arrear. But I think that, to say the least, Brett and Cotton, L.JJ., did not concur in that view. I am fully sensible of the great weight that is due to any expression of opinion by Jessel, M.R., but at the same time it appears to me that the language of Cotton, L.J., expresses more accurately the rule which is applicable. [His lordship read the passage already quoted from the judgment of Cotton, L.J., and continued:] I agree with the view of the Lord Justice, and wish to adopt his words as my own with regard to the present case. Here the proviso in the mortgage deed is one for the benefit of the mortgagee, and it is inserted with the view of compensating him for being kept out of his interest through nonpayment by the mortgagor. He goes into possession of the property and receives the rents, and thereby deprives the mortgagor of the readiest means of paying the interest, and, as the learned judge found, he had in some half years in his hands rents by which he might have satisfied the interest, and he does not show that he applied those moneys in the payment of anything else under the mortgage. In these circumstances ought he to be allowed to say that within the meaning of the proviso the interest was in arrear? In *Cockburn* v. *Edwards* Cotton, L.J., was not prepared to say that interest was in arrear as regarded the exercise of a power of sale, and it seems to me that the same principle applies to the present case, in which the mortgagee is claiming compound interest. It was pressed upon us by the appellants' counsel that if we so decide we shall be departing from the practice of the court that a continuous account is to be taken as between mortgagor and mortgagee without making any rests. I quite agree that that is the practice. But the answer is that the account will not be taken with rests. It is true that an inquiry will be made as to the state of the account each half year, but the account will proceed continuously though the inquiry will be made in order to see whether the proviso applies or not. I desire to say nothing as to how far the mortgagee might have appropriated the rents which he received otherwise than to the payment of interest. It is not suggested that any other appropriation was in fact made. If there were any evidence of such an appropriation I should desire to consider what the effect of it might be. I wish in particular to reserve my opinion as to the operation of the proviso in the event of an appropriation of rents by a mortgagee to the payment of the capital of the mortgage debt. As it is I agree with the judgment of Warrington, J.

COZENS-HARDY, L.J.—I am of the same opinion. The case is a difficult and important one. There is no decision of the Court of Appeal which is binding upon us, though some *dicta* of members of that court have been quoted. There are, however, two decisions of judges of first instance on the construction of a proviso for the reduction of the rate of interest upon punctual payment by the mortgagor. It was held first by Jessel, M.R., in *Union Bank of London* v. *Ingram*—and this was really followed by Kay, J., in *Bright* v. *Campbell*—that in such a case the receipt of rents by a mortgagee in possession could not be regarded as payment of the interest by the mortgagor so as to entitle the mortgagor to claim the benefit of the reduction of the rate of interest. Assuming that those cases were rightly decided, still it seems to me

that they in no way govern the present case. There is a great difference between those cases and the case of a proviso in favour of the mortgagee if, and if only, the interest should be in arrear. I think this distinction is very clearly pointed out by Cotton, L.J., in *Cockburn* v. *Edwards*—viz., that the interest may not be in arrear although it has not been paid by the mortgagor. The *dicta* of the judges of the Court of Appeal in that case cannot be reconciled. I have great hesitation in differing from Jessel, M.R., but on the other hand there is the *dictum* of Cotton, L.J., which commends itself to my mind as it does to my learned brethren. I understand Cotton, L.J., to put the case on the ground of estoppel against the mortgagee, that the mortgagee cannot be allowed to say that the interest is in arrear when he has in his hands rents which might be applied to its payment. I was at one time impressed with the argument that this view really involves the taking of the account of rents and profits with rests. But on consideration I agree with Stirling, L.J., that this will not be the result; the account will still be taken continuously in the usual way and the mortgagee will be entitled to simple interest at 6 per cent. unless he can make out in any half year the existence of the facts which entitle him to compound interest.

Solicitors, *Bower, Cotton, & Bower*, for *Longbotham & Son*, Halifax; *Scott, Spalding, & Bell*, for *William Lees*, Oldham.

High Court of Justice.

Chan. Div. } Farwell, J. } Dec. 7.

In re W. C. HORNE & SONS (LIMITED).
HORNE *v.* W. C. HORNE & SONS (LIMITED). (*a.*)

Company—Debenture-holder action—Plaintiff's solicitors' costs, charges, and expenses—Property recovered or preserved—Charging order—Solicitors Act, 1860 (23 & 24 *Vict. c.* 127), *s.* 28.

The plaintiff brought an action on behalf of himself and the other debenture-holders to realize their security,

Held, that the solicitor was entitled to a charging order for the difference between the plaintiff's party and party and solicitor and client costs of the action, on the fund belonging to the debenture-holders, because the plaintiff was unable to pay such difference.

This was an action by the plaintiff on behalf of himself and the debenture-holders in W. C. Horne & Sons (Limited), to enforce and realize their security.

In June, 1904, judgment was pronounced, and a receiver and manager was appointed. The company went into liquidation, and the receiver was appointed liquidator of the company.

Mr. F. H. Honey acted as solicitor for the plaintiff and the receiver.

Actions were brought and proceedings were taken with the sanction of the court, and the funds in court after paying the debenture-holders in full left a large surplus for the liquidator of the company.

Mr. F. H. Honey, as solicitor for the plaintiff, made an application by summons that it might be declared that the applicant as solicitor for the plaintiff and other holders of the mortgaged debentures of the defendant company was entitled to a charge upon the sum of £6,000 in court as being property recovered or preserved by the plaintiff and the other holders of the said debentures for the amount of the applicant's taxed costs, charges, and expenses of and in reference to this action.

The Solicitors Act, 1860, s. 28, provides: "In every case in which an attorney or solicitor shall be employed to prosecute or defend any suit, matter, or proceeding in any court of justice, it shall be lawful for the court or judge before whom any such suit, matter, or proceeding has been heard, or shall be depending, to declare such attorney or solicitor entitled to a charge upon the property recovered or preserved; and upon such declaration being made such attorney or solicitor shall have a charge upon and against and a right to payment out of the property, of whatsoever nature, tenure, or kind the same may be, which shall have been recovered or preserved through the instrumentality of any such attorney or solicitor, for the taxed costs, charges, and expenses of or in reference to such suit, matter, or proceeding; and it shall be lawful for such court or judge to make such order or orders for taxation of and for raising and payment of such costs, charges, and expenses out of the said property as to such court or judge shall appear just and proper."

Waggett, for the application, referred to *Harrison* v. *Cornwall Railway Co.*, 32 W. R. 748; *Greer* v. *Young*, 31 W. R. 930, 24 Ch. D. 548; *In re New Zealand Midland Railway Co.*, 49 W. R. 529, [1901] 2 Ch. 357.

Stone, for the company.

Shebbeare, for the plaintiff.

FARWELL, J., in giving judgment, said: This case is not without a little difficulty, but I am clearly of opinion that this charging order ought to be made, especially if it be possible to express the order in such a manner as, whilst carrying out the view that I have just expressed, not to seem to run counter to the decided cases. The plaintiff in this case has been so successful as to recover more than enough to pay all the debenture-holders in full, and still to have a surplus for the company.

I will grant the solicitor a charging order for the difference between the plaintiff's party and party and solicitor and client costs of the action on the fund belonging to the debenture-holders, because the plaintiff is unable to pay such difference. In *Harrison* v. *Cornwall Railway Co.*, 32 W. R. 748, a similar application was refused, but in that case there was no evidence that the plaintiff was unable to pay such costs, and in that case Kay, J., in his judgment, says: "If there were any question as to the solicitors not obtaining their costs I should not hesitate to make the order asked for." I will follow the *dictum*. But the larger amount of the costs were incurred in the proceedings that have been mentioned, and appear to me to be really part of the receiver's costs of administration and management and can be properly included in his accounts. I will grant a charging order for these costs also on the fund that will be payable to the liquidator, and the receiver will include them in his final account as part of his costs, and they will be dealt with by the master in due course. As the application is really for the benefit of the plaintiff and against the interests of the other debenture-holders, a consent brief on their behalf must be produced to the registrar.

Solicitors, *F. H. Honey; Baillie & Co.*

(*a.*) Reported by PAUL STRICKLAND, Esq., Barrister-at-Law.

Chan. Div. }
Buckley, J. } Dec. 19.

THOMPSON v. HAMMERSMITH CORPORATION. (a.)

Metropolis management—Streets and highways—Widening street—Power to take part of house—Michael Angelo Taylor's Act (57 *Geo.* 3, *c. xxix.*), *ss.* 80, 82.

A local authority requiring part of a house for the purpose of widening a street under Michael Angelo Taylor's Act may be compelled by the owner to take the whole as a condition of taking the part, if the removal of the part would destroy the house as a house.

Gibbon v. Paddington Vestry, 49 *W. R.* 8, [1900] 2 *Ch.* 794, *followed.*

Action.

By an indenture of lease dated the 15th of May, 1905, there was demised to Alfred Williams Thompson and Alfred Robert Symonds Jackson, the plaintiffs, a messuage or double shop known as No. 98, King-street, Hammersmith, for the term of forty years from the 25th of March, 1905, at the annual rent of £250. The lease contained a covenant by the plaintiffs at their own expense to forthwith proceed to alter the premises in accordance with the plans which had been already submitted to and approved by the lessors, and to execute such alterations within twelve calendar months from the date thereof in a thoroughly workmanlike manner to the reasonable satisfaction of the lessors. The alterations so agreed upon involved altering the premises, which were old and had not sufficient height for the plaintiffs' shop, on the ground floor, and converting the three floors of the front part of the premises into two floors. Before taking the lease they had seen a sketch plan showing that the borough council proposed to take part of the front of their house to a depth varying from 7ft. 2in. to 5ft. 3in. for the purpose of a street improvement.

The plaintiffs went into possession of the premises on the 8th of June, and at once commenced the works which they had covenanted to perform.

On the 20th of June the plaintiffs received a notice, dated the 16th of June, from the borough council of Hammersmith that for the improvement of King-street aforesaid, and under the powers vested in them by the Metropolitan Paving Act, 1817, commonly called Michael Angelo Taylor's Act (57 Geo. 3, c. xxix.), they had resolved to widen the said street and had adjudged that a strip of land of a depth varying from 7ft. 2in. to 5ft. 2in. (being in fact the strip of land of that depth on which the front part of the premises No. 98, King-street stood) obstructed such widening, and that they gave notice to treat accordingly.

On the 26th of June the plaintiffs served on the borough council a counter-notice requiring them to take and purchase the plaintiffs' interest in the whole of the house or shop No. 98, King-street, instead of that part only of such house or shop as was described in the notice to treat.

The borough council did not comply with the counter-notice, but on the 24th of October delivered to the plaintiffs a tender in writing of the sum of £1,100 as and for the plaintiffs' interest in the strip mentioned in the notice to treat.

The plaintiffs then delivered to the borough council particulars of their claim for the interest in the whole of No. 98, King-street, but the borough council refused to comply with their claim.

On the 7th of November the plaintiffs issued the writ in this action, claiming an injunction to restrain the defendants from proceeding under their notice to treat to take such part of the lands and hereditaments of the plaintiffs, No. 98, King-street, as was in the said notice mentioned.

Buckmaster, K.C., and *Waggett*, for the plaintiffs.—Michael Angelo Taylor's Act does not contain any provision corresponding to that contained in section 92 of the Lands Clauses Consolidation Act, 1845, enabling the owner to require the purchasing body to take the whole when part only is required. Part of a house may be taken under the Act provided that the part so taken does not destroy the identity of the house: *Gordon* v. *St. Mary Abbotts Vestry*, [1894] 2 Q. B. 742; *Gibbon* v. *Paddington Vestry*, 49 W. R. 8, [1900] 2 Ch. 794. Here the council claims to take the whole front of the house to a depth of from 7ft. 2in. to 5ft. 2in., and this would destroy the house as a house.

Astbury, K.C., *Courthope-Munroe*, and *Langston*, for the defendants.—Under their covenant the plaintiffs are bound to partly demolish this house; it may be regarded, therefore, as if in fact it had been partly demolished, and may be treated as "land" and not as a "house": *Thomas* v. *Daw*, 15 W. R. 113, 2 Ch. 1, 3 note; *Gard* v. *Commissioners of Sewers*, 28 Ch. D. 486, 507. At the time the plaintiffs took their lease they knew that the council intended to take part of the house. The accommodation of the house would not be destroyed, for it can be so altered as to give them equally good accommodation. The correctness of the council's adjudication cannot be questioned, if honestly made: *Thomas* v. *Daw*, 15 W. R. 113, 2 Ch., at p. 7; *Gard* v. *Commissioners of Sewers*, 28 Ch. D., at p. 494, 33 W. R. Dig. 106; *Stroud* v. *Wandsworth Board of Works*, 42 W. R. 355, [1894] 2 Q. B., at p. 5; *Metropolitan District Railway Co.* v. *Fulham Vestry*, 44 W. R. 53, [1895] 2 Q. B. 443.

BUCKLEY, J.—The question I have to decide is whether the defendants are entitled to proceed under a notice to treat, dated the 16th of June, 1905, with respect to a house numbered 98, King-street, Hammersmith. It is a notice to treat by which the defendants desire to acquire a strip off the front of the house numbered 98, King-street, varying in depth from 5ft. 2in. at the eastern end to 7ft. 2in. at the western end.

First, as to the law, section 80 of Michael Angelo Taylor's Act (57 Geo. 3, c. xxix.) does, but section 82 does not, add to the general words "houses, walls, buildings, lands, tenements, and hereditaments," the words "or any part thereof." In *Gordon* v. *St. Mary Abbotts Vestry*, however, it was decided in the Divisional Court that the words "or any part thereof" are by implication carried on into the words "such houses, buildings, lands," &c., in section 82, with the result that under that Act compulsory purchase may be made of part without taking the whole; thus differing from a purchase to which section 92 of the Lands Clauses Act applies. As a matter of decision that case ends there. The parties in that case were willing that the motion should be treated as the trial of the action, but the court declined so to deal with it, and as a matter of interlocutory order refused to restrain the vestry from proceeding upon their notice to treat. And this upon the ground that the court could not until the trial of the action determine the question whether that which the vestry proposed to take was or was not a part of the premises within the Act of Parliament. As a matter of *dictum*, however, the court there did go on to say what would satisfy the words "or any part thereof." They laid down that a house is *primâ facie* a unit incapable of division; that the vestry could take part of a house only when

(a.) Reported by T. PAKENHAM LAW, Esq., Barrister-at-Law.

that part was separable from the house so that it could be removed without destroying the house as a house. I need scarcely say that I should have had no hesitation in following this although it was but *dictum*. But the matter does not stop there, because in *Gibbon* v. *Paddington Vestry* this matter was the subject of decision by Stirling, J. At the trial of the action in that case Stirling, J., held that the owner could compel the vestry to take the whole of the house when the part which they claimed the right to take was not a part separable from the house so that it could be removed without destroying the house as a house.

As the next point, let me suppose that the house in question is one to which the owner is at the date of the notice to treat making, or proposing to make, or is under covenant to make, alterations. The defendants argue upon some words of Kindersley, V.C., in *Thomas* v. *Daw*, 2 Ch., at p. 3, that in such a state of facts the matter is to be treated as if that which the owner was contemplating doing had been done. The Vice-Chancellor's words are these: "At the time of the notice, it was true, No. 50 was not pulled down, but it was intended to be pulled down, and must for the purposes of this motion be considered as a house actually pulled down." The Vice-Chancellor's decision was appealed from, and upon the appeal, as I understand the judgment of Lord Chelmsford, he did not agree with that sentence; he refers to it at p. 6 of the report, and after saying that he is not disposed to agree exactly with the reasons which appear to have governed the Vice-Chancellor's decision, he goes on to affirm his decision, not upon the grounds which the Vice-Chancellor had assigned, but upon the ground, as appears at p. 8, that the commissioners had not satisfied the essential preliminary as to No. 50, in that their adjudication, which is to be found at p. 5, was not that the site of No. 50 was necessary, but only that part of the site of No. 50 was necessary for the purposes of the Act.

Apart from that case, and regarding the matter upon principle, it seems to me that the rights of the defendants must be determined, not upon that which the owner had in contemplation when the notice to treat was served, but upon the rights which the owner had as owner of a house which at the date of the notice to treat was of a particular kind, and which the owner might or might not as he was minded alter as he pleased. By the word "owner" here I mean all the owners at the time in question—that is to say, for the purposes of the present case, not the lessee only but the lessor also. The defendants' rights are not, in my opinion, enlarged by reason of any intended voluntary alterations which the plaintiffs were to make or were under covenant to make. At most the consideration could be relevant only if the alterations in question would if carried into effect result in a new house of which the part which the defendants desired to take was not an essential part. The fact that the plaintiffs are making or are under covenant to make certain alterations does not authorize the defendants to say: "You must make further alterations, which will cost you no more, and will answer your purpose just as well, and which when made will render the part which we want no longer an essential part of the house." The plaintiffs are entitled to say that the matter is to be dealt with regarding the house as it in fact is at the date of the notice to treat, or at the most as it will be when altered in the way in which they are going to alter it.

This being the law which, in my opinion, I have to apply, the relevant facts are as follows: The plaintiffs on the 15th of May, 1905, took a lease of the house No. 98, King-street; they had then seen a racing and knew that such a widening as is here in question was in contemplation as regards their house. Their lessors, however, could and did give them a leasehold interest in such a house as was then there on the site. The defendants' rights are no larger by reason of the fact that the plaintiffs took a lease of a house as against which the defendants had such rights as Michael Angelo Taylor's Act gave them, and of which the defendants were asserting, if that were the fact, that they had a right to take this strip. The question is, what rights does the Act give them? Have they or have they not a right to take the strip? Those rights I have discussed above. The question then is whether the part which the defendants propose to take is separable from the house so that it can be removed without destroying the house as a house. Now upon that, the first point upon which I comment is this: The building, as it stood on the 16th of June, 1905, was provided with and warmed by fireplaces set in a large chimney-stack, which was very ancient, I should think, by the position in which it stands, and which was midway between the two small houses which made up the larger house as the plaintiffs intend to occupy it. By taking the strip in question the defendants would have destroyed the whole of the chimney stack and destroyed all the fireplaces that warmed the rooms in the different parts at any rate of this house. Of course it is obvious that that is taking such a part of the house as not to leave it such a house as it was before; it could not be enjoyed as a house. But it is said, and said truly, that the plaintiffs were going to destroy the chimney-stack themselves in the alterations they were going to make. But, mark, they were going to destroy the chimney-stack for the purpose of enjoying the space that would be left bare by its removal and make one large shop. The defendants cannot, I think, say that for the purpose of determining their rights I must treat it as a thing destroyed, whatever view may be taken of *Thomas* v. *Daw*, when they propose to remove it, not for the purpose for which the plaintiffs intend to remove it—namely, to leave a large shop in the space formerly occupied by the chimney-stack, but for another purpose altogether—namely, of throwing that space into the street.

Of course this point is enough to dispose of the whole case, if I am right in saying that the fact that the plaintiffs were themselves going to remove it is immaterial; of course the removal of this by the defendants—if it was to be their removal—would destroy all the chimneys and fireplaces.

Secondly, it is necessary here to describe quite shortly something as regards the premises. These were old premises consisting of three floors—a ground floor, first floor, and some attics. The wall, which is called the back front of the house (I should call it the back wall of the house, but the surveyors call it the back front) was, at the level of the ceiling of the ground floor, carried upon girders so that the ground floor ran beyond it. The first floor and the attics did not run beyond it. The alterations which the plaintiffs proposed would have converted the three floors into two; would have raised the ceiling to the ground floor to some extent and thrown the remains of the house into a first floor room, and that would have been a room extending from the front wall of the house in King-street to this back front at the back. If the defendants take this strip they will destroy what at present are the first and second floors, and as altered will be the first floor room of the house, altogether. Mr. Chatfield Clarke, who was called for the defendants, was compelled to say that certainly those rooms as rooms would be nothing like as good as before. The best he could say was that they would be fair usable rooms. The depth of the

room from back to front would be so affected by taking this strip as that the room would become practically useless, not the same as before at all. However, the defendants say, "You can build a new back front seven feet further back, and the front wall will be seven feet further back, and then you will have the same space as you had before." To my mind that is no answer at all. I do not think the defendants are entitled to say, "We will take a part of your house and then we will show you how to build a new house, for that is substantially what this is, which will be just as good as the old one."

Thirdly, consider what will be the effect as regards the ground floor. As I have said, the back front wall there does not extend down to the ground floor, so that you get additional space there, and the plot is of such a considerable depth from north to south that you may make as good a shop perhaps on the ground floor to some extent. But it destroys the ground floor front shop in this sense, that the front part, the large extra space which would be gained by this intended removal of the chimney-stack, will be absorbed into the street and the shop itself will be thrown further back

Now that is a matter which, as regards the particular business which the plaintiffs desire to carry on, is one of moment. The principal part of the shop, the ground floor premises, is to be used for the purpose of a show case where they want to put up tailor's dummies and show their goods and so on in front. The ground floor shop, it seems to me, would be largely affected.

Fourthly, the strip, if acquired, will throw the front of No. 98 back to the extent I have said of 5ft. 2in. at one end to 7ft. 2in. at the other, and unless No. 96 on one side and No. 100 on the other are thrown back to a like extent nobody disputes that the value of the plaintiffs' premises No. 98 as a shop will be largely affected. They will be left in a sort of well set back from the main frontage of the street. The defendants say that they are going to set back Nos. 96 and 100 also. I daresay they intend to do so, but the position of affairs is this. As regards No 96 they finally sanctioned the purchase of what they want there on the day when this cause was in the paper for trial and settled it on the evening before. As regards No. 100, they have not up to the present moment even given a notice to treat.

For all these reasons I arrive at the conclusion that the strip which the defendants propose to take is such as that the part is not separable from the house, so that it could be removed without destroying the house as a house. I think that the case is governed by *Gordon* v. *St. Mary Abbotts Vestry*, and the decision of Stirling, J., in *Gibbon* v. *Paddington Vestry*. It seems to me, therefore, that the plaintiffs are entitled to the injunction they ask. In granting the injunction I do not in any way say what the defendants may be entitled to substitute for it. I only say that this notice to treat is one they cannot carry into effect. I therefore grant the injunction as asked by the indorsement of the writ, inserting the word "house" before the words "lands and hereditaments," as suggested by counsel.

Judgment for the plaintiffs.

Solicitors, *Guscotte, Wadham, & Co.; Watson, Sons, & Room.*

Chan. Div. }
Joyce, J. } Dec. 20.

MCMILLAN v. LE ROI MINING CO. (LIMITED). (*a*.)

Company — General meeting — Poll—Proxy — Voting papers—Powers of chairman—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 51.

By the articles of association of a company it was provided that votes might be given "either personally or by proxy," and that on a poll being demanded it should be taken "in such manner and at such time and place as the chairman of the meeting directs." At a general meeting of the company, on a poll being demanded, the chairman of the meeting directed that it should be taken by means of voting papers sent to each member, which should be signed by the member voting and returned to the company's offices by a certain date.

Held, that the use of such voting papers was irregular and invalid, and an injunction was granted restraining the company from acting upon the result of any poll so taken.

Motion.

This was a motion by the plaintiff, on behalf of himself and all other shareholders in the defendant company, other than the defendant directors, for an injunction to restrain the company and the directors from acting on a resolution purported to be passed at a general meeting of the company.

The facts were shortly as follows:

At a general meeting held on the 8th of December, 1905, certain resolutions were submitted dealing with a scheme of amalgamation. These resolutions being put, and there being a show of hands, a poll was demanded by the chairman. The chairman thereupon directed that the poll should be by polling papers signed by the members, the place should be the offices of the company, and the time should be any time before noon on the 22nd of December, 1905.

Polling papers were sent to all shareholders, having the resolutions printed thereon, together with instructions that the shareholder should mark "for" or "against" opposite each resolution, and return the paper, duly signed, to the offices of the company within the specified time.

It was provided by article 94 of the company's articles of association that votes might be "given either personally or by proxy"; and by article 87 that, on a poll being demanded, it should be taken "in such manner and at such time and place as the chairman of the meeting directs."

Younger, K.C., and *Kirby*, for the plaintiff.—It is clear from the articles, apart from authority, that there can be no voting at a poll unless the member is present or unless another member duly constituted his proxy is present and votes on his behalf. If this were otherwise section 51 of the Companies Act, 1862, would be evaded. If the articles or statutory authority are not clear on this point, a shareholder can have no right that he would not have at common law. Voting by a voting paper is not an enlargement of the meeting, like a poll, nor is it an incident at common law: *Reg.* v. *Wimbledon Local Board*, 30 W. R. 400, 8 Q. B. D. 459; *In re Horbury Bridge Coal Co.*, 27 W. R. 433, 11 Ch. D. 109.

Gore-Browne, K.C., and *Cozens-Hardy*, for the defendant company.—The defendants, by the employment of voting papers, were merely using their best endeavours to get the true opinion of the shareholders. By article 87 the poll may be taken in any way not contrary to natural justice or to the express

(*a*.) Reported by H. WOLCOTT WARNER, Esq., Barrister-at-Law.

provisions of the articles or the Companies Acts. Two modes of voting may co-exist: *Reg.* v. *Wimbledon Local Board.*

JOYCE, J., in giving judgment said: I do not feel the slightest doubt that *primâ facie* a voter must attend and give his vote personally unless there is any statutory or other provision entitling him to vote in a different manner. In this case it is clear that by the articles of association he must vote personally or by proxy—that is, through another member who must be present and vote on his behalf. The voting papers which have been issued are not authorized by the articles of association. It is true that the chairman may give directions as to the manner of voting, but, in my opinion, that does not entitle him to enlarge the power of voting or alter the rules as to the personal attendance of members. What is proposed to be done in this case is contrary to the articles of association of the company and is irregular and invalid. In my opinion the proposed mode of taking the poll by means of voting papers is unauthorized and invalid and the defendants must be restrained from acting on the result of any poll so taken.

Solicitors for the plaintiff, *Ashurst, Morris, Crisp, & Co.*

Solicitors for the defendant company, *Burn & Berridge.*

K. B. Div.
(Lord Alverstone, L.C.J., and Ridley and Darling, JJ.) Jan. 13.

STAINLAND AND HOLYWELL GREEN INDUSTRIAL CORN AND PROVISION SOCIETY *v.* STAINLAND WITH OLD LINDLEY URBAN COUNCIL. (*a.*)

Local government—Public health—Cleansing of cesspools—Construction—"And" whether conjunctive or distributive—Bye-laws—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 42 *and* 44.

The Public Health Act, 1875, *s.* 42, *enacts: "Every local authority may, and when required by order of the Local Government Board shall, themselves undertake or contract for . . . the cleansing of earth-closets, privies, ashpits, and cesspools."*

Held, that the word "and" is to be read distributively, and that the local authority therefore have power to undertake the cleansing of earth-closets, privies, and ashpits without undertaking the cleansing of cesspools.

Case stated by justices of the West Morley Division of the West Riding of Yorkshire.

A complaint was preferred by the respondent council against the appellants for having on the 2nd of March, 1905, failed to cleanse a cesspool on their premises at least once in every three months, contrary to a bye-law of the respondent council made on the 23rd of June, 1890.

The appellants were the owners and occupiers of certain premises erected prior to 1890, and consisting of a shop and a slaughter-house and stables at the rear, on which there was a cesspool used in connection with the premises. The cesspool received the drainage from the slaughter-house and stables and from the shop also, and at the date of the information it was so full and in such a state that it required emptying and cleansing. Notice was given by the respondents to the appellants requiring them to cleanse the cesspool, but the appellants neglected or refused to do so, alleging that it was the duty of the respondents themselves to empty and cleanse it.

On the 23rd of June, 1890, bye-laws were made by the predecessors of the respondents under section 44 of the Public Health Act, 1875, with respect to the periodical cleansing of earth-closets, privies, ashpits, and cesspools. The bye-laws provided, *inter alia*, that "the occupier of any premises shall, once at least in three months, cleanse every cesspool belonging to such premises." It was admitted that at the time these bye-laws were made the local authority had not themselves undertaken or contracted for the cleansing of earth-closets, privies, ashpits, or cesspools.

On the 6th of September, 1894, the respondents, pursuant to section 42 of the Public Health Act, 1875, passed a resolution "that the scavenging of privies, closets, and ashpits be undertaken by the board at once," and another resolution "that tenders be obtained for emptying and cleansing privies, closets, and ashpits . . . and that any earth-closets be emptied and cleansed monthly and privies and ashpits every three months."

These resolutions were duly confirmed, and it was admitted that thereafter the respondents carried out the work of scavenging privies, closets, and ashpits within their district, but that they had not at any time cleansed or emptied cesspools.

It was admitted that the appellants had from time to time, at their own expense, both before and after the making of the bye-laws, emptied and cleansed the cesspool down to the time when the question as to whose duty it was to carry out such cleansing and emptying of cesspools was raised by them.

It was admitted that the respondents from the passing of the resolutions of the 6th of September, 1894, provided in their estimates of expenditure for each year a sum for the scavenging of their district; and it was admitted that the appellants as ratepayers had duly paid their quota towards the general district rate.

For the appellants it was contended that the respondents, having undertaken to act under section 42, were bound to cleanse and empty cesspools in their district, and that the whole of the bye-laws made in June, 1890, were abrogated by the resolution of the 6th of September, 1894.

For the respondents it was contended that it was competent in their predecessors to resolve, as they had done, to undertake only part of the duty of scavenging and cleansing referred to in the second paragraph of section 42, and that the bye-law as to the cleansing of cesspools remained in full force and effect. The justices by a majority decided that the respondents' contention was correct in law, and that it was the duty of the appellants to cleanse and empty the cesspool; they therefore convicted the appellants, but stated this case for opinion of the court as to whether they were right in so doing

R. Cunningham Glen, for the appellants.—The respondents had no power to pass a resolution as to part of the things mentioned in the section. The word "and" must be read conjunctively, as the section casts a duty upon the local authority. The local authority cannot themselves say that their own resolution was bad, and the resolution must therefore be taken as covering the whole of the objects mentioned in the section.

Daldy, for the respondents.—The resolution is either bad or good. It is bad if the word "and" should be read conjunctively, in which case the bye-laws remain and the conviction must stand. But the resolution was a good and valid one. It is an enabling statute. It is impossible to think the Legislature

(*a.*) Reported by MAURICE N. DRUCQUER, Esq., Barrister-at-Law.

has not empowered the Local Government Board to order the local authority to undertake only some of the objects.

Lord ALVERSTONE, L.C.J.—I think the substantial question is whether the words in question in sections 42 and 44 of the Public Health Act, 1875, are to be read distributively or not. The point as to the validity of the resolution, if it had been taken before the justices, would, I think, have been a difficulty in the appellants' way; but it is better to deal with the matter upon the merits. In 1890 bye-laws were made dealing with the cleansing of earth-closets, privies, ashpits, and cesspools, and it is not suggested that these bye-laws were invalid. In 1894 the respondents themselves undertook the duty of scavenging earth-closets, privies, and ashpits, and it is argued for the appellants that the legal consequence of that resolution was that the respondents were also obliged to undertake the duty of cleansing cesspools. I have come to the conclusion that we ought not to construe section 44 as making it imperative upon the local authority to make bye-laws dealing with the whole group of things named therein. It is not disputed that if we take that view, the same construction should be placed upon the words in section 42; and as to that section I think it would be a strong thing to decide that the Local Government Board must order the local authority to undertake the cleansing of all these things if they have undertaken the cleansing of any. It would be difficult to contend that the powers of the Local Government Board were to be limited in that way. Section 44 supports the view contended for on behalf of the local authority, particularly those words in it empowering authorities to make bye-laws for the prevention of nuisances arising from snow, filth, dust, ashes, and rubbish. It is perfectly obvious that it may be necessary to have a bye-law as to filth or rubbish, whereas in many places there may be no necessity for a bye-law as to snow or dust. If we could see that the same burden would be imposed upon the local authority in respect of everything in the class named in section 42, it might be right that all these things should be grouped together; but I can conceive that there may be places where it is desirable to distinguish between them. This case affords an instance of that, for the appellant's cesspool receives the drainage from a slaughter-house as well as from stables and a shop. On the whole, the balance of my opinion is in favour of holding that under section 42 the Local Government Board have an option as to ordering, and the local authority have an option as to undertaking all or some only of the duties mentioned in the section, and that the local authority under section 44 can make bye-laws as to some of these things and are not bound to make them as regards all.

RIDLEY, J., concurred.

DARLING, J.—I have felt considerable doubt about this matter. It is possible to read section 42 either conjunctively or distributively. That being so, and not being clear in which way it ought to be read, what influences me in coming to a conclusion in favour of the local authority is this: I can quite imagine the Legislature limiting the discretion of a local authority and saying to them, "If you undertake these duties you must undertake them all"; but section 42 applies equally to the Local Government Board, and I find a difficulty in thinking that the Legislature meant to limit the board in that way—in supposing that the board should not be able to interfere unless it ordered the local authority to undertake the cleansing of all the things mentioned in the section. There is a very wide distinction between this cesspool which is apparently used for trade purposes, and the other things mentioned in the section.

Appeal dismissed.

Solicitors for appellant, *Helliwell, Harby, & Evershed*, for *Jubb, Booth, & Helliwell*, Halifax.

Solicitors for respondents, *Robbins, Billing, & Co.*, for *Longbotham & Sons*, Halifax.

K. B. Div.
(Lord Alverstone, L.C.J., and Lawrance and Darling, JJ.) } July 31; Aug. 3, 4, 1905.

REX v. BRAILSFORD. (a.)

Criminal law—Conspiracy—Indictment—Acts tending to public mischief—Obtaining a passport by false pretences.

Two defendants were found guilty on an indictment which alleged that they unlawfully conspired together to obtain a passport in the name of one defendant for the use of another defendant, to the injury and prejudice of the lawful, free, and customary intercourse existing between inhabitants of this country and of Russia, to the public mischief of the subjects and the endangerment of the continuance of peaceful relations existing between the King and the Czar and their subjects. On a motion in arrest of judgment, on the ground that the obtaining of a passport by false representation was not a criminal act,

Held, that the indictment was good.

At the trial the judge directed the jury that if they found that the defendants did conspire together to obtain a passport by false representation, and that they knew it was to be used by someone else, that those acts constituted a criminal offence.

Held, that the direction was right.

Motion for arrest of judgment.

The defendants H. N. Brailsford and A. H. M. McCulloch were convicted by a jury on an indictment which charged them with conspiring to obtain from the Foreign Office by means of false representations a passport made out in the name of McCulloch for his use in Russia, and with conspiring to send, and sending, the said passport to some unknown person in Russia to be used there by such unknown person "to the public mischief of the King's subjects, and to the endangerment of peaceful relations between the King and the Czar of Russia and their subjects respectively."

A summary of the material allegations in the indictment will be found set out in the judgment of the Lord Chief Justice.

The indictment contained a second count alleging that the defendants had obtained a passport by similar false pretences, but not alleging a conspiracy.

At the trial before Lord Alverstone, L.C.J., and a special jury in the King's Bench Division, the jury found both defendants guilty on the first count of the indictment and the jury were discharged without giving any verdict on the second count. On this verdict judgment was entered for the Crown, but a stay was granted in order that a motion in arrest of judgment might be made to the Divisional Court on the ground that the facts alleged in the first count of the indictment did not amount to a criminal conspiracy.

Sir Robert Reid, K.C. (*J. A. Simon* with him), for the defendants.—No offence known to the law is disclosed in the indictment. The facts disclose no known offence. There is no authority which says that any combination which causes public mischief

(a.) Reported by ALAN HOGG, Esq., Barrister-at-Law.

or endangers public safety is indictable. The court is being asked to create a new offence unknown to the common law.

He referred to *Reg.* v. *Jameson*, [1896] 2 Q. B. 325, and Stephen's History of the Criminal Law, vol. 3, p. 358.

Sir R. Finlay, A.G., and *Sir E. Carson, S.G.* (*H. Sutton. C. W. Mathews*, and *Bodkin* with them).—It is a well-known principle of the common law that acts involving public mischief are indictable. Here is a wrongful act, the attaining of a passport by misrepresentation, the natural consequence of which would be a public mischief. The indictment would have been good against an individual, but at all events it contains all the elements of a criminal conspiracy.

The following cases were cited: *Neeve's case*, 2 East P. C. 281; *Young* v. *Rex*, 3 T. R. 92; *Rex* v. *Dixon*, 3 M. & S. 11; *Reg.* v. *Higgins*, (1885) 2 East 5; *R.* v. *Wheatley*, 2 Burr. 1125; *Rex* v. *Vaughan*, 4 Burr. 2494; *Rex* v. *Berenger*, 3 M. & S. 617; *Mulcahy* v. *Reg.*, L. R. 3 H. L. 303, 17 W. R. Dig. 4; *Reg.* v. *Warburton*, 19 W. R. 165, L. R. 1 C. C. R. 274; *Quinn* v. *Leathem*, 50 W. R. 139, [1901] A. C. 495; *Reg.* v. *Aspinall*, [1896] 2 Q. B. D. 48; and *Reg.* v. *Parnell*, 14 Cox C. C. 505.

Sir Robert Reid, K.C., replied.

Aug. 1.—Motion in the same case for a rule *nisi* to set aside the verdict and judgment for the Crown on the grounds of misdirection and misrepresentation of evidence, and on the ground that there was no sufficient evidence in support of the indictment. The evidence given on behalf of the Crown went to prove the following facts: That the defendants combined and conspired together to obtain, and they did in fact obtain, from the Foreign Office by false and fraudulent representations a passport in the name of the defendant McCulloch for his use in Russia with the intent that it should be used by some other person, and that in fact, that it was so used with their knowledge and consent. It appeared that the passport, some months after it had been issued, was found on the body of a man who had been killed by the explosion of a bomb in his room at an hotel in St. Petersburg. In the course of his summing up to the jury the Lord Chief Justice directed them that if as a matter of fact they found that the defendants agreed between themselves, or one agreed with the other or some other person, to commit this act, then the offence in the indictment would be proved. They had to take the law from him, and he directed them that if they were satisfied that these defendants did conspire to do that which had been described to them by the Attorney-General to obtain this passport, that that was a criminal offence. During the course of the trial the Crown tendered in evidence a statement made in writing by the defendant McCulloch and given to an inspector of the Metropolitan Police who was making inquiries about the matter. The defendants' counsel objected to the admission of this evidence that McCulloch had been induced to make the statement by reason of the inspector telling him that there would be no prosecution. The Lord Chief Justice admitted the statement in evidence.

Sir Robert Reid, K.C. (*J. A. Simon* with him), in support of the motion.—The question of whether there was an intention to cause a public mischief should have been left to the jury. No evidence as to whether the acts did in fact cause a public mischief was given. The Lord Chief Justice was wrong in directing the jury that if they found the defendants did conspire to obtain a passport for a third person then a criminal offence had been committed. The statement of the defendant McCulloch was wrongly admitted in evidence.

Lord ALVERSTONE, L.C.J., read the following judgment of the court: This is a motion in arrest of judgment upon an indictment against Henry Noel Brailsford and Arthur Henry Muir McCulloch, against whom a jury found a verdict of guilty on the first count of an indictment in respect of a conspiracy to obtain a passport from the Foreign Office in the name of McCulloch to be used by another person. It is not necessary to repeat at length the allegations in the indictment; its scheme may be summarized as follows: It sets out the practice with regard to passports and the conditions upon which they are issued; it alleges a conspiracy between the defendants and other persons not known to obtain by false and fraudulent pretences and misrepresentations a passport in the name of Arthur Henry Muir McCulloch; it alleges the sending in of the necessary documents by Brailsford and McCulloch in the name of McCulloch, and the issuing of the passport thereon. It then alleges the use of the passport by other persons not known and concludes with the following averment: "And the said other persons whose names are unknown, in further pursuance of the said conspiracy, combination, confederacy, and agreement, did send and cause and procure to be sent the said passport lastly hereinbefore set forth, having then thereon the *visé* and signature of the said Russian Consul-General, out of the United Kingdom to a certain person or persons unknown for use when in Russia by a certain person whose name is unknown other than the said Arthur Henry Muir McCulloch, with the intent and purpose that the said passport should be so used in the dominions of the Czar of Russia by the said person whose name is unknown as aforesaid to the evil example of all others in the like case offending in contempt of our said Lord the King and his laws in fraud of the said regulations issued by and with the authority of the said Principal Secretary of State for Foreign Affairs, to the injury and prejudice and disturbance of the lawful, free, and customary intercourse existing between the liege subjects of our said Lord the King and the subjects of the said Czar of Russia, to the public mischief of the said liege subjects and to the endangerment of the continuance of the peaceful relations between our said Lord the King and the said Czar of Russia and their subjects respectively, and against the peace of our said Lord the King, his Crown and dignity."

The indictment contained a second count alleging as an offence the obtaining of a passport by similar false pretences, but without any allegation of conspiracy. The jury, as already stated, found both defendants guilty on the first count and said that they had not considered the second count, and I discharged them without their finding a verdict thereon. It was argued in arrest of judgment by Sir Robert Reid, on behalf of the defendants, that the count of the indictment upon which the defendants were found guilty was bad in law, as disclosing no indictable offence, and also on the ground that the act done—namely, the obtaining of a passport by a false representation—although an improper act, was not a criminal act or an indictable misdemeanour at common law and that the conspiracy to obtain such passport was not an indictable misdemeanour. We are clearly of opinion that the count is good and that the conviction must stand; but in deference to the arguments of Sir Robert Reid, and as the point has never arisen directly before, we think it right to state the reasons for our decision. It is not necessary for us to decide whether

apart from conspiracy the obtaining of a passport by false pretences—namely, by alleging that it was required for the use and protection of A. B., whereas it is in fact intended to be used by some third person, not known or recommended to the Foreign Office—is of itself a misdemeanour; but as the question has some bearing upon the validity of the conviction on the first count we desire to make a few observations thereon. It will be well to consider what a passport really is. It is a document issued in the name of the Sovereign, on the responsibility of a Minister of the Crown to a named individual, intended to be presented to the Governments of foreign nations, and to be used for that individual's protection as a British subject in foreign countries, and it depends for its validity upon the fact that the Foreign Office, in an official document, vouches the respectability of the person named. Passports have been known and recognized as official documents for more than three centuries, and in the event of war breaking out become documents which may be necessary for the protection of the bearer, if the subject of a neutral state, as against the officials of the belligerents, and in the times of peace in some countries, as in Russia, they are required to be carried by all travellers. It is not necessary to do more than to remember certain incidents in the nineteenth century to see what grave international questions might arise in the event of a person who holds a passport receiving ill-treatment in a foreign country. It cannot, of course, be maintained that every fraud and cheat constitutes an offence against the criminal law but the distinction between acts which are merely improper and criminal and those which tend to produce a public mischief has long been recognized. The cases cited by the Attorney-General—*Rex* v. *Higgins*, *Rex* v. *Wheatley*, and *Young* v. *Rex*—are authorities for this view. They are supported by the reasoning in the judgment in *Rex* v. *Berenger*, *Rex* v. *Dixon*, and *Neeve's case*, and a reference to the original record of the decisions of the judges which is in the possession of the Lord Chief Justice shows that *Neeve's case* did not depend upon the ground given at p. 822 of 2 East P. C. The whole chapter under the title of Cheats in that work is worthy of perusal. It is, however, unnecessary to consider this point further because we are clearly of opinion that the act done—namely, the obtaining of a passport by a false pretence is an act of the kind which would render a conspiracy to carry it into effect, unlawful and we think that both defendants have been rightly convicted of criminal conspiracy. Whatever attempts have been made from time to time to strain the law of conspiracy or to bring within its purview combination to which no objection could be taken when done by a single individual, no question of that kind arises in this case. For a great many years it has been the law of England that conspiracy consists "in the agreement of two or more to do an unlawful act or to do a lawful act by unlawful means. So long as such a design rests in intention only it is indictable. When two agree to carry it into effect the very plot is an act in itself, and the act of each of the parties . . . punishable, if for a criminal object, or for the use of criminal means": *Mulcahy* v. *Rex*. This definition was expressly approved by the House of Lords in *Quinn* v. *Leathem*. It cannot seriously be disputed that the obtaining of a passport from the Foreign Office by the false statement that it was required for a person named therein, and recommended to the Foreign Office, with the intent that it should be used by another and different person who has not been recommended, is a cheat and conspiracy to deceive the Foreign Office, and obtaining the document by means thereof is a criminal conspiracy. We are therefore clearly of opinion that the first count of the indictment upon which the defendants were found guilty is good and the conviction stands. In addition to the objection taken on motion in arrest of judgment a motion was made by Sir Robert Reid in arrest of judgment on Tuesday last, for a new trial upon the ground that there was no sufficient evidence in support of the indictment, and that the jury had been misdirected in that it had not been left to them to find that the act done might tend to public mischief. Without saying that there cannot be acts upon which an innocent construction might be put or that in some cases it might not be for the jury to find as a fact whether the party was innocent or not, we are clearly of opinion that no such argument can possibly be urged in this case. In criminal as well as in civil cases persons are responsible for the natural consequences of their acts. It was not disputed that there was abundant evidence that the defendants did combine to obtain a passport in the name of McCulloch with the intent that it should be used in Russia by some other individual, and that in fact it was so used with their knowledge and consent. We are of opinion that it is for the court to direct a jury as to whether such an act may tend to the public mischief, and that it is not in such a case an issue of fact upon which evidence can be given. Assuming the matter to relate to the issue of a public document by a public department of State, and it is obtained by a false representation for an improper purpose—*i.e.*, for use by a different person passing himself as the *bonâ fide* holder—we are of opinion that it is injurious to the public and tends to bring about a public mischief. It is scarcely necessary to cite authority, but we would call attention to the reasoning of Lord Mansfield in *Rex* v. *Vaughan*. A further point was raised, as to the misreception of evidence. We are clearly of opinion that the evidence of McCulloch was admissible, there being no evidence that the statement was otherwise than voluntary, and nothing to bring the case within the rule laid down in *Reg.* v. *Thompson*, on which ground the Lord Chief Justice had excluded a letter written by Brailsford to the other defendant. For these reasons the conviction must stand.

Conviction upheld.

Solicitor for the prosecutors, *Solicitor to the Treasury.*

Solicitors for the defendants, *Radford & Frankland.*

Privy Council.

(*On appeal from the Supreme Court of Victoria.*)

Nov. 7.

HAWTHORN CITY (MAYOR) v. KANNULUIK. (*a.*)

Negligence—Construction of drain—Overflow on neighbouring land—Trespass—Municipal authorities' liability—Statutory powers.

In 1889 *the appellant corporation, under their statutory powers, took over the care and management of a water-course and made it into a public drain. Later on there was an overflow over the respondent's land, which adjoins the drain, and this was occasioned by the then insufficiency of the drainage, though the works were large enough for the purpose in* 1889.

Held, that the corporation had acted negligently, and

(*a.*) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

were liable in damages for the injury caused to respondent's land owing to the overflow.

This was an appeal from the Supreme Court of Victoria.

The action was for trespass owing to the overflow of a main and other drains over respondent's land.

The facts are given in their lordships' judgment.

Danckwerts, K.C., and *M. L. Romer*, for the appellants.

Hugo Young, K.C., and *W. O. Hodges*, for the respondent.

The judgment of their lordships (Lords MACNAGHTEN, DAVEY, JAMES OF HEREFORD, and Sir ARTHUR WILSON) was delivered by

Lord MACNAGHTEN.—The conduit in the city of Hawthorn, which is now known as the "main drain" and for the most part is an open sewer, was formerly a natural watercourse receiving and carrying off nothing but the surplus storm-water of a hilly district about five hundred acres in extent. This district or drainage area, as it may be termed, has been divided between the municipalities of Hawthorn, Kew, and Boroondara. Hawthorn has about half The rest is comprised within the limits of the other two municipalities in nearly equal proportions. Kew on the north and Boroondara on the north-east and east are at rather a higher level and naturally drain through Hawthorn.

In 1888 the plaintiff Jaan Kannuluik purchased a plot of ground abutting on the watercourse at its lowest point in Hawthorn, just where it turns to the south with a sharp bend after passing under Auburn-road. From a contour plan of the drainage area it appears that the fall to this point is not less than 140 feet.

In 1889 the municipal authorities of Hawthorn under their statutory powers took over the care and management of this watercourse and made it into a public drain. They spent a good deal of money upon it in the way of improvement at intervals down to to the year 1896. The work was done in sections. The section adjoining Kannuluik's property was pitched and finished in 1889. A number of subsidiary channels have since been made by the municipal authorities of Hawthorn, or with their permission, for the purpose of running off the storm-water and sewage into the main drain. The result is that the water and sewage from the upper parts of Hawthorn and from the parts of Kew and Boroondara which drain through Hawthorn are concentrated and poured into the main drain with great violence. When there is heavy rain the flush of water is so great and so sudden that the channel becomes choked. There is an overflow, and when the flood subsides, the low-lying lands, and Mr. Kannuluik's premises in particular, the ground-floor of his dwelling-house and the surface of his garden, are covered with an offensive mixture of sewage and slime.

After several ineffectual complaints, Mr. Kannuluik brought this action against against the municipality of Hawthorn. The case was tried by Williams, J., without a jury. It occupied no less than seven days. The learned judge found in favour of the plaintiff and assessed the damages at £250.

On appeal the full court affirmed the judgment of Williams, J., but not altogether on the same grounds. The learned judge who tried the case relied principally, though not entirely, on faulty construction in 1889. In the full court, where the leading judgment was given by Holroyd, J., the decision turned rather on the subsequent acts and conduct of the municipal authorities.

Their lordships agree with Holroyd, J. The case seems to be a very simple one. The only question is, Have the municipal authorities acted negligently so as to do unnecessary damage to Mr. Kannuluik?

As for negligence, it is difficult to imagine a more conspicuous example of negligence than is shown by repeatedly pouring offensive stuff into a receptacle or channel proved over and over again to be insufficient to hold it and pass it on. The municipal authorities might just as well pour this stuff directly on the plaintiff's land. The damage to the plaintiff cannot be denied. It is nothing to the purpose, even if it be true, to say that the property in the plaintiff's hands and in the hands of his predecessors in title was often flooded before the municipal authorities turned the watercourse into a public drain. Nor is it enough to prove that the work done in 1889 was sufficient at the time. It is insufficient now. It has been insufficient for some time past. The mischief grows as building increases, as new roads are made, new channels formed, and more and more of the surface becomes impervious to rainfall. It is not suggested that there is any real difficulty in remedying the mischief. Indeed, if the evidence of the surveyors called on behalf of the plaintiff may be trusted, the matter can be set right at a very trifling cost.

Their lordships will humbly advise his Majesty that the appeal ought to be dismissed.

The appellants will pay the costs of the appeal.

Solicitors, *Roy & Cartwright; Lee, Ockerby, & Everington.*

Court of Appeal.

From Chan. Div. (Collins, M.R., and Romer and Cozens-Hardy, L.JJ.) — Jan. 16.

In re NESBITT AND POTTS' CONTRACT. (*a.*)

Vendor and purchaser—Specific performance—Title—Possessory title—Restrictive covenant—Notice—Purchaser for value—Real Property Limitation Act, 1833 (3 & 4 *Will.* 4, *c.* 27), *s.* 34.

A restrictive covenant is in the nature of an equitable easement over land, and is binding on the land into whoever's hands it comes, except in the case of a purchaser for value without notice. A trespasser, therefore, who acquires a title to land by virtue of the Statute of Limitations is bound by any restrictive covenant affecting such land, both before and after the expiration of the statutory period, and a purchaser from him is affected with constructive notice of the covenant if he accepts less than a forty years' title, being content to make no inquiry as to title before the date when his vendor's possession began.

Judgment of Farwell, J. (53 *W. R.* 297, [1905] 1 *Ch.* 391), *affirmed.*

This was an appeal from a decision of Farwell, J. (reported 53 W. R. 297, [1905] 1 Ch. 391).

By a contract in writing dated the 1st of January, 1903, F. V. Nesbitt agreed to sell to S. L. Potts a piece of land at Leytonstone for £3,200.

The contract provided that the title should begin with a conveyance dated the 11th of August, 1890, and that the purchaser should be deemed to have full notice of its contents.

An abstract was delivered on the 10th of February, 1904. It commenced with the conveyance referred to in the contract, which was a conveyance from

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

Thos. Headde to S. C. Davis, I. Davis, and L. Levy as joint tenants in fee simple. The recitals showed that the property had formerly been in the possession of Wm. T. T. Kidd, and that Thos. Headde had acquired a statutory title by the possession of the property by himself and his father for thirteen years after Kidd's death.

The only other abstracted deeds were a conveyance by S. C. Davis of his share in the property to L. Levy and the conveyance to the vendor, which was dated the 29th of November, 1901, and made by I. Davis and L. Levy.

On the occasion of his purchase the present vendor had produced to him a statutory declaration of the possession of Thos. Headde and his father for thirteen years before the 11th of August, 1890, and their successors in title since that date without interruption or any acknowledgment of the title of any person claiming under Kidd.

The abstract did not show the existence of any restrictive covenants affecting the user of the land but the purchaser ascertained *aliunde* that the property was subject to restrictive covenants contained in an indenture of the 9th of November, 1867. He accordingly made a requisition to the effect that he must be satisfied that these restrictions did not exist or he would be compelled to rescind the contract. The vendor answered this requisition: "The vendor purchased without notice, and, having regard to this and the fact that the title is one by adverse possession, these covenants do not now bind the land." In the interval between the delivery of the requisitions and that of the answers the purchaser received a letter from a solicitor on behalf of other freeholders on the estate threatening proceedings for an injunction to restrain any breach of the covenants. He then ascertained that covenants similar to those contained in the deed of 1867 had been entered into by Kidd in the conveyance to him in 1872.

The present vendor on his purchase had accepted a title commencing in 1878. He had no actual notice of the covenants, but would have obtained notice if he had insisted on a forty years' title.

The purchaser took out a summons asking for a declaration that the purchaser's objections to the title had not been sufficiently answered, or, alternatively, that the title shown was not one which the purchaser ought to be compelled to accept, and for a return of the deposit.

Farwell, J., held that the vendor had not shown a title.

The vendor appealed.

Jenkins, K.C., and *Macklin*, for the vendor, the appellant.—Farwell, J., held that these covenants ran with the land in accordance with the doctrine in *Tulk* v. *Moxhay*, 2 Ph. 774, and that we are bound by them. Our title is not derived, however, from any person who derived title under the covenantor, but from Headde, who had obtained a statutory title by possession. So far in every case of this kind the title has been derived from the covenantor. In this case the Statute of Limitations creates a parliamentary title and the person possessing the parliamentary title ceases to be bound by the covenant, at any rate as soon as the estate of the covenantor fails. The *dictum* of Jessel, M.R., in *London and South-Western Railway Co.* v. *Gomm*, 30 W. R. 620, 20 Ch. D. 652, is doubtless against that view, but we submit that this *dictum* is inconsistent with the later cases of *Hall* v. *Ewin*, 36 W. R. 84, 37 Ch. D. 74, and *Clegg* v. *Hands*, 38 W. R. 433, 44 Ch. D. 503. In any case the vendor derived title through a purchaser for value without notice. This is merely an equitable right derived from a contract. The vendor obtained the legal estate, and this is a protection against equitable interests: *Bailey* v. *Barnes*, 42 W. R. 66, [1894] 1 Ch. 25. A person claiming the legal estate by actual disseisin, without collusion with the trustee, will not be bound by the trust: Gilbert on Uses, p. 429. There can be no distinction between equities arising on trusts and equities arising on contracts.

Upjohn, K.C., and *Jessel*, for the respondent.—A restrictive covenant is in the nature of an equitable easement: *London and South-Western Railway Co.* v. *Gomm*. This view was followed in both *Rogers* v. *Hosegood*, 48 W. R. 659, [1900] 2 Ch. 405, and *Formby* v. *Barker*, 51 W. R. 646, [1903] 2 Ch. 539. A trespasser cannot get rid of an easement by acquiring a title under the Statute of Limitations, and the restrictive covenant being in the nature of an easement is equally binding. Then as to the question of notice, a purchaser is bound to make reasonable inquiries: Conveyancing Act, 1882, s. 3. He has not discharged this duty unless he requires the usual title—that is to say, forty years: *In re Cox and Neve*, 39 W. R. 412, [1891] 2 Ch. 109. The fact that he was purchasing a possessory title did not bind the purchaser to accept less than a forty years' title: *Jacobs* v. *Revell*, 49 W. R. 109, [1900] 2 Ch. 859. If, therefore, he chose to accept less than the full title, he is affected with notice of all he would have learnt if he had made proper investigations.

Macklin replied.

The following cases were also referred to in the course of the argument: *Keates* v. *Lyon*, 17 W. R. 338, 4 Ch. App. 218; *Maclean* v. *Mackay*, 29 W. R. 798; *Leech* v. *Schweder*, 22 W. R. 633, 9 Ch. App. 463; *Mander* v. *Falcke*, 40 W. R. 31, [1891] 2 Ch. 554; *Wilson* v. *Hart*, 14 W. R. 748, 1 Ch. App. 467; *Patman* v. *Harland*, 29 W. R. 707, 17 Ch. D. 353; *Tichborne* v. *Weir*, 67 L. T. 735, 41 W. R. Dig. 120; *Jackson* v. *Rowe*, 2 S. & Sm. 472; *Ecclesiastical Commissioners* v. *Parr*, 42 W. R. 561, [1894] 2 Q. B. 420; *Burrows* v. *McCreight*, 1 J. & L. 290; *Bolling* v. *Hobday*, 31 W. R. 9; *Haywood* v. *Brunswick Building Society*, 30 W. R. 299, 8 Q. B. D. 403.

COLLINS, M.R.—This is an appeal from a decision of Farwell, J. It has been most clearly and succinctly argued on the part of the appellant, but I have come to the conclusion myself that the learned judge's judgment is right, and, in point of fact, so exhaustive does his judgment appear to me to be that I should not venture to add or substitute anything of my own, except that I feel bound, in deference to the very able arguments which have been addressed to us, to give my decision in my own language.

The question arises in this way: The vendor seeks to have it declared that he has made a title which the purchaser ought to accept. What the vendor bought was what he himself describes in his affidavit as a squatter's title. A certain person had remained in possession of land for more than the statutory period, beginning somewhere, I think, about 1878, so that, at the end of the necessary time, he had acquired such right as arises under the Statute of Limitations in favour of a person who has occupied land for the statutory time, with the result that the title of the true owner is extinguished. Now this purchaser of that squatter's title contented himself with a squatter's title—that is to say, he contented himself with limiting his inquiries to the state of things subsequent to 1878. But when the title was being investigated by the present purchaser, he ascertained, not from any materials actually placed before him in the consideration of the title, but from independent information, that, in point of fact the person who had been dispossessed by the squatter had in the year

1872, being then the owner of the land in question, entered into a covenant with the owner of the adjoining land whereby certain restrictions were placed on the user of the land in question in the matter of building. Having notice of this covenant, the purchaser addressed a requisition based upon it to the vendor, with the result that the vendor contended two things: first of all, that it was a matter that he was absolutely unconcerned with; that any right claimed as arising, or asserted as existing, under something done by a predecessor—meaning thereby not a predecessor in the proper sense of the term, but the person whose right was extinguished as against the squatter—had ceased to exist by virtue of the Statute of Limitations, the squatter under whom the vendor claimed having acquired a title paramount to any preceding covenants or obligations accepted or imposed by the owner of this property, so that he was able to pass the property entirely free from any obligations incurred by former owners. That, inasmuch as the present vendor was a purchaser from the squatter, he received the land discharged from those obligations, and was able to pass it on to his purchaser, and therefore it was a matter not material to the discussion whether or not a former owner had imposed that obligation upon himself and upon the land. That was one point; the second point was that, even if it were the fact that what the owner of the land had done was effectual to create a burden under certain conditions, the vendor, at the time when he purchased from the squatter, was himself a purchaser for value, and that even if the squatter himself had not come in, as I have already said, entirely freed from any obligation, but this obligation passed through the squatter on to the purchaser from the squatter, still, unless that purchaser was a purchaser with notice of the burden, he was discharged from it; and it was contended that the present vendor Nesbitt in this case had neither actual nor constructive notice of the burden. That is the second point.

With regard to the first point the question really turns upon this, whether or not the effect of the Statute of Limitations was to vest in the squatter, at the expiration of the statutory period, the land in question discharged from the obligation of the covenant which had been created by the owner whose title was extinguished. Unless that is so, the burden of that covenant was on the land to which the squatter had become entitled simply through the extinction of the right of anybody else to turn him out, and this burden being imposed on the land notwithstanding his acquisition of it, every person who took that land would take it subject to the obligation of that covenant, unless he could prove that he was a purchaser for value without notice. Now whether or not that burden was imposed upon the land in the hands of the squatter depends upon the nature of the obligation created by a restrictive covenant entered into by the owner of the land. That such a covenant was entered into by the owner of the land whose right was afterwards extinguished, before his right was extinguished, there can be no doubt whatever; and if the right created by that covenant is what the late Master of the Rolls, Sir George Jessel, treated it as being—namely, a right in the nature of a negative easement, then it is not contended, or hardly contended, by the appellant here that a right of this nature would have been extinguished on the acquisition of the land by the squatter. It was admitted that a squatter could not take land freed from positive legal easements, and I understand it to be admitted also that if the right arising by virtue of the restrictive covenant was such as Sir George Jessel treated it—that is, analogous to a negative easement—then the squatter would take subject to the paramount right created by the obligation imposed by the covenant which adhered to the land and which bound those persons who became assignees of or acquired in any way a title to the land. It is suggested that the squatter was never an assignee—he was never a purchaser—and that, therefore, he does not come under the condition that a purchaser for value with notice is bound; but that he is a person who takes by a title given to him by law, which, it is asserted, is paramount to and overrides any such obligation as would have attached if the property had passed merely by assignment, so that the squatter coming in by operation of law takes independently of and freed from all such collateral obligations.

Now, that must depend upon the statute itself. Therefore we have got to see what the machinery of the statute is, and what, in point of fact, it effects. Now the Statute of Limitations, as one would expect, does not purport to annul by lapse of time any rights other than those which persons might have and ought to have exercised during the time. The statute does not begin to run in any case against a person until that person has been put to what is generally called his right of entry. Unless the circumstances have been such as to put the person who is to be barred by the lapse of time, upon the assertion of his right the time does not begin to run against him. All that the statute does is this: By section 34 it says this, "At the determination of the period limited by this Act to any person for making an entry or distress, or bringing any writ of *quare impedit* or other action or suit, the right and title of such person to the land, rent, or advowson, for the recovery whereof such entry, distress, action, or suit respectively might have been made or brought within such period shall be extinguished." That is the whole right that the squatter gets, the extinction of a title adverse to his own; but how does that affect the question here? What machinery is there in the Statute of Limitations which would affect the right of a covenantee having the benefit of a restrictive covenant? Nothing has been pointed out in the Act which touches it at all. There is no reason, to begin with, in principle, why it should be touched, because unless and until the right of that person has been in some way impinged upon, so that he has been called upon to exercise his rights, it would be clearly unfair that his rights should be affected. A person who stands simply with the benefit of a negative easement is certainly not put upon the assertion of his right unless and until that right has been interfered with in some way. It is a matter of absolute indifference to the person who owns the benefit of that obligation, who is the owner of that adjoining land over which that right exists, until that land has been used in some manner incompatible with his right. It seems to me, therefore, that the principal point of the discussion here is whether or not Sir George Jessel was right in the view that he took, that an obligation created by a restrictive covenant is in the nature of a negative easement creating a paramount right in the person entitled, over the land to which it relates. If that is so, then this gentleman by his squatting simply acquired a right to land subject to this incident; and then, of course, the burden of that incident would pass to all persons who become assignees of the land, and the squatter is not entitled to hand it over freed from that obligation.

Now, is that the law or not? To begin with, I do not think there was anything inconsistent with that view in the law as laid down in the leading case of *Tulk* v. *Moxhay*, though no doubt words are used there pointing to the equity as arising from the injustice which would accrue if a person getting land

at a reduced price by reason of a restriction being accepted, were afterwards able to pass that land to other persons freed from that obligation, receiving in return a fair price. That element, no doubt, does enter into the discussion when we come to criticize, as we always have to criticize, the position of a person who acquires for value a legal estate in that land. The right created is an equitable right, capable of being defeated by a person who acquires the legal estate for value, and therefore the question arises whether, in the circumstances of the case, there is something which would make it inequitable for that person to avail himself of his legal estate. That, as pointed out by counsel for the respondents, is an inquiry which is inevitable in cases where you are dealing with equitable rights and legal estates. But that does not in the least prevent the right in question being what Sir George Jessel considered it to be —namely, a burden imposed upon the land, and passing with the land, subject, of course, to this: That it might be defeated by a purchaser for value without notice, but in order to defeat it the burden would be upon the person who took the land to show that he had acquired it under such conditions as to defeat the right as against him—namely, that he had acquired it for value and without notice.

Now, that being Sir George Jessel's view in *Gomm's case*, it seems to me that that view has been adopted more than once in this court—particularly in the case of *Rogers* v. *Hosegood*, that has been cited, although the point that arose in that case was, strictly, the running of the benefit, and not the running of the burden, as has been pointed out by the learned counsel for the appellant. Still, I think the principle which was dealt with there was not one limited only to the running of the benefit, but also dealt with the running of the burden, and I cannot help thinking that the court there did guide themselves by, and adopt, as expressing the true view in this matter, the view taken by Sir George Jessel in *Gomm's case*. It seems to me, therefore, that that view stands, not only on the great authority of Sir George Jessel, but it has also the authority of this court, not only in the case of *Rogers* v. *Hosegood*, but also in the later case of *Formby* v. *Barker*, which was cited to us this morning, and I think also in *Haywood's case*. It seems to me, therefore, that the law is clearly established in accordance with Sir George Jessel's view of that matter, and that this burden did remain on the land binding any person who could not show that he had bought for value and without notice. Therefore the squatter's title does not help the plaintiff in this case.

Now that brings us to the second point: Has the plaintiff here shown — and the burden is upon him to show—that having bought for value he has bought without notice of this incumbrance? Now there again it seems to me quite clear he has not discharged that burden. He admits that he accepted a title commencing in 1878. He was entitled to demand a title of forty years, and it seems perfectly clear that if he had insisted upon a title of forty years he must have had before him the existence of a covenant made as late as 1872 by the person whose title was displaced and extinguished, in the words of the statute, by possession for the statutory period by the person through whom the vendor now claims. That is equivalent to notice. In point of fact, by reasonable care in demanding the title to which he was reasonably entitled, he must have discovered the fact that there was this burden, and, if so, he must be taken as having had constructive notice of it. It is not even necessary to go as far as that, because I agree with Farwell, J., in this, as in all other points of the case, that the burden being upon the purchaser to show that he had bought for value without notice, he has not discharged that burden by simply stating "I did not push my inquiries beyond that." Whether he could have discovered it or not I do not know. I believe that is in doubt. But that does not seem to me to discharge the burden, if the burden is shown, and therefore it appears to me, on all grounds, that the vendor is not in a position to enforce the purchase against the purchaser, and therefore the appeal fails.

ROMER, L.J.—I also have come to the same conclusion as arrived at by Farwell, J., and for the reasons given in his very clear judgment. I also agree with what the Master of the Rolls has said, and I might be contented with leaving the case as stated in those two judgments, but, having regard to their importance, I desire to add a few words of my own upon certain of the points that arise in the case.

In the first place, with regard to the general doctrine concerning a negative covenant, such as we are dealing with in this case, I think that whatever reasons may have been given for the doctrine in the earlier cases, and notwithstanding the way in which the doctrine has been referred to in some judgments in early cases, yet at the present day the doctrine ought to be regarded as well settled. I think the law is that such a covenant, when validly created, binds the land in equity, and can be enforced against subsequent owners of the land, subject only to the limitations that, being an equity, it cannot be enforced as against a *bonâ fide* purchaser of the land, that is to say, of the legal estate, without notice. This was clearly pointed out by Jessel, M.R., in the case of *London and South-Western Railway Co.* v. *Gomm*, where, at p. 583 of the report, he says: "The doctrine, rightly considered, appears to me to be either an extension in equity of the doctrine of *Spencer's case* to another line of cases, or else an an extension in equity of the doctrine of negative easements, such, for instance, as a right to the access of light, which prevents the owner of the servient tenement from building to obstruct the light." And he says: "This is an equitable doctrine, establishing an exception to the rules of common law which did not treat such a covenant as running with the land, and it does not matter whether it proceeds on analogy to a covenant running with the land or on analogy to an easement. The purchaser took the estate subject to the equitable burden, with the qualification that if he acquired the legal estate for value without notice he was freed from the burden." The qualification, however, did not affect the nature of the burden; the notice was required merely to avoid the effect of the legal estate, and did not create the right, and if the purchaser took only an equitable estate he took subject to the burden whether "he had notice or not." As pointed out by my lord, in subsequent cases that view of the law has been adopted by this court. Indeed, to hold otherwise would lead to a result which, in my opinion, would be lamentable, for according to the contention of the appellant, it would result that, while any person in occupation of the land, claiming through the covenantor, even though only a tenant from year to year, or a mere occupant by permission, would be bound by the the covenant, yet a squatter going into occupation without any right or any permission of the true owner could say that, as between him and the covenantee, the land was freed from the covenant. In other words, he could as against the covenantee successfully plead his own trespass as putting him in a better position than if he had gone upon the land by right. I cannot think that the law necessitates any such result. On the contrary, as I have said, in my opinion the negative covenant does bind the land in equity,

and I think that with regard to a squatter dealing in the first place with the time before that squatter has acquired any statutory right by lapse of time, inasmuch as he could not say he was a purchaser of a legal estate without notice, he would be bound by the covenant during his squatting, and that the covenant could be enforced against him if he sought to break it at the instance and on behalf of the covenantee. Now, that being, in my opinion, the position of the squatter before he has acquired a statutory right under the Statute of Limitations, let me consider what would be the position of the squatter after a twelve years' occupation under the statute. By that occupation he has no doubt acquired a statutory title as against the covenantor, or the heirs or assigns of the covenantor, who during those twelve years has or have been so remiss as not to eject him; but he does not thereby of necessity become entitled to hold the land free from the obligation of the negative covenant. That obligation was one existing against the title of the true owners of the land The right of the true owner, no doubt, has gone as against the successful squatter, who has acquired a title against him under the statute, but the equitable right of the covenantee still exists. It was not a right that could be barred by the operation of the Statute of Limitations in favour of the statutory squatting owner. The covenantee was not an assign of the land, or of any part of the land, or of any estate in the land which was capable of being barred by the operation of the Statute of Limitations; nor was the covenantor a trustee in any sense of the land for the covenantee, or of any part of it, or of any estate in it. The covenantee could not, directly or indirectly, by any person representing him and his right, in respect of that right under the restrictive covenant, take proceedings to recover possession against the squatter during the twelve years, and, in the case I am considering, the covenantee would, in my opinion, be no more barred by the operation of the Statute of Limitations by not taking proceedings against the squatter during the twelve years than he would have been barred by not taking proceedings against the true owner had that true owner remained in possession during that period. There is a fallacy, as it appears to me, in the argument of the appellant, and I think it is this: The argument seems to assume that the statutory owner becomes, at the end of the statutory period of limitation, in the same position as if he had ousted by statutory title all the prior owners of the estate so as to destroy all negative covenants validly created by them. That is not so. If A. being really entitled to land ousts by his superior good title one B. who has created restrictive covenants, or purported to create them, at a time when B.'s title was bad as against A., then, of course, when A recovers possession he is not bound by the restrictive covenants, for they were not originally validly created as against him (A.); but if A. is admittedly the true owner in fee in possession of the land at the time when he enters into valid restrictive covenants binding the land in equity, then a subsequent squatter, even when he ultimately by twelve years' occupation becomes entitled to the land as against A., or his heirs or assigns, cannot say or be heard to say that A. had no right to enter into the covenants originally, or that those covenants never had any validity as against him, the squatter, or ceased to have validity directly the twelve years elapsed. And certainly a squatter, who, if he did not know of the restrictive covenants validly entered into by the true owner, at best could only say that he did not know of them then, because he made no inquiry as to the title before he squatted, cannot say that he is in the position of a purchaser of the land for value without notice. So to hold would, in my opinion, be most unjust towards the covenantee, and lead to what appears to me would be most undesirable consequences affecting many estates in this country now usefully regulated by such restrictive covenants as I am considering. That being so, it remains to be considered whether, in the present case, the vendor, or his vendor, was a purchaser for value without notice. Now, in my opinion, if a purchaser chooses, either by agreement with the vendor or otherwise, to take less than a forty years' title, he cannot by so restricting his investigation, and by not inquiring into the title for the part of the period I have referred to, say that he was not affected with notice of equities affecting the land that he would have ascertained by reasonable inquiries into that part of the title. The appellant seems to contend that the case where a vendor has acquired a title merely by possession under the Statute of Limitations is to be treated as an exception to the rule I have indicated, and that a trespasser who has acquired a good title by successful trespass for twelve years or more is not bound, or should be treated as not being bound, to make any inquiries whatever as to an earlier title, but is to be treated as if he were in the position of a person who had purchased without notice after making proper inquiry as to title. I cannot agree with that contention of the appellant. I cannot see why a successful trespasser for twelve years, or a purchaser from him, should be placed in a better position than an ordinary owner or vendor, or a purchaser from such ordinary vendor. I do not see that he is entitled to be regarded as being in any peculiarly favoured position. That being so, in the present case neither the present vendor nor the vendor to him can say he was a purchaser without notice. If the present vendor or his vendor had insisted on a proper title, in regard to length, being given to him, or had made proper inquiries into that title, it is clear that he must have ascertained the existence of the negative covenants in question. It certainly is, in my opinion, for the vendor in this case to prove the plea of purchaser for value without notice on his behalf, or on behalf of the vendor to him. He has not discharged the onus cast upon him. For these reasons I think the appeals fails.

COZENS-HARDY, L.J.—I am of the same opinion, and I so entirely agree with all that was said by Farwell, J., in his judgment, and with the judgment of the Master of the Rolls and Romer, L.J., that I almost doubt whether I ought to occupy even a few minutes of the time of the court, but having regard to the great importance of the case, perhaps it is right that I should add a few words.

The suggestion which is at the root of the appellant's argument is this: That a squatter can wholly disregard restrictive covenants affecting the building estate. That is so startling a proposition, and so wide reaching, that it must be wrong. The value of estates in the neighbourhood of London and all large towns, and the amenity of those estates, depends almost entirely upon the continuance of the mutual restrictive covenants affecting the user and the enjoyment of the property, and when we are told that the squatter, notwithstanding that he is a mere trespasser, is to be in a different and a better position from that occupied by a person deriving a title strictly through the original covenantor, one feels that there must be an answer to the argument, and I think the elaborate discussion and investigation of the authorities makes the answer quite plain. A restrictive covenant of this kind, or rather the benefit of a restrictive covenant of this kind, is a paramount right of the nature of a negative easement not in any way

capable of being affected by the provisions of the Statute of Limitations on which the squatter relies. The only rights extinguished for the benefit of the squatter under section 34 are those of persons who might have brought during the statutory period, but did not in fact bring, an action to recover possession of the land. But the person entitled to the benefit of a restrictive covenant like this never had any cause of action which he could have brought, because unless and until there is a breach, or a threatened breach, of such a covenant, it is impossible for the person entitled to the benefit of it to bring any action. It appears, therefore, so far as the squatter himself was concerned, both during the currency of the twelve years, and after the expiration of the twelve years, there would be no possible answer to the claim of anybody seeking to enforce the claim, in fact there would, so far as he is concerned, be no difference between this, which was in the nature of an equitable easement, and a legal easement strictly and properly so called. But although the squatter took this property subject to this equitable burden, it may be, of course, in spite of that, that the present vendor, who purchased from or through the squatter, may be able to say that the burden does not affect the property in his hands. But what must he prove in order to claim this exemption? He must prove that he is a purchaser for value without notice. If he simply pleaded in the old days "I am a purchaser for value," such a plea would have been demurrable; he must go further and allege and prove that he was a purchaser for value without notice. Now can the present vendor allege and prove that? I think not. It is not necessary, of course, to prove actual notice. That has not been contended. But if a purchaser chooses to take a title without making full inquiries, he cannot be allowed to say that he had no notice of that which a full abstract would have disclosed. On this point the observations of North, J., in *Cox and Neve's Contract*, and the passages which have been referred to in [1891] 2 Ch., p. 117, are so much in point that I may venture to read them: "I must say I dissent entirely from the proposition that the purchaser would have taken the property free from the restrictive covenant if he had made no inquiry. On the contrary, I think he would have been bound by it, and for this reason. He had agreed by the bargain contained in the conditions of sale to accept a title of less than forty years. That cannot relieve him from all knowledge of the prior title, or it would come to this—that if a man was content to purchase property on the condition that he should not inquire into the title, he would acquire a title free from any restrictions, and would not have constructive notice of any incumbrance." Of course the law does not permit of anything so absurd as that, and I should be sorry to think that there could be nowadays any real doubt upon that. In the case of a lessee the law has gone possibly one step further, because in *Putman* v. *Harland* it has been held, and so far as I know, it has never been questioned, that a lessee is convicted with notice of any restrictive covenants, the existence of which he would have learned if he had investigated the lessor's title. Even though, since the year 1874, the lessee is not entitled under an open contract for a lease to require the production of the lessor's title, as Sir George Jessel in that case said, that alteration of the law did not really prevent or interfere with the application of *Tulk* v. *Moxhay*. If the lessee wanted to escape from that obligation he, in agreeing to take the lease, should have required the production of the lessor's title. So that the doctrine has been extended, and I venture to think, properly extended, not merely to a case where a purchaser under an open contract would get notice of the document, but, at least in the case of a lease, to a case where a purchaser under an open contract would not be entitled to require production of the documents which alone could give him notice. I think that a squatter, who has been in possession for more than twelve years, is certainly in no better position than any other person. He cannot make a good title without making and delivering a full abstract extending over the full period, and if the purchaser is willing to take a title depending upon the Statute of Limitations, and the effect of section 34, he must take such title as the vendor has, which is a title subject to the equitable burden, as it is often called, by analogy to *Tulk* v. *Moxhay*, except in so far as it can be shown that the equitable burden has been got rid of by means of a purchaser for value without notice.

For these reasons I think the appeal fails and must be dismissed.

Solicitors, *Harris, Chetham, & Cohen; Granville Smith, Coleman, Betts & Co.*

From Chan. Div.
(Vaughan Williams, Stirling, and Cozens-Hardy, L.JJ.) — Dec. 20.

In re ODDY.
MAJOR *v.* HARNESS. (*a.*)

Practice—Judgment—Order that plaintiff do recover a sum of money—Four-day order—Enforcing order—R. S. C., 1883, *ord.* 42, *r.* 3; *ord.* 41, *r.* 5.

Judgment in an action for a breach of trust was given in the form that the plaintiff do recover a sum of money. The plaintiff subsequently obtained a four-day order for payment of this sum.

Held, on appeal, that the four-day order must be discharged, the court having, under the old common law practice as it existed before the Judicature Act, no jurisdiction to supplement an order for the recovery of a sum of money by a four-day order, while rule 3 *of order* 42 *did not apply, as a four-day order was not a mode of enforcing the original order but was an addition or supplement to it.*

This was an appeal from a decision of Buckley, J.

By the judgment in the action, which was dated the 5th of August, 1905, the court declared that the defendant Harness had committed a breach of trust in the sale and application of the sum of £1,200 4 per cent. Debenture Stock in the Midland Railway Co., referred to in the statement of claim, and it was ordered that the plaintiff do recover from the said defendant the sum of £1,248 11s., being the loss occasioned to the trust estate after deducting certain payments already made by the defendant Harness, and that the said defendant do pay to the plaintiff his costs of the action.

By an order dated the 6th of November, 1905, made by Buckley, J., in chambers upon the application of the plaintiff, it was ordered that the defendant Harness do, within four days after service, pay to the plaintiff the sum of £1,501 1s., being the amount of the judgment with interest and costs.

The defendant moved to discharge this order.

Buckley, J., was of opinion that the case was within the words of ord. 42, r. 3, and accordingly dismissed the motion.

The defendant appealed.

By ord. 42, r. 3: "A judgment for the recovery by or payment to any person of money may be enforced

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

by any of the modes by which a judgment or decree for the payment of money of any court whose jurisdiction is transferred by the principal Act might have been enforced at the passing thereof."

By ord. 41, r. 5: "Every judgment or order made in any cause or matter requiring any person to do an act thereby ordered shall state the time, or the time after service of the judgment or order, within which the act is to be done, and upon the copy of the judgment or order which shall be served upon the person required to obey the same there shall be indorsed a memorandum in the words or to the effect following, viz.: 'If you, the within named A. B., neglect to obey this judgment [or order] by the time therein limited, you will be liable to process of execution for the purpose of compelling you to obey the same judgment [or order].'"

Cave, K.C., and *Luxmoore*, for the appellant.—The court has no jurisdiction to make a four-day order where the original order is in the form that the plaintiff do recover: *Drewett* v. *Edwards*, 26 W. R. 60, 122; *Hulbert* v. *Cathcart*, [1894] 1 Q. B 244 42 W. R. Dig. 54. Rule 3 of order 42 does not apply here, as to make a four-day order when there is no order for payment is not to enforce the original order but to add something to it.

Cannot, for the plaintiff.—*Drewett* v. *Edwards* was decided before rule 3 of order 42 was made. Here there is a declaration that the defendant has committed a breach of trust, which distinguishes the present case from both *Drewett* v. *Edwards* and *Hulbert* v. *Cathcart*. The judgment is for the recovery by a person of a sum of money, and according to ord. 42, r. 3, it may be enforced in any mode by which a judgment or decree for the payment of money could have been enforced before the passing of the Judicature Act.

No reply was called for.

VAUGHAN WILLIAMS, L.J.—I think that this appeal must be allowed. So far as the practice is concerned the case cited to us of *Drewett* v. *Edwards*, which was a decision of the Court of Appeal, is really an authority. I am aware that that case was decided before rule 3 of order 42 was made, but that case shows as plainly as possible that according to the practice at common law an order that the plaintiff do recover could not be supplemented by a four-day order; and in the Chancery Division they did not use that form of order at all. *Drewett* v. *Edwards* was followed in the Queen's Bench Division by *Hulbert and Crowe* v. *Cathcart*, and though the latter case deals with sequestration, it did lay down in an emphatic manner that an order that the plaintiff do recover a sum of money could not be followed by a four-day order. Buckley, J., says that he does not quite understand the earlier part of the judgment of Wills, J., in that case. I think he can only mean that he does not understand why Wills, J., decided as he did, because the words of the judgment are very plain indeed. The only thing we have to deal with here is the language of rule 3 of order 42, which Buckley, J., dealt with in his judgment, and on which I think he intended to base his judgment. [His lordship read the rule.] Buckley, J., says that this case comes within the very words of that rule. I do not agree with him there. In the first place I agree with the argument that was addressed to us by counsel for the appellant, that to make a four-day order is not to enforce an original order that the plaintiff do recover. In my judgment it is to add a new order to the original order. Further, it would not be true to say that a four-day order so far as it fixes time is an order which ought in the ordinary course to have been added to an order that the plaintiff do recover. Not only have I never known such a thing done, but it would in fact defeat the very object of taking an order in that form. Plaintiffs are sometimes very anxious to get an order in that form because it enables them to get immediate execution. There is a manifest difference between an order for payment by a trustee and an order that the plaintiff do recover in considering the question what may be done to complete or supplement or perfect the order. In this particular case we do not know what led the plaintiff to take the order in this form, but we know that he did so. We also know that if the plaintiff had not brought the order to the registrar in that form, the registrar would never have made it in that form. I think that this appeal must be allowed with costs.

STIRLING, L.J.—I am of the same opinion. The judgment which was given in this case, after a declaration that the defendant had committed a breach of trust, proceeded to order that the plaintiff do recover from the defendant a certain sum of money, being the amount of the loss occasioned to the trust estate. That judgment having been given on the 5th of August, 1905, subsequently an application was made, to which the learned judge acceded, that that order be supplemented by making an order that the defendant Harness do pay to the plaintiff within four days of service of the order then made the sum of £1,501 1s. That order is now appealed from, and the question is whether the learned judge had power to make such an order. The judgment is one by which it is ordered that the plaintiff do recover a certain sum of money. Now, rule 3 of order 42 provides as follows. [His lordship read the rule, and continued:] A judgment for the recovery by the plaintiff from the defendant of a sum of money was a form of order which, prior to the Judicature Act, 1873, was not adopted by the Court of Chancery. It was a form of order which, prior to the Judicature Act, was peculiar and appropriate to the courts of common law. In order, therefore, to ascertain how such an order can be enforced, we have to consider how such an order could have been enforced in the common law courts at the time when the Judicature Act was passed. Could such an order have been enforced in the common law courts by a supplementary order directing payment within a limited time? We have been referred to two authorities which show that that could not be done. *Drewett* v. *Edwards* is a decision of the Court of Appeal subsequent to the Judicature Act, and is binding on us, and *Hulbert* v. *Cathcart* is a more recent decision to the same effect of a Divisional Court, while no case is cited to the contrary. It seems clear, therefore, that a judgment for recovery of a sum of money could not be supplemented by an order for payment within a limited time. From that point of view the order of the learned judge cannot be justified. But reference was made to ord. 41, r. 5. [His lordship read the rule.] It is said that the court has jurisdiction under that rule to make such a supplemental order as we have here. I think not. I agree with counsel for the appellant that making such a supplemental order is not enforcing an order already made. It is making an additional and another order, which appears to me to be contrary to the practice of the court in such a case as this. As regards the argument that the declaration in the first part of the judgment, that the defendant was a trustee and had committed a breach of trust distinguishes this case from the two cases cited, it appears to me that declaration cannot affect the construction of the order in the latter part of the judgment. If it is desired to pursue the remedies which

under the Debtors Act, 1869, are still available against trustees who are ordered to pay money in their possession or under their control, the parties must be careful to select that form of order which was formerly adopted in the old Court of Chancery.

COZENS-HARDY, L.J.—I agree. It seems to me that there never was a time at which in any court a judgment for the recovery of a sum of money in those words could have been enforced by a four-day order. In the language of Brett, L.J., in *Drewett* v. *Edwards*, the four-day order was made in equity to supply a deficiency in the decree which might have contained what was given in the four-day order. The judgment obtained here is not a judgment which ever did or could name a day, and so there is no deficiency to supply. That was really the principle upon which Wills, J., proceeded in *Hulbert and Crowe* v. *Cathcart*. He says: "The judgment is not an order to pay money; and for a master to order that the unsuccessful party shall pay the sum recovered within a certain time is totally to alter the nature of the remedy." For the reasons given by my lord and Stirling, L.J., I think this appeal must be allowed, and I can only regret that Buckley, J.'s, attention was not called to the case of *Drewett* v. *Edwards*, which is a decision binding on us in principle, although it is quite true that rule 3 of order 42 was not then in force.

Solicitors, *Slark, Edwards, & Co.; H. Dade & Co.*

From K. B. Div. (Collins, M.R., and Romer and Mathew, L.JJ.) — Nov. 22.

BANNATYNE *v.* MACIVER. (*a.*)

Principal and agent — Money borrowed by agent on behalf of principal without authority—Application of money in discharge of principal's legal liabilities—Right of lender to recover from principal.

An agent of the defendant firm borrowed money from the plaintiff on behalf of the firm, but without having any authority from them so to do, and applied the money so borrowed in discharging legal liabilities of the firm.

Held, that, by virtue of the equitable principle stated by Lord Selborne, L.C., *in* Blackburn Building Society *v.* Cunliffe, Brooks, & Co., 31 *W. R.* 98, 22 *Ch. D.* 61, *the plaintiff was entitled to recover from the defendants the money so borrowed and so applied.*

Appeal by the plaintiff from the judgment of Grantham, J., at the trial of an action without a jury.

The action was brought on a bill of exchange or, in the alternative, for money lent.

The plaintiff was a ship and insurance broker carrying on business in London. The defendant firm were also ship and insurance brokers, carrying on business at Liverpool and having a branch business in London.

Between the months of March and May, 1904, the manager of the defendants' London branch, named Hudson, applied to the plaintiff for advances, stating, but without having any authority so to do, that he was borrowing on behalf of the defendant firm, and the plaintiff accordingly gave him cheques for sums amounting to £350. Hudson paid the greater part of the sums so advanced into a banking account which the defendant firm kept with a London bank, and on which he had authority to draw. Nearly the whole of the amount so paid into the banking account was used by Hudson in discharging the liabilities of the firm, and even that part of the sums advanced which he did not pay into the bank was applied by him to the purposes of the firm. Subsequently Hudson accepted in the name of the firm a bill of exchange drawn by the plaintiff for £370 10s., being the amount of the sums advanced with interest.

The defence was that Hudson had no implied authority to borrow money on behalf of the defendant firm, and that the defendant firm kept him supplied from time to time with sufficient money to cover the liabilities of the branch.

At the trial the defendants negatived implied authority to borrow by giving evidence to the effect that it was not necessary or customary for a partner in a firm of ship and insurance brokers to have authority from his co-partners to borrow money.

For the plaintiff it was contended that he was at any rate entitled to recover on the ground that the sums advanced by him had been in fact expended in paying the liabilities of the defendant firm.

Grantham, J., gave judgment for the defendants.

J. R. Atkin (*Scrutton, K.C.*, with him), for the plaintiff.—The plaintiff is entitled to recover money advanced by him and applied in discharge of the defendants' liabilities by virtue of the equitable principle stated in *Blackburn Building Society* v. *Cunliffe, Brooks, & Co.*, 31 W. R. 98, 22 Ch. D. 61. This principle applies where money is borrowed by a partner on behalf of his firm without authority so to do and the money is applied in discharge of the firm's liabilities: Lindley on Partnership (7th ed.), p. 219.

Carver, K.C., and *Sims Williams*, for the defendants.—The equitable principle cited only applies to cases where money is borrowed by an agent of a company with limited powers of borrowing. It does not apply to the ordinary case of principal and agent. An ordinary principal cannot be held liable if he has supplied the agent with sufficient money for the purposes of the agency. In similar circumstances a firm are not liable for money borrowed by a partner although they have derived benefit from it: *Smith* v. *Craven*, 1 Cr. & J. 500. This case ought to be decided on contract alone, and there was no authority, express or implied, neither was there any ratification.

COLLINS, M.R.—It seems to me that this case can be put on a simple and clear basis. A man named Hudson was acting in London as the representative of the defendant firm, and he was allowed considerable latitude in the conduct of the business of the firm. He had an account at a London bank in the name of the firm, and as he seemed to be spending more money than they desired him to spend, they remonstrated with him, but they let him go on, and at last a time came when he had used all the money at the bank. As there were pressing demands in connection with the firm's branch business, Hudson borrowed money from the plaintiff, telling him that the money was required for the purposes of the firm. It is clear that a portion of the money so borrowed was applied by Hudson in paying liabilities of the firm. The plaintiff now says that he is entitled in equity to claim back from the defendants the money so applied in discharging their legal liabilities, and he asks for an account and relief. The principle on which the claim is based was stated by Lord Selborne, L.C., in *Blackburn Building Society* v. *Cunliffe, Brooks, & Co.* He said: "I think the consistency of the equity allowed in the *Cork and Youghal Railway Co.'s case*, 18 W. R. 26, L. R. 4 Ch. 748, with the general rule of law that persons who have no borrowing powers cannot, by borrowing, contract debts to the lenders, may be shown in this way. The test is, has the transaction

(*a.*) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

really added to the liabilities of the company? If the amount of the company's liabilities remains in substance unchanged, but there is, merely for the convenience of payment, a change of the creditor, there is no substantial borrowing in the result, so far as relates to the position of the company. Regarded in that light, it is consistent with the general principle of equity that those who pay legitimate demands which they are bound in some way or other to meet, and have had the benefit of other people's money advanced to them for that purpose, shall not retain that benefit so as, in substance, to make those other people pay their debts." That was cited in the case of *In re Wrexham, Mold, and Connah's Quay Railway Co.*, 47 W. R. 464, [1899] 1 Ch. 440. Here money found its way into the coffers of the defendants and was applied in discharge of their liabilities. It seems clear, therefore, that the equity spoken of by Lord Selborne arises. I think the plaintiff is entitled to an account and to recover what shall be found due on the account.

ROMER, L.J.—I am of the same opinion. I think this case is governed by the general principle which I will state. Where money is borrowed on behalf of a principal by an agent, the lender believing that the agent has authority, and it turns out that the agent has no authority, and that his action has not been ratified by the principal, then, though the principal cannot be sued at law, yet in equity, to the extent to which the borrowed money has been applied in paying the principal's debts and liabilities, the lender is entitled to stand in the same position as if the money had been borrowed with authority. The precise difference between the position of such a lender and the position of a person who is entitled to stand in the shoes of a creditor absolutely is pointed out in *In re Wrexham, Mold, and Connah's Quay Railway Co.* It is contended that the principle which I have stated is limited to the case of agents of limited companies. I see no reason for such limitation, neither does there appear to be any authority for it. I therefore think the appeal must be allowed.

MATHEW, L.J., concurred.

Appeal allowed.

Solicitor for the plaintiff, *J. S. Wilkinson.*

Solicitors for the defendants, *Charles Russell & Co.*, for *Lightbound, Owen, & Co.*, Liverpool.

High Court of Justice.

Chan. Div. Kekewich, J. — Nov. 20, 21, 22, 23, 24.

WHITEHOUSE *v.* HUGH. (*a.*)

Vendor and purchaser—Building scheme—Roadway—Power to vary plans—Dedication—Cul-de-sac.

The plaintiff purchased a plot of land subject to a building scheme. On the plan attached to the conveyance a roadway, leading up to a railway and adjoining the plaintiff's land, was shown as a vacant space. This road was used by the public. One of the conditions embodied in the building scheme was that the vendors reserved power to allow variations in the plans and conditions.

Held, first, that in these circumstances the plan alone did not amount to a representation that the road should always remain a road, and that a purchaser could not be restrained from building thereon; and, secondly, that, in absence of active dedication, mere user by the public was not sufficient evidence of dedication.

Attorney-General *v.* Antrobus, [1905] 2 *Ch.* 206, 53 *W. R. Dig.* 174, *followed.*

Action.

This was an action by which the plaintiff claimed an injunction to restrain the defendant from building on a roadway adjoining the plaintiff's land in contravention of a building scheme adopted by the Birkbeck Freehold Land Society in 1878. The plaintiff also alleged that the said roadway had been dedicated to the public.

The roadway in question was a short one leading from Mackenzie-road, Beckenham, over a level crossing on a branch of the London, Chatham, and Dover Railway. It was little used and had never been metalled.

In 1885 the plaintiff purchased from the Birkbeck Land Society a freehold plot of land, numbered 352 on the society's plan. This plot, on which a house had been erected, was on the south-eastern corner of Mackenzie-road and the roadway in question. On the plan annexed to the plaintiff's conveyance the roadway was shewn as a vacant space between plots 352 and 355. This conveyance was made subject to certain conditions and stipulations, by the ninth of which the vendors reserved to themselves the power to allow variations in the plans and conditions.

In 1894 the building society came to an arrangement with the London, Chatham, and Dover Railway whereby the railway was released from maintaining the level crossing, and in 1897 the building society erected a wooden fence across the Mackenzie-road end of the roadway in question, and in the same year sold the two plots over which the roadway passed to a Mr. Willard, the defendant's predecessor in title, as building land.

In 1894 Mr. Willard sold 21, Mackenzie-road, which was erected on plot 355, and the two plots over which the roadway passed to the defendant, who, in the month of November, commenced to erect two houses thereon.

Stewart-Smith, K.C., and *Todd*, for the plaintiff.—The plaintiff bought his house relying on the building scheme being carried out. That scheme is binding on the land society and on all persons claiming through them. The roadway in question was part of that scheme, and the defendant cannot now treat the roadway as building land: *Heriot's Hospital* v. *Gibson*, 2 Dow. 301; *Tucker* v. *Vowles*, 41 W. R. 156, [1893] 1 Ch. 195; and *In re London School Board and Foster*, 87 L. T. 700, 51 W. R. Dig. 88. In addition to this there has been dedication of the roadway in question to the public.

Lawrence, K.C., and *Cozens-Hardy*, for the defendant.—The Birkbeck Society have reserved power to vary the scheme, and this is a variation that the society have allowed. There has never been a sufficient dedication to the public: *Attorney-General* v. *Antrobus*, [1905] 2 Ch. 206.

KEKEWICH, J., in giving judgment, said: The plaintiff first puts his case on this, that the plot of ground in question was shown as a road on the plan attached to his conveyance, and that the building society, who were the real defendants, were obliged to maintain it as a roadway. But in the first place this plot of ground is not described on the plan as a road, but is merely shown as a vacant space, and,

(*a.*) Reported by H. WOLCOTT WARNER, Esq., Barrister-at-Law.

further, it is admitted that no case can be found in which a plan alone, such as this is, has been held sufficient ground for saying that the vendor could not alter what appears on the plan. I have been referred to the case of *Heriot's Hospital* v. *Gibson*, which seems to point the other way, and to *Tucker* v. *Vowles*, which also seems to point in the same direction; indeed, the latter case is almost a decision on the point. In *In re London School Board and Foster*, to which I have been referred, there certainly appear to be some expressions which seem to show that representations might possibly be inferred from a plan that a particular scheme should be followed without variation. I will pass that case by with merely an indication that in my opinion a plan alone would not be sufficient. I therefore hold against the plaintiff, that there was no representation that there was a road or that this vacant place should remain vacant. But, besides this, the conveyance was made subject to the condition which reserved to the land society power to allow any variation in the plans and conditions. The relations between the parties in all these building scheme cases is contractual, and if one of the parties reserves to himself power to alter the contract, then that reservation becomes part of the contract itself, whether the contract was expressed or implied. Now, in this case I do not think that vendors could say that they would not make the roads specified in the scheme or would make them in a different way. But why should they not allow someone to build on this vacant space? The only answer that can be given is that it is not strictly a vacant space but a road; and if it is not so shown on the plan, it is a road in fact. That, in my opinion, is not a sufficient answer. A mere private road may be converted into anything else. It may be converted into a playground or into anything else convenient to the vendors. I therefore hold that the plaintiff cannot say that the vendors could not allow the defendant to build houses on this plot, and that consequently the plaintiff is not entitled to an injunction to restrain the defendant from so building.

But, further, it has been said that the roadway was dedicated to the public, and, having been so dedicated, no building can be allowed thereon to the plaintiff's detriment. I will assume that, without the plaintiff showing special damage, this question can be tried in the absence of the Attorney-General. It is important to consider the position of this road. It is a road leading up to a railway and there is no dedication of any part of the railway line to the public use. There was merely a private right of way over the railway, and that right has now been released. The result is that the road in question is in the nature of a *cul-de-sac*. It has been said that this road has been converted into a public road by user. But in *Attorney-General* v. *Antrobus*, Farwell, J., said that, in the absence of any active dedication, mere user by the public has never been held sufficient to constitute dedication in the case of a *cul-de-sac*. There is nothing here but a mere user by the public of a vacant space which the building society might allow anybody to use. On this point, in my opinion, the plaintiff's case completely breaks down. There must therefore be judgment for the defendant with costs.

Solicitor for the plaintiff, *James Powell*.

Solicitors for the defendant, *Rubinstein & Co.*

Chan. Div. } Nov. 3, 4.
Farwell, J. }

In re FRIEND'S SETTLEMENT.
COLE *v.* ALLCOT. (*a.*)

Settlement — Construction — Survivors — Stirpital survivorship.

Real estate settled by deed upon trust for seven tenants in common for life with remainder to his or her children attaining twenty-one or marrying—proviso that if any one or more of the tenants for life should die without issue or leaving issue which should die under twenty-one or unmarried, the share of such tenant for life should be divided between "the survivors and survivor of them and their issue in all respects as the original shares."

Held, that the same principles apply in the construction of a deed and of a will.

Held, that "survivors and survivor" must be construed "others and other," and that children of tenants for life who had attained twenty-one and died took accrued shares, although they did not survive the tenants for life whose shares had accrued to them.

Cole *v.* Sewell, 2 *H. L. C.* 186, *followed.*

Waite *v.* Littlewood, 21 *W. R.* 131, 8 *Ch.* 70, *and* Lucena *v.* Lucena, 26 *W. R.* 254, 7 *Ch. D.* 255, *discussed and distinguished.*

Adjourned summons.

By a deed dated in 1836 W. Friend settled certain hereditaments, in the events which happened, to trustees and their heirs upon trust for the six daughters and the son of R. M. Morey for life as tenants in common, and from and after their respective deaths upon trust to convey the shares of them so dying unto and equally between their, his, or her child or children who being a son or sons should live to attain the age of twenty-one years, or being a daughter or daughters should attain that age or marry, and their respective heirs and assigns as tenants in common *per stirpes*: "Provided always that if any one or more of the said six daughters of the said R. M. Morey or the said James Morey shall die without issue, or leaving issue, and such issue being a son or sons shall die under the age of twenty-one years, or being a daughter or daughters shall die under the said age of twenty-one years without being or having been married, then and in such case the share or shares of her, him, or them so dying, as also the share or shares which by virtue of this present proviso shall have survived to her, him, or them of and in the said hereditaments and the rents and profits thereof shall go to and be divided unto and equally between the survivors and survivor of them the said six daughters of the said R. M. Morey and the said James Morey and their, her, and his issue respectively for such estates and interests in such shares and proportions and in such manner in all respects as the original shares of the said six daughters of the said R. M. Morey and the said James Morey and their issue respectively are hereinbefore directed to be divided."

Four of the tenants for life died without issue. Another married and died leaving one son, who attained twenty-one, and then died in the lifetime of some of the tenants for life. Another married and died leaving several children who had attained twenty-one and were alive. The seventh tenant for life was still alive.

On the death of James Morey without issue in 1901 the question arose as to who was entitled to his share. By the summons the following questions were

(*a.*) Reported by C. H. CARDEN NOAD, Esq., Barrister-at-Law.

raised: (1) Whether the gifts over upon the deaths without issue of the tenants for life took effect in favour of the other tenants for life irrespective of such tenants for life or any children of them respectively being living when such gifts over took effect; (2) or whether such gifts over took effect only in favour of the tenants for life who, or the children of whom respectively were, living when such gifts over took effect; and (3) whether such gifts over took effect only in favour of children living when such gifts over took effect to the exclusion of children then dead?

Jenkins, K.C., and *Paice*, for the trustee of the settlement.

R. J. Parker, for the assignee of the share of the son of a tenant for life who had died after attaining twenty-one, argued that "survivors and survivor" must be construed as "others and other." This was not like *In re Bilham*, 49 W. R. 483, [1901] 2 Ch. 169, where "survivors" meant stirpital survivorship.

E. P. Hewitt, for a surviving child of a tenant for life of full age, submitted that this settlement must be construed literally, not being a will, but a deed, and that "survivors" meant survivors in stock.

F. E. Farrer in a similar interest.

W. R. Sheldon, for the surviving tenant for life.

FARWELL, J., in giving judgment, said: The case of *Cole* v. *Sewell*, 2 H. L. C. 186, shows conclusively that the same principles apply in construing a deed and in construing a will. There, too, it was said by Lord Brougham that "survivor or survivors" may, regard being had to the circumstances, operate as the words "other or others." In the present case, therefore, I regard the question exactly as if I were construing a will. The accrued shares are directed by the settlement to go in all respects as the original shares. If I cut down the vested interests, which appear to me to be clearly given to the children of the son and of the six daughters so as to make them contingent on their surviving any one of the tenants for life, then the accrued shares would not go "in the same manner in all respects" as the original shares, and I should be disregarding the plain words of the settlement.

As to the case of *Waite* v. *Littlewood*, 21 W. R. 131, 8 Ch. 70, and *Lucena* v. *Lucena*, 26 W. R. 254, 7 Ch. D. 255, which were cited to me, the learned judges were trying to find elements of survivorship to justify them in reading "survivors" as "others," and suggested that it might be found in survivorship of stocks. But this survivorship may be that not of individuals, but of estates or interests. For instance, if the original gifts are to the life-tenants' children who attain twenty-one, then if A., a surviving life tenant, dies without issue, while B., another life tenant, has predeceased him leaving a child who attained twenty-one but predeceased A., then the *stirpes* of B., having acquired a vested interest under the original gift, has "survived" to take by way of accruer the share of A. The result in this case is that I hold that "survivors" means "others," and that the children of the tenants for life need not survive the last tenants for life, and the declaration will follow this.

Solicitors, *Paice & Cross; Stow, Preston, & Lyttelton*, for *J. Leake*, Shifnal.

Chan. Div. }
Buckley, J. } Jan. 19, 24, 31.

YOUNG v. CUTHBERT. (a.)

Education — Public elementary school — Non-provided school—Mistress—Dismissal—Consent of local education authority—Education Act, 1902 (2 *Ed.* 7, *c.* 42) *—Powers of subcommittees.*

The managers of a "non-provided" elementary day school, maintained by the local education authority under the Education Act, 1902, *gave a teacher notice of dismissal without first obtaining the consent of the local education authority.*

Held, that the notice of dismissal was valid, section 7, *clause* 1 (c), *of the Education Act*, 1902, *only making the consent of the local education authority to the dismissal of a teacher a condition on observance of which the managers can require the school to be maintained by the local education authority, but not making its consent a condition precedent to a valid dismissal as between the managers and the teacher.*

Action.

The plaintiff was on the 30th of November, 1905, in the employment of the defendants as head mistress of St. John's Home School at Clewer, in Berkshire, under the terms of an agreement containing a provision that the agreement might be terminated at any time by either party giving the other three calendar months' notice in writing.

The school is what is called a "non-provided" school, in other words it is a school "maintained," but not "provided," by the local education authority.

In October, 1905, no charges or complaints had been brought against the plaintiff by the defendants, who were the managers of the school, but they had come to the conclusion that she was out of harmony with them, and that this was detrimental to the best interests of the school. In these circumstances, on the 17th of October, 1905, there was a meeting of the managers, at which the plaintiff attended, and a resolution was passed that "in view of the evident friction with which the school was being conducted" the plaintiff should be asked to resign, and that if she refused, notice should be sent to the Berkshire Education Committee that the managers desired to terminate their agreement with her.

The plaintiff refused to resign, and accordingly a letter was written by the managers to the Berkshire Education Committee, to which a reply was received on the 28th of November. The reply stated that "the committee will approve the notice given by your managers to Miss Young to terminate her engagement."

On the 30th of November the managers gave the plaintiff notice of the termination of her agreement from the 1st of December, and enclosed with their letter a cheque for three months' salary in lieu of notice. They stated that this notice had the approval of the Berkshire Education Committee. The authority for this letter was this: the Berkshire County Council had, pursuant to section 17 of the Act of 1902, delegated their powers to an education committee, and that committee in exercise of the power given by Schedule I., A (6) of the Act had appointed a subcommittee to deal with, among other things, the appointment and dismissal of teachers. The subcommittee appointed a "section" to deal with the details surrounding the dismissal of teachers and to make recommendations to the sub-committee.

On the 25th of November the section gave its

(a.) Reported by T. PAKENHAM LAW, Esq., Barrister-at-Law.

consent to the dismissal, and this was the consent referred to in the letter of the 28th of November.

On the 9th of December the sub-committee approved and adopted the action of the section.

On the 18th of December the plaintiff issued her writ whereby she asked for an injunction to restrain the defendants from dismissing her until the consent of the education authority for the county of Berkshire had been obtained and until an opportunity had been given her to defend herself before the properly constituted authorities. On the same day she served a notice of motion in the terms of the writ, and on the 19th of January, 1906, the motion came on. Inasmuch as the education committee was to meet next day the hearing stood over till the 24th of January.

On the 20th of January the education committee gave their approval to the action of the sub-committee and the section.

The arguments are fully stated in the judgment.

Buckmaster, K.C., and *A. A. Thomas*, for the plaintiff.

W. F. Hamilton, K.C., and *Edward Ford*, for the defendants.

Arthur Underhill appeared for the Berkshire County Council.

BUCKLEY, J.—On the 30th of November, 1905, the plaintiff was in the employment of the defendants as mistress of the St. John's Home Day School, at Clewer, in Berkshire, upon the terms of an agreement, dated the 5th of July, 1900, which contained a provision that the agreement might be terminated at any time by either party, on giving the other three calendar months' notice in writing. The school is what is known as a "non-provided" school under the Education Act, 1902, that is to say, it is a school maintained, but not provided, by the local education authority. On the 30th of November, 1905, the defendants, as managers of the school, gave the plaintiff notice of the termination of her agreement from the 1st of December, and enclosed with their letter a cheque for three months' salary in lieu of notice. They stated that this notice had the approval of the Berkshire Education Committee. On the 2nd of December, 1905, the plaintiff wrote that she was advised that the notice was invalid and inoperative. The ground of her contention was that, having regard to the provisions of the Education Act, 1902, the managers could not dismiss her without the consent of the local education authority, and that that consent had not been obtained. On the 18th of December she issued the writ in this action, asking for an injunction to restrain the defendants from dismissing her until the consent had been obtained, and until an opportunity had been given her to defend herself before the properly constituted authority; and on the same day she gave a notice of motion for an injunction in the same terms. That motion came on for hearing before me on Friday, the 19th of January, 1906. It then appeared that one question in dispute was whether the education authority had given their consent, and that a meeting of the education committee of the district was to be held the next day, Saturday, the 20th of January. I therefore directed the further hearing of the motion to stand over until Wednesday, the 24th of January, so that I might know what the committee would do. On the 24th of January it appeared that on the 20th of January the education committee passed a resolution "that the education committee consent to the dismissal" in question, "such dismissal having been given on the 30th of November last." Under these circumstances, I pointed out that an interlocutory judgment was impossible, and that the matter resolved itself into a question possibly of money and also of costs, which could only be determined at the trial. The parties, with great good sense, consented to treat the hearing of the motion as the trial of the action; and the plaintiff's counsel, upon my invitation, stated that the judgment for which under those circumstances he asked was a judgment for a declaration that the plaintiff had received no valid notice of dismissal and for the costs of the action. I have, therefore, now to give judgment at the trial of the action finally determining the plaintiff's rights in the matter.

The plaintiff contends that the consent of the local education committee is, under the Education Act, 1902, a condition precedent to dismissal by the managers, that such consent had not been given on the 30th of November, 1905, and that consequently the notice of that date is invalid. I will assume, in the first instance, that on the 30th of November, 1905, the consent of the authority had not been given, and upon that assumption will investigate what is the true construction of the section of the Act of Parliament bearing upon this matter. Section 7 of the Act of 1902 provides that the education authority shall maintain and keep efficient public elementary schools, but, in the case of a school not provided by them, only so long as certain following conditions and provisions are complied with. One of these conditions is (clause 1 (*e*)) that the consent of the authority shall be required to the dismissal of a teacher unless the dismissal be on certain grounds, being grounds not relevant to this case. The plaintiff argues that the conditions and provisions which are found in clauses (*a*) to (*e*) of section 7 are affirmative statutory provisions binding as such upon the parties affected—in other words, that section 7 is to be read as if clauses (*a*) to (*e*) formed independent affirmative sections of the Act and were then followed by another clause providing that the authority shall maintain and keep efficient the school only so long as clauses (*a*) to (*e*) are complied with. In my judgment this is not the construction of the Act of Parliament. The contract between the managers and the teacher is a contract to which the education authority is not a party. The question is whether that contract between the managers and the teacher is to be read as if, by virtue of the statute, it contained a clause to the effect that the managers will not dismiss the teacher without the consent of the authority. Does the Act of Parliament introduce such a stipulation into the contract? The answer, I think, is in the negative. Section 7 contemplates that the conditions may or may not be complied with; it cannot be, then, that the statute is to be read as requiring that they shall be complied with. Reading the section quite shortly, and introducing only the relevant words, its frame is as follows: The local education authority shall maintain and keep efficient the school only so long as the consent of the authority shall be required to the dismissal of a teacher—meaning, I think, only so long as the managers, as between themselves and the authority, observe the condition that without the consent of the authority they will not dismiss. Let me take another of the conditions—say clause (*d*)—and see what is the true construction of the Act in that case. Suppose the managers do not keep the schoolhouse in repair, what is the consequence? It will follow that the local authority will no longer be bound to maintain and keep efficient the school. But could proceedings be instituted against the managers for breach of a statutory duty by way of *mandamus* to compel them to keep the schoolhouse in repair or by way of consequences for misdemeanour? In my judgment, certainly not. Take again clause (*b*). Does that give the local authority statutory authority to inspect the school? I think not. The frame of the

section is that the authority shall maintain the school so long as the authority shall have power to inspect the school. From this it results that if the managers refuse inspection the local authority ceases to be liable to maintain, but not that the school can be compelled to submit to inspection. There is another sub-section to be considered—viz., section 7 (7)—which provides that, subject as there mentioned, the managers shall have the "exclusive power of appointing and dismissing teachers." Exclusive of whom? Exclusive, I conceive, of the education authority. This shows that the managers have the dominant power, and that that is controlled only by the powers which the local education authority have under the section. If the consent of the local authority is a condition precedent to appointment or dismissal, the words "exclusive power" seem strangely inappropriate. The true meaning, I think, is that, unless the education authority intervene, the power of apppointment and dismissal rests with the managers, and that the consent of the authority is required in the sense that, if the education authority interpose, the managers must choose between two alternatives—viz., either to yield to the wishes of the authority or cease to receive maintenance from public funds. The words as to consent, whatever be their effect, are, I think, operative only as between the authority and the managers and do not give any right to the teacher. There is nothing in the Act to affect the contract between the managers and the teachers. The effect of the provisions of the Act is only to produce certain consequences as between the managers and the local authority, if the former act without the consent of the latter in any case in which such consent is required. Thus far I have assumed that the consent of the local authority had not been given.

The facts as to what had been done are as follows: The Education Act came into force in this district on the 30th of August, 1903. In October, 1905, no charges or complaints had been brought against Miss Young by the managers, but they had come to the conclusion that the teacher was out of harmony with the managers and that this was detrimental to the best interests of the school. Under these circumstances, on the 17th of October, 1905, there was a meeting of the managers, at which the plaintiff attended, and a resolution was passed that "in view of the evident friction with which the school was being conducted" the lady should be asked to resign, and that, if she refused, notice should be sent to the Berkshire Education Committee that the managers desired to terminate their agreement with her. The lady did not resign, and accordingly a letter was written by the managers to the Berkshire Education Committee, which evoked a reply of the 28th of November, 1905. That reply stated that "the committee will approve the notice given by your managers to Miss Young to terminate her engagement." Acting upon that letter, the notice of dismissal was given on the 30th of November. The authority for the letter of the 30th of November was this: The Berkshire County Council had, pursuant to section 17 of the Act of 1902, delegated their powers to an education committee, and that committee, in exercise of the power given by Schedule I., A (6) of the Act, had appointed a sub-committee to deal with, amongst other things, the appointment and dismissal of teachers. The sub-committee appointed a section to deal with the details surrounding the dismissal of teachers and to make recommendations to the sub-committee. On the 25th of November the section gave its consent. This was the consent referred to in the letter of the 28th of November. On the 9th of December the sub-committee approved and adopted the action of the section. The writ was issued, as I have stated, on the 18th of December. Subsequently, on the 20th of January, the consent of the education committee itself was given, as I have before stated. In my judgment the education committee, having regard to section 17 of the Act, could exercise all the powers of the local education authority. The education committee was for this purpose the original authority. Further, having regard to Schedule I., A (6), the sub-committee was, I think, a body which could determine, and not merely report to the committee upon, a question such as this consent. But I do not think that the "section" was other than a subordinate body. Its duty was to consider and recommend to the sub-committee. Its action required, I think, approval by the sub-committee. Under these circumstances it seems to me that on the 30th of November, 1905, the consent of the authority had not been obtained. But in my judgment this is not a matter on which the plaintiff can rely as invalidating the notice which was given her. This matter of consent was, as I have said, a matter arising only as between the authority and the managers. It was not a condition precedent to a good notice of dismissal. A subsequent consent by the authority to that which the managers had done under a provisional consent given by their subordinate section refers back, I think, and ratifies the act which the managers did, if any such ratification was required. Moreover, on the 9th of December, being before the issue of the writ, the sub-committee had approved the action of the section. Further, and as a separate point, absence of consent, if there was such absence at the relevant date, is not, I think, a matter which the plaintiff can set up. It gives her no right. It is a matter which would result only in consequences as between the school and the education authority. In my opinion the action fails and I dismiss it, and, as the defendants ask for costs, it must be dismissed with costs.

Judgment for the defendants.

Solicitors, *Baker & Nairne; Freeman & Son; Dale, Newman, & Hood*, for *T. F. Morland*, Reading.

Chan. Div.
Swinfen Eady, J. } Jan. 20.

In re CRIGGLESTONE COAL CO. (LIMITED).
STEWART *v.* THE COMPANY. (*a.*)

Practice—Debenture-holders' action—Property in danger—Motion for judgment on admissions—R. S. C., 1883, *ord.* 51, *r.* 1b.

Where debenture-holders brought an action for the realization of their security, and moved for judgment on admissions, the judge, in the absence of some of the third debenture-holders, directed a sale with the approbation of the judge.

This was a motion for judgment on admissions contained in the pleadings.

The plaintiffs in the action were, the holder of some of a first issue of debentures (who also held £3,000 of a third issue of debentures), on behalf of himself and all other first debenture-holders, and the trustees of a deed securing the first issue of debentures; and the defendants comprised the company, which was a colliery company, the holder of all the second debentures, and the holder of £19,000 out of £40,000 third debentures. The principal money of the first issue of debentures had not fallen due, and there were no arrears of interest.

(*a.*) Reported by F. HARDINGE DALSTON, Esq., Barrister-at-Law.

The plaintiffs, by their statement of claim, alleged that the company's mine was in danger of destruction owing to flooding, and the proposed minutes contained a declaration to the effect that the plaintiffs were entitled to a charge upon the undertaking and property of the company, and directed that the receiver (who had been appointed upon the passing of a resolution that the company should cease to carry on business) should be at liberty to sell the property, assets, and effects of the company as a going concern. An affidavit by the receiver in support of the allegations contained in the statement of claim had been filed, as was required by Cozens-Hardy, J., in *In re Day and Night Advertising Co.*, 48 W. R. 362.

The defendants by their defences admitted the allegations in the statement of claim.

An order for immediate sale was asked for under R. S. C. 1883, ord. 51, r. 1*b*, which directs that, in debenture-holders' actions, where the debenture-holders are entitled to a charge by virtue of the debentures or of a trust deed or otherwise, and the plaintiff is suing on behalf of himself and other debenture-holders, and where the judge in person is of opinion that there must eventually be a sale, he may in his discretion direct a sale before judgment, and also after judgment, before all the persons interested are ascertained, whether served or not.

Hon. E. C. Macnaghten, K.C., and *H. M. Humphry*, for the plaintiffs.

Manson, for the company.

Baden Fuller, for the other defendants.

SWINFEN EADY, J.—There must be a direction that the property be sold with the approbation of the judge, instead of a direction for the receiver to sell. This will overcome the difficulty of making an order in the absence of some of the third debenture-holders, who might dispute the right of the plaintiffs to a charge. There must be a declaration of charge, for upon that rests the jurisdiction to direct a sale under ord. 51, r. 1*b*.

By following this course, the absent debenture-holders can be brought in upon the making of an application to approve any conditional contract of sale.

In other respects the judgment will be in the usual form.

Solicitors, *Gribble, Oddie, Sinclair, & Johnson*, for *Stewart & Chalker*, Wakefield.

K. B. Div.
(Lord Alverstone, L.C.J., and Wills and Darling, JJ.) Nov. 11.

FOWLER *v.* CRIPPS. (*a*.)

Trade-mark — False trade description — Merchandise Marks Act, 1887 (50 & 51 *Vict. c.* 28), *ss.* 2, 3.

The appellant sold in the ordinary course of business a hundredweight of soda, which was described in the invoices as "soda crystals." The mixture, when analyzed, was found to contain crystallized carbonate of soda mixed with Glauber salts, or crystallized sulphate of soda, varying in the different samples from 18 *to* 64 *per cent. The evidence showed that the term "soda crystals" meant ordinary washing soda, and that that article consisted of crystallized carbonate of soda containing not more than* 2 *per cent. of sulphate of soda or Glauber salts. He was charged on an information with having applied to the goods a false trade description.*

Held (Darling, J., *dissenting*), *that the description of the mixture sold as "soda crystals" was a false trade description within the meaning of section* 3 *of the Merchandise Marks Act*, 1887, *and that the appellant was properly convicted.*

Case stated.

At a petty sessions held at Tunbridge Wells an information was preferred by the respondent on behalf of the Board of Trade against the appellant under section 2, sub-section 2, of the Merchandise Marks Act, 1887, charging that the appellant on the 1st of September, 1904, did unlawfully sell certain goods, to wit, a quantity of Glauber salts mixed with soda crystals, to which a false trade description, to wit, soda crystals, was applied contrary to the provisions of the Act. The following facts were proved in evidence:

The appellant is a retail oilman and hardware dealer carrying on business at Tunbridge Wells, and on the 1st of September, 1904, he sold in the ordinary way of his trade to William Gayton Butler, a traveller in the employment of Brunner, Mond, & Co. (Limited), manufacturing chemists, a hundredweight of soda which was described on the invoices delivered with the goods as "soda crystals." The price charged for the goods was four shillings.

A portion of the soda purchased by William Gayton Butler was analyzed and was found to contain soda crystals and crystallized carbonate of soda mixed with Glauber salts or crystallized sulphate of soda.

Analysis of six several samples were proved with the following results:

Soda crystals—(1) 64 per cent.; (2) 78·87 per cent.; (3) 35·10 per cent.; (4) 37·29 per cent.; (5) 86·8 per cent.; (6) 39·3 per cent.

Glauber salts—(1) 34 per cent.; (2) 18·78 per cent.; (3) 64·53 per cent.; (4) 61·87 per cent.; (5) 43·1 per cent.; (6) 60·7 per cent.

In explanation of the difference in the results of these various samples it was stated that the carbonate of soda and the sulphate of soda having been separately produced were mechanically mixed together subsequently to the manufacture, and consequently in their manufacture there might be more of one sort than of the other.

There are many salts of sodium which are prepared in a crystallized form. Seventeen salts of sodium are mentioned in the British Pharmacopœia, and one witness said there were as many as 3,000 salts of sodium. Carbonate of soda and sulphate of soda are only two of them. These are both usually prepared and sold in a crystallized form.

The process of crystallization is similar in each case. The result is a chemical combination in crystallized form of about 33 per cent. of carbonate of soda or sulphate of soda, as the case may be, and 66 per cent. of water.

Carbonate of soda is produced by various processes, and one of such processes, that employed by Messrs. Brunner, Mond, & Co., is known as the ammonia process. The crystallized carbonate of soda prepared by this process contains a small proportion of sulphate of soda. This small quantity is left in the manufacture, or is added to the soda ash in the process of crystallization for the purpose of hardening the crystals.

There are other processes by which crystallized carbonate of soda is produced different from the process adopted by Messrs. Brunner, Mond, & Co. These processes, two of which are known as the Leblanc and the Pernkoff processes, were referred to by the witness.

Both have a proportion of sulphate of soda. In the Leblanc process there is a trace and in the

(*a*.) Reported by ALAN HOGG, Esq., Barrister-at-Law.

Pernkoff process about 30 per cent., but not in the form of crystal. Carbonate of soda in the crystallized form and containing not more than 2 per cent. of sulphate of soda is the commodity commonly known as washing soda for domestic use, and is usually described as "soda crystals."

This description is not applied to sulphate of soda, nor usually to carbonate of soda containing more than 2 per cent. of sulphate of soda. All the witnesses who gave this evidence were (with one exception) analytical manufacturing chemists.

The market value of crystallized carbonate of soda is about double that of Glauber salts, a crystallized sulphate of soda.

Sulphate of soda, or Glauber salts, has no detergent qualities, but in appearance is exactly like carbonate of soda.

The appellant was not called as a witness.

It was contended on behalf of the appellant that crystallized soda and soda crystals are the same; that when a description is true with regard to the material of which two or more things are composed, it cannot under any circumstances become a false trade description as to any one of them; that soda is a genuine term applicable to any preparation or compound of sodium, and cannot be a false description when applied to any one of them; that the word "soda crystals" when applied to crystallized carbonate of soda or to crystallized sulphate of soda is a true description of the material of which each article is composed, and therefore cannot be a false description when applied to a mixture of both; that there was no evidence of any false description within the meaning of the Merchandise Marks Act, 1887. It was contended on behalf of the respondent that the words "soda crystals" were only applicable to crystallized carbonate of soda containing not more than 2 per cent. of sulphate of soda and that it was therefore a false trade description when applied to a mixture of carbonate of soda and crystallized sulphate of soda when the proportion of the latter was more than 2 per cent. of the whole.

The justices held that "soda crystals" meant ordinary washing soda, and that on the evidence before them that article consisted of crystallized carbonate of soda containing not more than 2 per cent. of sulphate of soda or Glauber salts, and that the description was a false trade description when applied to the mixture of crystallized carbonate of soda and crystallized sulphate of soda. They accordingly convicted the appellant, and the question for the opinion of the court was whether the justices were right in convicting the appellant.

By the Merchandise Marks Act, 1887, s. 3, sub-section 1: "For the purposes of the Act 'trade description' means any description, statement, or other indication, direct or indirect . . . as to the material of which any goods are composed. . . . And the use of any figure, word, or mark which, according to the custom of the trade, is commonly taken to be an indication of any of the above matters shall be deemed to be a trade description within the meaning of this Act. The expression 'false trade description' means a false description which is false in a material respect as regards the goods to which it is applied."

Avory, K.C. (*Bonsey* with him), for the appellant.—The magistrates were wrong. Glauber salt is a species of soda crystals, and the custom of the trade cannot make that a false description which, apart from the custom, is a true description.

Sir E. Carson, S.G. (*H. Sutton* and *Safford* with him), for the respondent.—A description may be quite correct and yet false as a false description. Here the case finds that the words "soda crystals" means, according to the custom of the trade, ordinary washing soda. The description, therefore, of Glauber salt as soda crystals was a false description.

Avory, K.C., replied.

DARLING, J.—I am reluctant to differ from the rest of the court, but I am bound to express my view. The appellant is charged with selling a quantity of Glauber salts mixed with soda crystals under the false trade description of "soda crystals." The ground of the complaint was that, whereas, according to the custom of the trade, the term "soda crystals" means washing soda or carbonate of soda containing not more than 2 per cent. of Glauber salts; the mixture sold by the appellant contained a very much higher proportion of Glauber salts, varying from 18 per cent. in one of the samples taken to as much as 64 per cent. in another. It is said that this was a false trade description as to the material of which the mixture was composed. Now, there are many salts of soda in a crystallized form, and sulphated of soda or Glauber salts is one of them. It is in fact one of the many "soda crystals." And to describe it as what in fact it is cannot, in my opinion, amount to a false trade description; for I think that no amount of usage in the trade can give one species of the class the exclusive right to a description which, though true of that species, is not untrue in fact of the others. Then if it is equally true to describe carbonate of soda and sulphate of soda separately as soda crystals it cannot be a false trade description to apply that name to a mixture of the two. I think the appeal should be allowed.

WILLS, J.—I think this conviction must stand. The Merchandise Marks Act was passed, not to ensure scientific accuracy in trade terms, but to protect trade, and to ensure, as far as legislation can do so, that trade shall be carried on honestly, and that terms shall not be applied to substances where the application would, according to the common acceptation of those terms in the trade, lead the purchaser to assume that he was buying something different from what he was really buying. Section 3, sub-section 1, says that "the use of any . . . word which, according to the custom of the trade, is commonly taken to be an indication of any of the above matters," including paragraph (*d*), as to the material of which any goods are composed, "shall be deemed to be a trade description." Here we have the term "soda crystals" used, which is commonly understood to be a guarantee that the substance is carbonate of soda containing not more than 2 per cent. of the sulphate. And if, as here, the substance contains 18 per cent. or more of the sulphate the application to it of the term soda crystals is to my mind clearly a false trade description. The fact that a description as applied to particular goods is scientifically correct will not prevent it from being a false trade description. And the converse is equally true. Many trade terms are of very old standing, and it may be that with the advance of science some of them will become scientifically incorrect, but proof of that incorrectness will not cause them to be false trade descriptions if they continue to be understood in the trade as indicating the same substances which they did when those terms first came into use.

Lord ALVERSTONE, L.C.J.—I agree with the view taken by my brother Wills. If I could come to the conclusion that all that is required to satisfy the statute is to show that the description is chemically true, I think it would be impossible to support this conviction. But I agree with Wills, J., in thinking that that was not the way in which the section was

intended to be construed. The clause in section 3, sub-section 1, that the use of any figure, word, or mark which, according to the custom of the trade, is commonly taken to be an indication of any of the above matters, shall be deemed to be trade description within the meaning of this Act, in my opinion renders it impossible so to construe the section.

Appeal dismissed.

Solicitors for appellant, *Neve & Beck.*

Solicitor for respondent, *Solicitor to the Board of Trade.*

Court of Appeal.

From K. B. Div. (In Bkcy.). (Vaughan Williams, Stirling, and Cozens-Hardy, L JJ.) And K. B. D. (Bigham and Walton, JJ.). } Nov. 20; Dec. 4, 15.

In re BRINDLEY.
Ex parte TAYLOR & Co. (*a.*)

Bankruptcy—Petition—Deed of assignment—Acquiescence—Undue pressure—Sufficient cause for refusal of receiving order—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 7, *sub-section* 3.

A petitioning creditor in bankruptcy, who recognizes that a trustee under a deed of arrangement has a good title and who sells goods to the trustee and is paid by him therefor, is estopped from saying that the deed is a fraud upon creditors and an act of bankruptcy. A clause in a deed of arrangement authorizing the trustee by the direction of the committee of inspection or of the majority of the creditors to pay any creditor in full who does not execute or assent to the deed should not be inserted therein.

Appeal from the registrar of the County Court of Staffordshire holden at Hanley.

On the 7th of September, 1905, the debtor executed a deed of assignment for the benefit of his creditors which contained a clause giving a discretion to the trustee, with the assent of the committee of inspection, to pay in full any creditor or creditors who might decline to assent to the deed. On the date of the execution of the deed a circular was sent out informing the creditors of its execution and calling them to a meeting to be held on the 15th of September.

On the 11th of September the petitioning creditors wrote to Messrs. Alcock & Co., the solicitors to the debtor, and also to the trustee under the deed, stating that their claim amounted in all to £694 0*s.* 3d., but that as to two items amounting together to £238 they had serious grounds of complaint against the debtor. They had placed both these items in the hands of their solicitors, and would not consider any arrangement but payment concerning them; but as to the other items in the account they would be prepared to consider anything that was in the best interests of the debtor, and acceptable to the general body of creditors. The letter concluded: "We will not be present at the meeting, and our solicitors have instructions to press the matters in hand."

They also wrote to the debtor to the same effect. When they received from the trustee a report of the proceedings at the meeting they wrote that they had nothing to add to their former letter, and refused to assent to the deed of arrangement. They did, however, sell some timber to the trustee to enable him to carry out a contract of the debtors, and this dealing with the trustee was afterwards alleged, on behalf of the debtor, to amount to an acquiescence in the deed of arrangement.

On the 25th of September they presented a petition founded on the execution of the deed as an act of bankruptcy. Shortly afterwards they heard of the clause in the deed empowering the trustee to pay dissenting creditors in full, and on being asked by the debtor's solicitors to join in the deed of arrangement they wrote to the debtor that they would not take any composition or agree to any assignment unless the two items amounting to £238 were paid in full.

On the 6th of October the petition came on for hearing before the registrar, who dismissed it upon the grounds that the creditors' demand for payment of £238 in full as a condition of agreeing to the deed constituted undue pressure, and that their dealings with the trustee amounted to such acquiescence in the deed as would preclude them from founding a petition upon it. The registrar considered that he was bound by the decisions in *In re Shaw, Ex parte Gill*, 49 W. R. 264, and *In re A Debtor*, 53 W. R. 223.

The petitioning creditors appealed.

Nov. 20.—*F. E. Smith*, for the petitioning creditors, contended that those cases were distinguishable on the facts.

H. Reed, K.C., and *B. C. Brough*, for the debtor, relied upon the cases referred to by the registrar, and upon *In re Hawley, Ex parte Ridgeway*, 4 Mans. 41, 45 W. R. Dig. 9.

Judgment was reserved.

Dec. 4.—BIGHAM, J.—My brother Walton will read the judgment of the court.

WALTON, J.—This is an appeal from the decision of the registrar of the county court at Hanley, in Staffordshire, refusing to make a receiving order on a bankruptcy petition that had been presented against the debtor, on the ground that the correspondence between the debtor and the petitioning creditors, and the debtor and the trustee under the deed of arrangement, abundantly showed that the petitioning creditors made every attempt and used every exertion to obtain an undue preference as to payment of part of their debt; and further, that they acquiesced in the assignment within the meaning of the authorities by continuing to trade with the debtor's trustee. The registrar no doubt based his decision on sub-section 3 of section 7 of the Bankruptcy Act, 1883, which enacts that if the court is satisfied that for sufficient cause no order ought to be made, the court may dismiss the petition. Now it is well established that the court will not allow proceedings in bankruptcy to be made use of by a creditor for the purpose of extortion or to obtain some unlawful or inequitable advantage. If, for instance, it is proved on the hearing of a petition that the petitioning creditor has by threats of bankruptcy endeavoured to induce the debtor to give him a secret preference over his other creditors whilst joining with them apparently on equal terms in a composition or deed of arrangement, the petition should be dismissed. This is the effect of the decisions of the court in the cases of *In re Shaw*, 49 W. R. 264, and *In re A Debtor*, 53 W. R 223. The registrar thought that the facts of the present case brought it within the rules followed in those cases and dismissed the petition. The facts appear from the correspondence and the question is whether the inferences drawn by the registrar from the correspondence can be supported. On the 7th of September, 1905, the debtor executed a deed of assignment to a trustee for the general benefit of his creditors. The deed contained a clause in the following words: "If the trustee in his own

(*a.*) Reported by P. M. FRANCKE and HENRY STEPHEN, Esqrs., Barristers-at-Law.

discretion shall think it expedient to do so, or if a committee of inspection shall be appointed by the creditors, then if a majority of such committee shall so direct, it shall be lawful for the trustee to pay in full or otherwise than by dividends under these presents any creditor or creditors who shall decline to execute or assent to these presents." On the same 7th of September a circular was sent by Messrs. Alcock & Co, then acting as the debtor's solicitors, to each of the creditors of the debtor stating that a meeting of creditors was to be held, and that the deed had been executed, and asking each creditor to let them know the amount of the debtor's indebtedness to him, and whether the creditor would be "disposed to agree to the method of dealing with the estate that may commend itself to the majority of the creditors present at the meeting." The petitioning creditors, in answer to this circular, wrote to the debtor's solicitors informing them that the debtor's indebtedness to them amounted altogether to £694 0s. 3d., and stating that as to two items (amounting together to about £238) included in the £694 0s. 3d. they had certain special grounds of complaint against the debtor, and concluding as follows: "Both these items are in the hands of our solicitors, Messrs. Quiggin & Co., and we will not consider any arrangement other than payment concerning them, but for the other items in the account we will be prepared to consider anything that is in the best interests of your client and that may appear acceptable to the general body of creditors. We will not be present at the meeting, and our solicitors have instructions to press the actions they have in hand." The petitioning creditors wrote to the debtor a letter to the same effect. At the meeting of creditors, which the petitioning creditors did not attend, a resolution was passed adopting the deed and providing for the appointment of a committee of inspection. Notice of this was given by circular sent to the creditors, and amongst them to the petitioning creditors, by Messrs. Alcock & Co., who appear to have also acted for the trustee and the committee of inspection. The petitioning creditors wrote in reply that they had nothing to add to their previous letter. Afterwards, on the 18th of September, a Mr. Arrowsmith and a Mr. Edge, friends of the debtor, had an interview with the petitioning creditors, and pressed them to assent to the deed of arrangement. The petitioning creditors, however, refused to enter into any negotiations or arrangement with either the debtor or the other creditors except upon the terms already mentioned. It is admitted that they not only threatened, but at or about this time commenced proceedings in bankruptcy against the debtor. On the 25th of September they appear to have heard for the first time of the clause in the deed which authorized the committee of inspection to pay the debt of any non-assenting creditor in full, if they thought it expedient to do so. They wrote to Mr. Arrowsmith suggesting that the terms upon which they were insisting might be carried out by the committee of inspection under the deed. This letter was handed to Messrs. Alcock & Co., who wrote to the petitioning creditors informing them that they could not advise the committee of inspection to assent to the terms proposed, and in reply the petitioning creditors refused in any way to modify their original requirements, and said that the bankruptcy proceedings would be carried on with due diligence. This completes the story, and I can find in it no indication of any attempt, or design, or intention on the part of the petitioning creditors to defraud or deceive the other creditors or to obtain a preference by any secret or improper means. They had a right to refuse their assent to the deed altogether; there was nothing wrong in itself in refusing their assent except upon the terms that the two items were paid in full; but it would, of course, have been fraudulent for them to have assented to the deed subject to a condition, kept secret from the other creditors, that part of the debt due to them should be paid in full. And if, in fact, they endeavoured by a threat of bankruptcy to induce the debtor to join with them in a scheme by which they should obtain such an unfair and fraudulent advantage over the other creditors, the decision of the registrar is right. It seems to me, however, that there is no evidence that the petitioning creditors intended that the terms upon which they insisted should not be disclosed to the other creditors. On the contrary, it seems to me reasonably clear that they were willing that every one interested should be informed of them. They were standing on their rights and insisting on having a part of their debt at all events paid in full. But there seems to me no evidence that they were attempting to take any undue or improper or inequitable advantage of the other creditors. The second ground upon which the registrar acted was that the petitioning creditors had acquiesced in the deed of arrangement. It seems that, after the deed was executed, they were asked to supply, and did supply or offer to supply, the trustee with some timber for the purpose of the business. This is not necessarily acquiescence in the deed. It is perfectly clear, in my opinion, that they, in fact, did not acquiesce. With all respect to the registrar, I am unable to adopt his construction of the undisputed facts of this case, and I think the appeal must be allowed.

BIGHAM, J.—I have had an opportunity of considering my brother Walton's judgment, and I entirely concur in it. A receiving order will be made against the debtor as of the date when the registrar ought to have made it.

The debtor appealed.

Reed, K.C., and *B. C. Brough*, for the appellant, cited *In re Stray*, 15 W. R. 600, (1867) L. R. 2 Ch. 374; *In re Goldberg*, (1905) 91 L. T. 664; *In re Hawley*, (1897) 45 W. R. Dig. 9; *In re Woodroff*, 45 W. R. Dig. 9, (1897) 4 Man. 46.

F. E. Smith and *G. H. Rittner*, for the petitioning creditor.

Dec. 15.—VAUGHAN WILLIAMS, L.J.—The principle is that a man, who looks upon a deed as honest and unimpeachable and then takes an advantage under it, is estopped from thereafter saying that the deed was void. In this case the petitioning creditors recognized that the deed conferred a good title on the trustee and in such a manner that they were precluded from saying that it was a fraud upon creditors. They had sold timber to the trustee under the deed and been paid for it by him. In other ways they had also recognized the deed. The appeal must be allowed, and the receiving order should not have been made, for the reason that the petitioning creditors had by their acts so acquiesced in the title of the trustee that they were estopped from saying that it was void.

STIRLING, L.J., agreed. The deed was treated by the petitioning creditors as good.

COZENS-HARDY, L.J., concurred. The last clause of the deed, empowering the trustee at his discretion to pay in full any creditor declining to execute or assent thereto, is most improper and might possibly invalidate the deed entirely.

Appeal allowed.

Solicitors, *M. A. Orgill*, for *Alcock & Abberley*, Burslem; *Norris, Allens, & Chapman*, for *J. M. Quiggin & Co.*, Liverpool.

From Chan. Div. (Vaughan Williams, Stirling, and Cozens-Hardy, L.JJ.) July 10, 11, 13, 14, 17, 18, 20-22, 24-26; Aug. 11, 1905.

MERCER AND OTHERS v. DENNE. (a.)

Custom—Validity—Legal origin—Presumption—Right of drying nets on seashore—Character of accreted land — Evidence — Reputation — Depositions — War Office map and chart in possession of Admiralty.

It is a valid custom for fishermen to dry their nets on land situate near the sea in the parish which they inhabit, nor will a modern method of drying invalidate the custom so long as no unreasonable burden is thereby cast on the land. Accreted land is subject to customs binding on the land to which it is accreted. A survey not intended to affect the royal revenues but to serve temporary private purposes is not admissible as a public document, nor is one made by a deceased officer in discharge of his duty, when it is not shown that it was his duty to make it. Maps and plans made by the Board of Ordnance in the seventeenth century are not admissible as public documents nor as evidence of reputation. A chart in the possession of the Admiralty, but not an Admiralty chart, is not admissible.

Judgment of Farwell, J. (53 *W. R.* 55, [1904] 2 *Ch.* 534), *affirmed.*

This was an appeal from a judgment of Farwell, J. (reported 53 W. R. 55, [1904] 2 Ch. 534).

The facts showed that the plaintiffs, who were fishermen and inhabitants of the parish of Walmer, had been in the habit of using a piece of ground, covered with shingle, situated near the sea, for the purpose of drying their nets by spreading them on its surface, and they claimed to do this by right and custom.

The defendant, who was a landowner in the parish, had denied the custom, and pleaded that the drying had been exercised only by leave and license, and that the ground used for the drying was not foreshore, but that it had been formed by gradual accretion to land of which he was the owner, and therefore belonged to him.

Farwell, J., rejected as evidence of reputation certain evidence tendered by the defendant which consisted of depositions taken upon an information in 1639, some War Office maps, and a chart in the possession of the Admiralty; and held that the custom set up by the plaintiffs was good, and granted the injunction claimed by them.

The defendants appealed.

Levett, K.C., Jenkins, K.C., and *J. Gatey,* for the appellants, cited *Sturla* v. *Freccia,* 5 App. Cas. 623; *Price* v. *Torrington,* 1 Salk. 285; *Mellor* v. *Walmesley,* 53 W. R. 581, [1905] 2 Ch. 164; *Thomas* v. *Jenkins,* 6 Ad. & E. 525; *Hammerton* v. *Honey,* 24 W. R. 603; *Dyce* v. *Hay,* 1 Macq. 305; *Scratton* v. *Brown,* 4 De G. & J. 485; *Attorney-General* v. *Chambers,* 4 De G. & J. 55; *Foster* v. *Wright,* 4 C. P. D. 438, 28 W. R. Dig. 94.

Upjohn, K.C., and *R. J. Parker,* for the respondents, cited *Doe* v. *Turford,* 3 B. & Ad. 890; *Chambers* v. *Bernalson,* 1 C. M. & R. 347; *Newcastle* v. *Broxtowe,* 4 B. & Ad. 273; *Pain* v. *Patrick,* 3 Mod. 289; *Fitch* v. *Rawling,* 2 H. Bl. 393; *Blundell* v. *Catterall,* 5 B. & A. 268.

July 18.—VAUGHAN WILLIAMS, L.J.—I agree with Farwell, J., that the reports relating to Walmer Castle are not admissible in evidence. They are not records affecting the King's property or revenues, nor intended as such. Each of them was to serve a temporary purpose, and in no way affected Crown property, Crown revenues, or Crown grants when the respective purposes were served. None of the documents are admissible as coming within the doctrine of *Price* v. *Earl of Torrington,* as explained by *Doe* v. *Turford,* and *Smith* v. *Blakey,* 15 W. R. 492, L. R. 2 Q. B. 326. There is nothing to show that any of them were contemporaneous with a transaction which it was the duty of the deceased person to record. There is no evidence what the instructions were, or of the relation of those instructions to the document sought to be put in evidence, or of the source of the knowledge or information on which the contents of the report or estimate were based. Those reports were not like the field-book entries made by a deceased surveyor for the purpose of a survey on which he was professionally employed, which this court hold to be admissible in *Mellor* v. *Walmesley,* 53 W. R. 581; 1905, 2 Ch. 164. I agree with Farwell, J., that the depositions taken on the information of 1639 are not admissible as evidence of reputation, and also that the War Office maps and the chart in the possession of the Admiralty are not admissible.

STIRLING and COZENS-HARDY, L.JJ., agreed.

Aug. 11.—VAUGHAN WILLIAMS, L.J.—This is a difficult case. Most cases with regard to validity of a custom are difficult of decision. The fact is that reason recoils from the proposition that legal memory goes back to an arbitrary date at the beginning of the reign of Richard I., A.D. 1189, and if one finds proof of uninterrupted modern usage there is a natural inclination to presume the previous existence of the custom right back to 1189, even though the facts may be such as to force upon reason the conclusion that the modern usage could not in fact have been adopted for more than a few generations. Judges, therefore, presume everything possible which would give a custom a legal origin, and find in favour of a manifestly modern custom as being an extension which falls within the reason of so much of the modern usage as may well have existed throughout legal memory. I think that in the present case it is very difficult in reason to arrive at the conclusion at which Farwell, J., seems to have arrived—viz., that the drying of nets after cutching or oiling can be treated as a mere expansion, with the changes which take place in the circumstances of mankind, of the ancient custom of drying nets wet with sea water when taken out of the fishing boats on their return to the shore after fishing. Nor do I think that the validity of the latter custom, established by so many *dicta* in the books and old cases, is in any sense conclusive of the reasonableness or validity of a custom to dry after cutching or oiling nets in preparation for the user of them in sea fishing. It may be perfectly reasonable in favour of commerce and navigation to invade private property forming part of the beach, because it is so convenient to dry the nets wet and heavy with sea water on the nearest part of the beach suitable for such a purpose, since it is difficult to see how in many parts of the coast where cliffs or other causes make the inland difficult of access, sea fishing by nets could be carried on otherwise. But it by no means follows that it is reasonable in favour of commerce and navigation to bring from the land behind the beach nets which have been cutched or oiled at some inland spot and dry them on a part of the beach which is private property. The drying, at all events after oiling, burdens the land with the nets for a much longer period than the drying of the nets after being wetted with sea fishing does. But this difficulty arises: If the court treats the drying of the nets after oiling as a usage or custom to be tested as to reasonableness or unreasonableness, or whether or not it is contrary to the public good, or injurious or prejudicial to the many, the court will clearly be dealing with a modern

(a.) Reported by HENRY STEPHEN, Esq., Barrister-at-Law.

usage arising within living memory. I am not at all sure that the proper inference to draw from the evidence and from the user of the word "cutching" (derived from "cutch," an astringent plant of great astringent power, imported in great quantities from the Malay Archipelago, which, as far as the evidence goes, seems to be still used to prepare and preserve the nets for fishing) is not that the process of cutching did not begin in the eighteenth or nineteenth century. But perhaps the court may assume without evidence that some process of tanning nets before using them for sea-fishing has prevailed ever since the date of legal memory. Of course, if these customs are to be treated otherwise than as the expansion of the old custom, the custom relied on by the plaintiffs could not be supported. But I have persuaded myself that the court may regard the custom (as Cozens-Hardy, L.J., says in his judgment) as a custom for fishermen "to dry nets at all times necessary or proper for the purposes of the trade or business of a fisherman," and the modern usage of drying after cutching or oiling as a development of an ancient custom to do all the drying necessary or proper for the trade or business of a fisherman on the beach, and may so regard the custom, notwithstanding the increase of the burden on the land resulting from the modern user. As to the contentions of the defendant based on the recession of the sea and usage of a part of the beach, now free of sea but formerly covered by sea-water, not raising a custom in respect of the land gained by the gradual and, as it proceeded, imperceptible recession of the sea, I think those contentions fail entirely, for the reasons given in the judgments of my brothers, which I have had the advantage of reading. But I wish to add this, that I think there is evidence in this case to show that the practice of drying nets has really in time gone by extended to any convenient places on the sea-shore, and not only to the eleven acres of land in question, although of late years the shingle beach, of which the eleven acres consists, has afforded the most convenient spot for drying after oiling and cutching, and has, therefore, come to be freer of weeds and vegetable growth than other parts where the beach adjacent to Walmer happens to be shingly. Moreover, it seems to me that the right of drying nets must have always been exercised on the shingly ground which happened for the time being to be nearest to the foreshore and yet generally free from overflowing by the sea at high tides. If this view were taken of the evidence the result would be that the drying would, by following the receding sea, always take place on the part of the beach convenient for drying nets next to the sea. This part of the beach, although covered by the sea in times gone by, would, on the principles which the court has recognized in respect of land gained by accretion, be subject to the custom in favour of drying nets, and the area subject to the custom would always be adjacent to the sea. Take the beach which is now nearest to the old Cinque Port of Rye, which is now miles away from the port, though the sea formerly was immediately adjacent, it would be difficult to my mind to avoid the conclusion that the drying area must in such a case follow the sea. The custom began at the boundary between beach and sea. As the sea imperceptibly retires the law does not recognize any alteration in the land owned, or that there are new boundaries further away from the centre of the close, and, on the same principle, the area of drying would always be adjacent to the boundary for the time being between the beach and the sea. Such a custom would obviously be more reasonable than that which we are supporting. But neither the plaintiffs nor the defendant put forward at the trial or since this view of the custom. On the contrary, when I suggested it during the argument, both sides rejected it. This being so, I do not think it ought to be taken into consideration in this case. The result is that I agree with the rest of the court that this appeal should be dismissed, with costs.

STIRLING, L.J.—In this case the plaintiffs, on behalf of themselves and all other persons carrying on the trade of fishermen in the parish of Walmer, claim a customary right to dry their nets over a piece of ground (called the "beach ground"), which is covered with shingle, and is situate near the sea, and lies between the grounds of a house known as Walmer Place on the north, the grounds of Walmer Castle on the south, a public road called Wellington-road on the west, and the foreshore on the east, and containing at the present time about eleven acres. The evidence of living witnesses shows that for a period extending over seventy years, and by reputation for many years earlier, the inhabitants of Walmer who are fishermen have used so much of this piece of land as was not for the time being covered by the sea for the purpose of drying their nets in the following way: Down to a period of from twenty-five to thirty-five years ago, immediately before the commencement of the mackerel and herring fisheries respectively, the nets intended for use in those fisheries were tanned or cutched and brought to the beach ground and there dried; and, at the close of each of these seasons the same nets were again brought there and dried before being put away until next required. From twenty-five to thirty-five years ago the practice of tanning or cutching nets was discontinued, and in lieu thereof the nets were oiled, and the oiled nets were taken to the beach ground and dried there in the same way as the cutched or tanned nets had previously been. As I read the evidence, sprat-nets were never taken there at all until the introduction of oiling; but from that period the sprat-nets, being oiled, have been taken there and dried. This user has extended over the whole eleven acres, except where they were for the time being covered by the sea. It was admitted in this court (and, in my opinion, rightly) that a custom for fishermen to dry nets, which had become wetted by use in fishing, on a particular piece of land was good; but it was said that a custom to dry nets, which had not been wetted by the sea, but only in the process of tanning, cutching, or oiling preparatory to use for fishing, was bad; and that, as the evidence showed that the alleged custom extended to that drying no less than to drying at the end of the several fishing seasons, the alleged custom was bad *in toto*. Now the ground on which the custom to dry nets in the strict sense has been upheld is that it is in favour of commerce and navigation—Bacon's Abridgment (vol. 2) p. 566—and see what is said by Tindal, L.C.J., in *Tyson* v. *Smith*, 9 A. & E. 421. The tanning, cutching, or oiling of nets belonging to fishermen tends to preserve the nets and make them useful for a longer period, and the subsequent drying of nets seems to me to fall within the reasons thus assigned for the custom. It is laid down by Holt, C.J., in *City of London* v. *Vanacre*, 12 Mod., p. 271, that general customs may be extended to new things which are within the reasons of those customs. There is not, in my opinion, evidence from which it ought to be inferred that the practice of tanning or cutching has arisen within the time of legal memory. But it was said that, so far as related to the drying after oiling, the user extended over a period of from twenty-five to thirty-five years only; and moreover, that this user was more burdensome than the old user for drying after tanning or cutching. I think, however, that the law as laid down by Lord St. Leonards in *Dyce* v. *Hay*, 1 Macq. 312, cited by Farwell, J.,

applies, and that those entitled to the benefit of a custom ought not to be deprived of that benefit simply because they take advantage of modern inventions or new operations, so long as they do not thereby throw an unreasonable burden on the landowner. The evidence does not convince me that an unreasonable burden has been cast on the owner. The practice has been in existence for twenty-five years at least, without any objection being raised until the land recently passed into the hands of the defendant, although, during the greater part of that time, the property belonged to one who seems to have stood on his rights, and objected to anything which went beyond the custom as stated: see the evidence of the defendant's witness, William Thomas Hoyle. It is next said that a considerable portion of the "beach ground" consists of an accretion during the last fifty or sixty years, and that the custom cannot extend to that part. Custom, it is argued, is a local law, which must have existed from time immemorial—that is, from the beginning of the reign of Richard I.—and cannot be applicable to land which can be shown to have emerged from the sea in modern times. In *The King* v. *Lord Yarborough*, 2 Bligh N. S. 147, it was established that lands found by allusion—that is, gradual and imperceptible deposit, on the shore of the sea, belonged, not to the Crown as owner of the foreshore, but to the owner of the demesne lands of a manor, which were formerly bounded by the sea, as parcel of those demesne lands. Every manor must have existed prior to the statute of *Quia Emptores*; but it was not suggested that the operation of the rule was excluded by reason of the accretions having taken place in modern times. The reason of that rule is stated by Baron Alderson in *In re Hull and Selby Railway Co.*, 5 M. & W. 327, to be "that which cannot be perceived in progress is taken to be as if it never had existed at all." This was approved by Lord Chelmsford in *Attorney-General* v. *Chambers*, 4 De G. & J. 68, and has been applied in the present case by Farwell, J., who held that this accretion is to be treated as though it had occurred in 1186. It was insisted, however, that the doctrine of accretion is a rule of property law, and has nothing to do with custom, which is truly described as a local law. No authority was cited in support of this contention, and I am unable to agree with it. The local law points out the particular piece of land on which the right is to be exercised; and then the rule of the common law steps in and says that, where imperceptible accretion has occurred, the piece of land is to be treated as having been as it is from the commencement of legal memory. Lastly, it was urged that other lands in the neighbourhood of Walmer were subject to the same custom, and that the whole burden was being thrown on the defendant's land. The evidence does not appear to me to show with certainty that there are other lands subject to the custom; but, even if it were otherwise, all that the defendant would have to complain of would be an excessive use of his land, and this would not deprive the plaintiffs of the right to a reasonable use of the beach. I am, therefore, unable to differ from Farwell, J., and I think that the appeal ought to be dismissed.

COZENS-HARDY, L.J.—This is an appeal from a judgment of Farwell, J.'s, establishing the right of the fishermen of Walmer to dry their nets on some land known as the "beach ground," the property of the defendant. I might content myself with saying that I agree, not only with the judgment, but also with the reasoning upon which that judgment is based. The only exception or qualification I should make is, that, after the advice we have received from the officer sent by the Admiralty to assist us, I do not interpret Spence's chart of 1795 in the manner which, upon the expert evidence at the trial, Farwell, J., adopted. This, however, is not really of importance. The scale is so small that no safe inference can be drawn as to the precise line of high water at the spot in question in 1795. And, even if the sea has been steadily receding from 1795 to the present time, the result will not be affected, as pointed out by Farwell, J., when dealing with the law of accretion. Having regard, however, to the elaborate arguments addressed to us, and to the great importance of the case, I think it right to state in my own words, and as briefly as may be, why I think the appeal should be dismissed. The right asserted is based upon a custom extending beyond legal memory. Such a custom is often spoken of as a local law. Mr. Levett did not dispute, and in fact admitted, that a custom for the fishermen of a particular locality to dry their nets on the land of a stranger may be supported in law, though there is no actual decision to that effect. But, having regard to the numerous *dicta* referred to by Farwell, J., I feel no doubt that his decision on this point was correct. The persons, if any, entitled to the customary right are sufficiently ascertained—viz., the fishermen of Walmer. The real contest has raged over two points—viz. (*a*) over what land does the customary right extend, and (*b*) what is the extent of the right pleaded and how far its existence is justified by the evidence. (*a*) It is contended that the "local law" can only affect a definite close, which must have been available for the exercise of the customary right in the reign of Richard I., and that the evidence shows that a considerable part of the "beach ground," now eleven acres in extent, was at that time covered by the sea, and therefore could not have been used for drying nets. In my opinion this contention ought not to prevail. It appears certain, from the evidence of geologists and from the discovery of Romain remains immediately to the west of the "beach ground," that at least the western part of the "beach ground" existed in and long prior to the reign of Richard I. in substantially the same condition as at present. Within living memory the sea has gradually receded on this part of the coast, but there is nothing improbable in the suggestion that the reverse process may have gone on since the reign of Richard I., with the result that the line of high water is now practically the same as at that date, in which case the point under discussion would not arise. Assuming, however, that the sea has gradually and continuously receded, I think the land which has been added by accretion to the defendant's land must be subject to the customary right. The principle stated by Baron Alderson in *In re Hull and Selby Railway Co*, that "that which cannot be perceived in its progress is taken to be as if it had never existed at all"—a principle which is applied between two private owners, and between the Crown and a private owner—should be applied here. In the view of the law this is the same close as that affected by the local law in the time of Richard I. It is urged that this extension of area renders the custom uncertain, and, if the sea should still further recede, unreasonable. But I cannot assent to the argument. It must not be forgotten that the persons claiming under the custom are bound to exercise their rights reasonably and with due regard to the interest of the owner of the soil. (*b*) It remains to consider what is the custom pleaded, and how far it is supported by evidence. The custom pleaded is for the fishermen of Walmer at all times necessary or proper for the purposes of the trade or business of a fisherman to dry their nets upon the "beach ground," and for that purpose to spread those nets upon the surface thereof. The evidence proves that, so far as living memory goes, and by reputation prior to living

memory, the "beach ground" has been used (1) for drying nets after fishing when wet with sea water, the nets being either taken from boats immediately in front of the "beach ground" or brought in carts from some more convenient landing place; (2) for drying nets which have been "cutched" in order to render them more fit for use, the nets being brought in carts from the place where the cutching process has been performed, and taken away when dry, so as to be ready for the fishing season. I think it probable that the *dicta* which recognize the validity of a custom to dry nets had reference only to drying nets after they have been used for fishing, and not to drying nets in preparation for fishing, though I do not feel certain of this. But every argument used to support the former seems to me equally valid to support the latter. It is equally "in favour of fishing and navigation." "Cutching" is merely another name for, and is equivalent to, tanning. What are the pricise ingredients put into the cutch-pot is nowhere explained. I see no ground for inferring that it is a comparatively modern process because "cutch" is a material used for tanning and imported from the Malay Archipelago. There is nothing to lead me to doubt that tanning nets in preparation for fishing is an ancient process, and if so it cannot be seriously urged that the fishermen are bound to use only tanning materials known in the reign of Richard I. and that by substituting "cutch"—if in truth they have substituted it—they have lost their right. Or, to put the proposition in another and perhaps more accurate way, I think the proved usage of cutching nets is sufficient evidence of a custom to dry nets treated with suitable materials in preparation for fishing. This brings me to the third branch of the usage proved. About thirty or thirty-five years ago it was found desirable to oil herring nets instead of cutching them. This change was probably due to the use of cotton, instead of flax or hemp, as the material from which herring nets are made. Since that date cutching has been applied only to mackerel nets. In my view this falls within the same principle. It is nothing more than the application of a new and improved method of securing the former result. It is consistent with and supported by the older usage. I have not overlooked the argument that oiling imposes a greater burden on the land, as the nets take longer to dry. But, unless I am prepared to confine the fishermen to the precise methods adopted *tempore* Richard I., I cannot yield to this argument. The illustration given by Farwell, J., of the game of cricket, which was justified in *Fitch* v. *Rawling*, 2 H. Bl. 393, although cricket was not known in the reign of Richard I., is much in point. It follows that, in my opinion, the custom as pleaded is sufficiently established by the evidence—viz., a custom to dry nets at all times necessary or proper (whether before or after the fishing season) for the purposes of the trade or business of a fisherman. If I had not taken the view of the evidence which I have indicated I should have desired time to consider whether section 2 of the Prescription Act does not apply. Farwell, J., necessarily held himself bound by *Shuttleworth* v. *Le Fleming*, 19 C. B. N. S. 687, and *Mounsey* v. *Ismay*, 3 H. & C 486. In those cases the Court of Common Pleas and the Court of Exchequer held that the Prescription Act applies only to easements strictly so called, where there is a dominant tenement and a servient tenement, and does not apply to a customary right claimed by inhabitants of a particular district, although the word "custom" is found in the section. Those cases are open to review in this court, but I do not think it necessary on the present occasion to express any opinion upon the important point there decided.

Appeal dismissed.

Solicitors for appellants, *Bower, Cotton, & Bower*, for *Mowll & Mowll*, Dover.

Solicitors for respondents, *Hare & Co.*, for *F. W. Hardman*, Deal.

High Court of Justice.

Chan. Div. Kekewich, J. } Jan. 19, 23, 30.

In re BOSWELL.
MERRITT *v.* BOSWELL (*a.*)

Limitations, Statutes of—Solicitor's costs—Part payment—Retainer of moneys due to client.

Where a debtor owes a creditor several debts, some of which are statute-barred and some of which are not, and pays a sum without appropriating it to any particular debt, or the creditor retains moneys which he has collected on behalf of the debtor, no promise to pay the statute-barred debts can be inferred.

Waugh *v.* Cope, 6 *M. & W.* 824, *followed.*

Adjourned summons.

This was a claim brought in by a creditor on taking the accounts in a creditor's administration action commenced by originating summons on the 5th of August, 1904, in which the usual judgment was made on the 14th of November, 1904.

The testator was James Freeman Boswell, one of the plaintiffs in the prolonged and costly litigation known as *Boswell* v. *Coaks*. The claimant, Mr. Emerson, acted as the solicitor for the plaintiffs in that case, and he also acted as the solicitor for the testator in other matters until the date of the testator's death.

After the death of the testator the claimant brought in a claim for over £5,000 due on three bills of costs in relation to these various matters. It was admitted that nearly the whole of this claim was barred by the Statute of Limitations, unless certain alleged part payments took the claim out of the statute. These alleged part payments were as follows:

On the 1st of January, 1896, the testator made a payment to the claimant of the sum of £20.

In December, 1897, the testator owed certain moneys for which he had given security. The claimant, on behalf of the testator, obtained a larger loan on the same security, paid off the original creditors, and retained the balance, £63, on account, with the assent of the testator.

In January, 1902, the claimant, on behalf of the testator, recovered a small sum of money, and when his costs were paid there remained a balance of £2 4s. 2d. This amount the claimant, with the testator's assent, placed to his credit.

In September, 1902, on the death of a Mr. Greenwood, the claimant received from an insurance office the sum of £400 due on a policy on Mr. Greenwood's life, to which the testator was entitled, subject to a mortgage. After discharging the mortgage and making certain payments, the claimant retained the balance, £43 6s. 8d., with the assent of the testator.

The next transaction was in regard to a payment by a third party. *Boswell* v. *Coaks* was an action for the benefit of certain creditors, of whom Lord Walsingham was one, and in 1904 Lord Walsingham paid the claimant the sum of £20 as a contribution to the costs of that action.

(*a.*) Reported by P. JOHN BOLAND, Esq., Barrister-at-Law.

Christopher James, for the claimant.—These payments kept alive the debts not statute-barred at the dates on which they were paid. The payment on the 1st of January, 1896, kept them alive until the 1st of January, 1902. There were payments again in 1897 which would go beyond 1902, and there were again payments in 1902: *In re Friend, Friend* v. *Young*, 46 W. R. 139, [1897] 2 Ch. 421; *Cleave* v. *Jones*, 6 Exch 573; and *Thomas* v. *Cross*, 7 Exch. 733.

P. O. Lawrence, K.C., and *Galbraith*, for the plaintiffs in the administration action.—Payments without accounts stated do not keep alive a debt against the statute: *Waugh* v. *Cope*, 6 M. & W. 824; *Nash* v. *Hodgson*, 3 W. R. 590, 6 D M. & G. 474; and *Mills* v. *Fawkes*, 5 Bing. N. C. 455.

Armitage, for the defendants, the executors.

KEKEWICH, J., in giving a considered judgment, said: The general principle of the law, in respect of the doctrine that the effect of the statute may be avoided by part payment of principal or by part payment of interest, is stated in Darby and Bosanquet's book on the Statute of Limitations, p. 107, as follows: "The principle of this doctrine is that any such payment is an acknowledgment of the existence of the debt, and from it the law raises an implication of a promise to pay the residue or the principal, as the case may be, just as it does from a simple acknowledgment in writing." On the 1st of January, 1896, when a large portion of Mr. Emerson's claim was already statute-barred, but a large portion was not, Mr. Emerson pressed for a substantial payment on account of his costs, but the testator declared his inability to find at the moment more than £20, which sum was accordingly paid. This must be taken to have been an acknowledgment by the testator that more than £20 was due, and that from such acknowledgment there ought to be inferred a promise to pay. But what did the testator promise to pay—the whole balance or only so much of it as was not then statute-barred? According to the authorities the promise was only to pay so much as was not then statute-barred, the rule being that in order to give the payment a more extensive operation it must be shown to have been made expressly on account of the statute-barred debt. In respect to the item of £63 Mr. Emerson seeks to treat it as a payment by the testator from which a promise to pay ought to be inferred. There was nothing in the evidence to support the conclusion that this money was expressly devoted to any statute-barred debt, and it follows that if any promise to pay could be inferred that promise would extend only to so much of the debt as was not statute-barred. Even that ought not to be inferred. The testator, knowing that some balance was due to him on the completion of the transaction, assented to that balance being retained by Mr. Emerson, who, he knew, had claims against him, and he may have used some such expression as "Put the money to my credit or to my account." That is not enough. The circumstances of *Waugh* v. *Cope*, 6 M. & W. 824, were very like those now under consideration, and the entire judgment of the court, as reported on p. 829, is directly applicable to this case. The same result was expressed by Parke, B., in *Thomas* v. *Cross*. The £63 cannot, therefore, be properly treated as having been paid at all in the sense in which the word "paid" is used in this branch of the law. The evidence in regard to the retainer of £2 4s. 2d. is similar to that respecting the sum of £63, and the observations on the latter sum apply to this also. The same remarks apply to the transaction in regard to the insurance policy on Mr. Greenwood's life. With respect to the payment by Lord Walsingham, he recognized a moral obligation to contribute to the costs of the litigation in *Boswell* v. *Coaks*, and ultimately, after some correspondence, he sent a cheque for £20 to Mr. Emerson. No doubt to this extent the testator's liability to Mr. Emerson was reduced, but Lord Walsingham did not make the payment on account of the testator or in part payment of his debt, but in recognition of the moral obligation. In no sense can the payment be treated as one by the testator from which a promise to pay the balance of his debt can be inferred against him.

The result is that nothing has been done to take out of the operation of the Statute of Limitations the debts which were barred at the date of the judgment. This does not cover the whole of the debts, and there are a few items in respect of which Mr. Emerson is entitled to prove. He will be admitted a creditor for these sums, and be allowed such costs in respect thereof as the master thinks fit. He must pay the costs of the adjournment into court, but there will be no order as to the costs of the claim in chambers except that the parties opposing will be allowed theirs in the ordinary course out of the estate.

Solicitors, *Whites & Co.*, for Emerson; *C. G. Scott* for the plaintiffs and defendants.

Chan. Div. } Farwell, J. } Jan. 29, 30; Feb. 5.

ATTORNEY-GENERAL *v.* MAYOR, &C., OF MANCHESTER. (*a.*)

Corporation—Municipal corporation—Statutory powers—Tramway business—Common carrier—Incidental powers—Ultrà vires—*General Tramway Act*, 1870 (33 & 34 *Vict. c.* 78)—*Railway Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 20), *s.* 86—*Manchester Southern Tramways Act*, 1903 (3 *Ed.* 7, *c. cxciii.*)—*Manchester Corporation Tramways Act*, 1889 (62 & 63 *Vict. c. cclv.*).

The defendants were incorporated by Royal Charter and subject to the Municipal Corporations Act, 1882. *The Manchester Corporation Tramways Act*, 1899, *enabled the Manchester Corporation to run carriages and take tolls on all the network of tramways mentioned therein, and to use such tramways for the purpose of carrying passengers and of conveying and delivering animals, goods, minerals, and parcels.*

Held, it was not ultrà vires *for the corporation to deliver by cart or otherwise at the consignee's house or to any other place authorized by him, including the station of a railway company, such goods as they have brought on their tram lines, such delivery being fairly incidental to their authorized business. There was nothing in the Acts relating to the Manchester Corporation which authorized them to act as carriers generally without reference to their tramways. The defendants were not entitled to expend money for the purpose of establishing or maintaining or carrying on the business of carriers, except as part of or in connection with their tramway undertaking, and in respect of articles carried along all or part of the tramways.*

Action.

This action was brought by the Attorney-General on the relation of Thomas Watson, against the Corporation of Manchester. The plaintiff claimed an injunction to restrain the defendants from acting as carriers or delivery agents, excepting on their tram-

(*a.*) Reported by PAUL STRICKLAND, Esq., Barrister-at-Law.

ways, and from expending any of the corporate moneys for that purpose.

The facts of the case are set forth in the judgment of Farwell, J.

Upjohn, K.C., Montague Lush, K.C., and *Rowlatt*, for the plaintiff.

Balfour Browne, K.C., Macmerran, K.C., and Hugh Moulton, for the defendants.

FARWELL, J., in giving judgment, said: This is an action by the Attorney-General on the relation of a ratepayer against the Corporation of Manchester claiming, in effect, an injunction to restrain the defendants from acting as carriers or delivery agents, excepting on their tramways, and from expending any of the corporate moneys for that purpose, and for incidental declarations. The defendants were incorporated by Royal Charter dated the 23rd of October, 1839, and they justify the acts complained of both under the powers given to them by their private statutes and also under their common law rights and powers as a corporation by charter, and they claim the right to act generally as common carriers. The action is to a great extent *quia timet*, for the defendants commenced operations last year, and the writ was issued on the 5th of May, 1905. The defendants have called no evidence to show what business is actually done by them, and their acts and intentions are gathered from the documents put in evidence and their admissions and answers to interrogatories. Their intention is to put in operation a large and comprehensive scheme of parcels delivery and collection, and, as part of this scheme, they propose to accept "cash on delivery" parcels—*i.e.*, parcels where the value thereof is to be collected by them on delivery, and subsequently handed to the senders; "express delivery"—*i.e.*, parcels to be delivered by special messengers at special rates; and "to insure" parcels. They also propose to act as agents for all railway companies for the receipt of parcels, and to pay to the companies monthly all moneys due to them for the carriage of parcels in consideration of a payment to the corporation of a penny per parcel for collection. They propose also to collect and deliver parcels outside the radius of their tramway lines altogether, between places having no connection with their trams; and to collect and deliver goods which have never travelled, and are not intended to travel, by their trams at all. In April, 1905, they issued a book of rates and arrangements for the conveyance of parcels traffic from Manchester to all parts of the United Kingdom and abroad, and described themselves as agents for all railway companies, and they have spent several thousand pounds in plant, vans, and horses, and have engaged numerous agents and servants with a view to carrying on this business. All that expenditure has been or is intended to be entered in account and dealt with as part of the expenditure of the corporation in respect of their tramway undertaking, as part of the working and establishment expenses, and as part of the management of the tramway, &c. All the expenditure at present incurred in providing horses, vans, carts, stables, offices, and agencies used and to be used in connection with collecting, carriage, and delivery of parcels has been defrayed out of money borrowed by the tramway undertaking or capital applicable thereto. The charges for the services so proposed to be rendered will in many cases be in excess of the maximum charges authorized for the use of the tramways when the tramways are used, and in cases when the tramways are not used will be made without statutory authority.

Now the difference between a statutory corporation and a corporation incorporated by Royal Charter is well settled; the former can do such acts only as are authorized directly or indirectly by the statute creating it; the latter (speaking generally) can do everything that an ordinary individual can do. If, however, the corporation by charter be (as are the defendants) a municipal corporation, then they are subject to the restrictions imposed by the Municipal Corporations Act, 1882, and will be restrained from applying their borough funds to purposes not authorized by that Act: *Attorney-General* v. *The Mayor of Newcastle*, 23 Q. B. D. 492, 38 W. R. Dig. 139. If the defendants in this case had no statutory powers, it is plain that they could not apply their borough fund either for the purposes of the tramways or of the business of general delivery agents or common carriers. Granting that theoretically a corporation by charter could lawfully run tramways or carry on such a business, they could not do so in practice without the expenditure of money, and it is accordingly argued in the present case that, if and so far as the defendants are carrying on business as carriers in excess of their statutory powers, they are doing so under their common law powers, and that the expense of such excess adds nothing to the expenses incurred in respect of the exercise of the statutory powers, and, therefore, cannot be restrained.

I will first consider the statutory powers of the defendants. Under the General Tramways Act, 1870 (33 & 34 Vict. c. 78), a local authority was authorized to acquire possession of a tramway, but, if they did so, could only lease it to a third person or allow it to be used by the public in respect of tolls; nothing in the Act authorized any local authority to place or run carriages upon such tramway and to demand and to take tolls and charges in respect of the use of such carriages (section 19). By a provisional order confirmed by an Act of 1875 (38 & 39 Vict. c. clxvii.), the defendants obtained powers (section 6) to construct and maintain the tramway therein described with all proper rails, plates, offices, weighbridges, stables, carriage-houses, warehouses, works, and conveniences connected therewith and for the purposes thereof and to work and use the same. Section 14 provides: "The tramways may be used for the purpose of conveying passengers, animals, goods, minerals, and parcels." Section 16 provides, under the head of tolls: "The promoters may demand and take for every passenger travelling upon any of the tramways or any part thereof and tolls or charges not exceeding one penny per mile (and for this purpose the fraction of a mile beyond an integral number of miles shall be deemed a mile), but the promoters may charge for any less distance than three miles any sum not exceeding 3d." Section 17: "The promoters may demand and take for all animals, goods, minerals, and parcels conveyed upon the tramways any tolls not exceeding the rates per mile specific in the schedule to this order annexed." Section 18: "If the promoters under the authority of the Tramways Act, 1870, demise the rights of user of the tramways and of demanding and taking in respect of the same tolls and charges authorized by this order, such tolls and charges shall include all charges which may be made for the use of the tramways and of carriages and for motive power and every other incidental expense"; and then a list of tolls is appended. It will be observed that if the corporation demise the right to use the tramways, reference is made to incidental expenses which is not to be found in section 16; and in the Provisional Order of 1878 (41 & 42 Vict. c. clxiii.), sections 14 to 18, the tramways being then in lease, a similar provision is inserted, and in clause 18 certain tolls and charges are authorized, and it is enacted that "such tolls or charges shall include all tolls and charges which may

be taken or made for the use of the tramways and of carriages, wagons, or trucks, and for motive power, and every other expense incidental to such conveyance." Whatever may have been the reason for this distinction between the corporation and its lessees, the Manchester Corporation Act, 1897 (60 & 61 Vict. c. ccxli.), s. 20, clearly contemplates the working of the tramways by the corporation itself. It is common knowledge that by this time municipalities had in many cases been authorized to acquire works of a public nature within their boundaries with a view to working them at a profit. It is no part of the function of this court to consider whether municipal trading of this or any other kind is or is not politic; my duty is confined to construing the Acts by which the Legislature has conferred that power, and I know of nothing that would authorize me to apply principles of construction to an Act giving power to a municipality to carry on some trading operations differing from those applicable to an Act giving similar powers to any other corporate body. The next Act, 1899 (62 & 63 Vict. c. ccliv.), is that on which the defendants mainly rely. It recites "and whereas it would be of public and local advantage if the tramways within the city were worked in connection with those in the adjoining neighbouring districts, and it is, therefore, expedient that the corporation should be empowered to take leases of and to work such last-mentioned tramways, and that further facilities as by this Act provided should be afforded for the working of tramways within and beyond the city," and then it defines in section 2—"'City tramway' means any tramway for the time being within the city; 'outside tramway' means 'any tramway for the time being in any district adjoining or near to or connected by tramway with the city'; 'tramway undertaking' includes 'any tramway for the time being in lease to the corporation and all rights and powers of the corporation over or in respect of 'outside tramway.'" Section 8 provides, "Notwithstanding anything to the contrary contained in the Tramways Act, 1870, or in any other Act or order the corporation may place and run carriages on and may work any tramways for the time being belonging or in lease to the corporation or on which they may have any powers to place or run carriages, and whether within or beyond the city, and may take and demand tolls and charges in respect of such tramways and of the use of carriages thereon, and the corporation may reconstruct or alter such tramways and may provide all such buildings, cars, rolling-stock, engines, machinery, electric and other plant, apparatus, and appliances, horses, and stables, as they may deem requisite or convenient for the working or user by the corporation of such tramways by animal or mechanical power, and may sell or dispose of or exchange such of the before-mentioned articles and things as from time to time may no longer be required"; and section 22 provides, "Notwithstanding anything contained in any other Act or order relating to any tramways for the time being belonging or in lease to the corporation or on which they have power to place or run carriages, such tramways may be used for the purpose of conveying and delivering animals, goods, minerals, or parcels, provided always that the corporation shall not be under any obligation to carry on the tramways unless they think fit any animals, goods, minerals, or parcels except that every passenger travelling" may take 28lb. weight with him; and section 24 provides that, "subject to the provisions of this Act, part of section 18 and the schedule of the Manchester Corporation Tramways Order, 1878, shall apply to and in respect of the city tramways and outside tramways for the time being belonging or in lease to the corporation or on which the corporation have power to place or run carriages," and the provisions of section 18 as to tolls and charges for goods and parcels, and so on, are similar to those in the Manchester Corporation Tramways Order, 1875, above mentioned.

This Act, in my opinion, enables the corporation to run carriages and take tolls on all the network of tramways mentioned therein, and to use such tramways for the purpose of carrying passengers and of conveying and delivering animals, goods, minerals, and parcels. Mr. Upjohn pressed upon me that there is no power to carry or deliver, but merely a power to use the tramway for the purpose of carrying and delivering, but this appears to me too narrow a ground on which to found a decision. I refer to the Railways Clauses Consolidation Act, 1845, s. 86, and I find that there is no power to carry generally thereby conferred, but a power to "carry and convey upon the railway all such passengers, goods," &c. I am unable to see any real distinction between this and the power given to the corporation by sections 8 and 22 of the Act of 1899. But a railway company acting (as all railway companies now elect to act and as the defendants act) as carriers, and not as either toll takers or conveyers (see Wills, J.'s, judgment in *Hall* v. *London, Brighton, and South Coast Railway Co.*, 15 Q. B. D. 537), have undertaken the ordinary duties of a carrier, as Byles, J., put it in *Taylor* v. *Great Northern Railway*, 14 W. R. 639, L. R. 1 C. P. 385: "The first duty of a common carrier is to carry the goods safely; the second is to deliver them." This duty to deliver would exist without the express use of the word in section 22, and I cannot read that section as restricting the corporation to delivery from the trams. In the absence of custom or of special contract, I apprehend that a railway company is not bound to deliver at the house or shop of the consignee, but, if they do not, they are bound to keep the goods safely for a reasonable time and to deliver to the consignee or his agent when he calls for them. But there is nothing *ultra vires* in their delivering by cart or otherwise at the consignee's house or to any other place authorized by him, including the station of a railway company, such goods as they have brought on their tram lines; such delivery is fairly incidental to their authorized business. As Lord Halsbury puts it in *Sowerby* v. *Great Northern Railway*, 7 R. & C. Cases, at p. 170, "They (that is, the Great Northern Railway) are permitted by law to carry on the business not only along their line, but also in connection with it and as part of the same general undertaking by which they make profit—the business of distributing the goods which they so bring from distant points to the places where the different consignees intend they shall be delivered. For that purpose they have to build stations, both for the receipt and for the dispatch of goods which are so entrusted to them." It would be difficult in the present case to put any practical limit to the place of delivery. It cannot be at the terminus only—this is probably in the middle of the highway—some radius of space within which a receiving store may be situate must be allowed, and some means of conveying to this store must be permitted. There is no ground for confining it to manual labour; indeed, the weights mentioned in the schedule of tolls negative this; it must, therefore, be open to the defendants to use horses and carts even to get the goods to their own depôt, and, if they can do this, I see no reason why they should not be allowed to convey them to the consignee's address or some other place named by him. So far, therefore, as the expenditure complained of arises out of the working of their tramway undertaking, as explained above, I

can see no objection to it. The defendants are empowered to build goods stations for the reception and for the delivery of goods; to provide and pay for carts and horses and the like for collection and distribution, and to pay wages to men employed for those purposes; to provide buildings to house the horses and carts so used; to receive and transmit goods by rail, and to insure; for inasmuch as a common carrier is an insurer of the goods entrusted to him at common law, it must be open to the defendants to make a bargain limiting such liability or undertaking it on special terms.

So far as regards "cash on delivery goods" I have no evidence that this is part of the business of a common carrier, and I can only say that if it is, then the corporation can accept goods for carriage and delivery on their trams on those terms. But this is all restricted to goods which travel along the trams, or some part thereof; there is nothing in the Acts to authorize the corporation to act as carriers generally without reference to their tramways. The question, as is pointed out in *Attorney-General* v. *London County Council*, [1901] 1 Ch. 781, 49 W. R. Dig. 97, is not whether the business can be conveniently or advantageously conducted with the tramway business, but whether it is by necessary implication incidental or accessory to it, and I think that it is not. To collect and deliver parcels for the tramway is fairly incidental; to collect and deliver parcels outside the radius of the trams, and without any connection with the trams, is not incidental to the tram business, but distinct from it. At the best it could only be said to be incidental to the incidental, and such reasoning would authorize a railway company to carry on a coal merchant's business, because they must buy coal, and this was restrained in *Attorney-General* v. *Great Northern Railway*, 8 W. R. 556, 29 L. J. Ch. 794. For the same reasons I hold that the corporation cannot act as general agents for the railway companies, but only in respect of tram-borne goods. The defendants, however, further contend, and I think rightly, that the corporation can so act by virtue of its corporate existence, and that this court will only interfere to prevent the expenditure of the borough funds on such a venture; but they say also that there is nothing to show that they have made any such expenditure. I have, however, already stated that they threaten and intend to do so, and I am not satisfied that they have not already done so. It is obvious that a delivery service by carts to and from villages not connected with the company, and a general agency for all railway companies, must entail expense, even if the same carts and men be used as are employed ordinarily in tram service proper; some of both are required, and there is wear and tear to be considered; the horse that delivered tram-borne parcels only might last for years, while the journeys between outside villages might break him down in a twelvemonth. I cannot believe that a large general delivery service and a general railway agency can be added to a service limited to the connection with trams without expense. No evidence has been given of the amount of such expenditure, but the plaintiff is, in my opinion, entitled to an account at his own risk of all sums so expended.

I have said nothing so far as to the charges which the corporation make for the services rendered by them in addition to the sums allowed by their Acts, and I do not think it is proper that I should express any opinion as to their legality in this action. The Attorney-General sues on the relation of a ratepayer to restrain the improper use of the borough fund; these charges when received are an increase to the borough fund; if any one can complain, it is the person against whom they are made; the relator profits by them. If they are wrongfully made, and litigation ensues, it is not a matter of course that the costs if the corporation fail, would be allowed out of the borough fund; but, however that may be, the question of their legality appears to me to be one of some difficulty, and I am not aware of any authority which would justify me in preventing the corporation from receiving payments simply because it may be doubtful whether they are properly recoverable or not. An individual can make such charges and receive them; if they are wrongfully made, he may be liable to an action. The corporation as a chartered corporation may do the same; there is no depletion of corporate funds by such receipt; whether or not there will be when the payments are successfully reclaimed I will leave to be dealt with when the question arises. Reference was made to the Manchester Southern Tramways Act, 1903 (3 Ed. 7, c. cxciii.), but no facts were proved to show that it had any operation, and I cannot read section 87, subsection 7, of that Act in the way proposed by the defendants. I think it must mean "any tramways, &c., now purchased by or leased to the corporation, or which they shall be entitled to purchase or lease, and shall have purchased or leased." It cannot have been intended to make tramways which the corporation had neither purchased nor leased part of the undertaking of the corporation.

I propose to make a declaration that the defendants are not entitled to expend any part of the city fund, or the receipts of their tramway undertaking, or the proceeds of any city rate, or any other moneys of the defendants, or of the city, for the purpose of establishing or maintaining or carrying on the business of carriers, except as part of and in connection with their tramway undertaking, and in respect of articles carried along all or part of the tramways for the time being belonging or in lease to the corporation, or on which they have power to place or run carriages, and to grant an injunction in similar terms. If the plaintiff desires it, I will also direct an inquiry on similar lines, reserving the costs of such inquiry. I have felt some difficulty as to the costs of the action. The plaintiff has failed in a part of his claim, but he has also succeeded to a substantial degree, and there are no issues of fact by which the costs could be measured separately; the only evidence adduced by the defendants proved abortive. The action was properly brought, and the plaintiff ought, I think, to have the general costs, but with some considerable deduction. I have come to the conclusion that justice will be done if I order the defendants to pay to the plaintiff one-half of his costs of the action, leaving the plaintiff to bear the other half, and the defendants will, of course, bear their own costs. I will suspend the operation of the injunction for fourteen days to give the defendants time to decide whether they will appeal or not.

Solicitors for the plaintiffs, *Ince, Colt, & Ince.*

Solicitors for the defendants, *Austin & Austin*, for *W. H. Talbot*, Manchester.

Chan. Div.
Swinfen Eady, J. } Jan. 16, 19, 30.

In re RATTENBERRY.
RAY *v.* GRANT. (*a.*)

Will—Legacy—Debt owed by testatrix to legatee—Satisfaction.

A testatrix bequeathed a legacy to a sister to whom she owed money at the time of her death. The amount of the legacy exceeded the amount of the debt. The sister, as an executrix, retained a sum sufficient to satisfy the debt with interest in addition to the legacy.

Held, that the legacy was in satisfaction of the debt.

Originating summons.

The plaintiff was a sister of the testatrix, who died on the 22nd of February, 1904. In 1899 the testatrix had borrowed from the plaintiff sums amounting in all to £150, upon which interest at the rate of £5 per cent. per annum had been paid by the testatrix during her life. At the time of the death of the testatrix these loans had not been repaid.

By her will, dated the 23rd of November, 1903, the testatrix had bequeathed to the plaintiff a legacy of £400, and had appointed her to be an executrix. The will contained no directions for the payment of debts.

The plaintiff, in her capacity of executrix, retained out of the testatrix's estate a sum sufficient to satisfy the debt with interest and also the legacy.

The object of this summons was to determine the question whether the legacy was in satisfaction of the debt.

Baden Fuller, for the plaintiff.—The fact that the legacy was given generally takes the case out of the general rule. The testator intended the legacy to be payable in addition to the debt. By paying interest the testatrix shows that she did not intend the debt to be paid by the legacy. The doctrine of satisfaction would not apply in the case of a debt after the date of the will. The debt was in the nature of a running account.

Austen-Cartmell, for the residuary legatees.—The legacy must be considered to be in satisfaction of the debt. The effect of the authorities in point is summed up in *In re Horlock*, 43 W. R. 410, [1895] 1 Ch. 516.

Jan. 30.—SWINFEN EADY, J.—The rule is that a legacy to a creditor of an amount equal to or greater than the debt is *primâ facie* to be considered a satisfaction of the debt. This rule was established two centuries ago; but no sooner was it established than it was frequently disapproved of, and exceptions were engrafted upon it. In *In re Horlock*, *Calham* v. *Smith*, 43 W. R. 410, [1895] 1 Ch. 516, Stirling, J., said that he joined with the many judges who had disapproved of the rule laid down, and that he equally disapproved of the exceptions which had been engafted on it, but that both were binding upon him. They are both equally binding upon me. The present case is, in my opinion, within the rule, unless there is sufficient indication of intention to exclude the rule. The debt was £150, money borrowed by the testatrix in 1899 from her sister, the plaintiff, upon which the testatrix paid interest at 5 per cent. during her life, and it was payable on demand. The legacy is a general pecuniary one of £400, without any time being specified for payment of it, and without any mention of interest. The will bears date the 23rd of November, 1903, and does not contain any direction to pay debts. It is sought to exclude the rule on the ground that the debt carries interest from the death and the legacy only from one year after the death. But it was decided by Lord Hardwicke in *Clark* v. *Sewell*, 3 Atk., at p. 99, that where the legacy is in satisfaction of a debt, and no time is fixed for payment of the legacy, it carries interest from the death of the testator. If the will mentions a date for payment, then interest will only run from that date; and this was the ground upon which *Haynes* v. *Mico*, 1 Bro. C. C. 129, and *Adams* v. *Lavender*, McCl. & Y. 41, were decided, as pointed out by Stirling, J. Indeed, in *Clark* v. *Sewell*, 3 Atk., at p. 97, Lord Hardwicke said: "According to the rule of this court, a legacy that ought to be deemed a satisfaction must take place immediately after the death of the testator; for the debt, whether of a principal sum or for interest, is due at the death of the testator, and therefore the legacy must be so too. . . . There is no case to make a legacy a satisfaction of a debt where the legacy is not due at the time of the testator's death, but is made contingent, and to take place at a future day. . . . Whether the postponing of the legacy is a month only, or a longer time, it makes no manner of difference." Lord Hardwicke, in referring to a legacy that "must take place immediately after the death of the testator," means a legacy the payment of which is not postponed by the testator. A legacy is within the rule laid down by Lord Hardwicke if it is an immediate legacy, although, of course, only payable in a due course of administration, and after debts and funeral expenses have been provided for. In *Fowler* v. *Fowler*, 3 P. Wms. 353, where the debt due at the date of the will was £200 for arrears of pin-money, and a general pecuniary legacy of £500 was given, Talbot, L.C., held that the legacy was a satisfaction of the debt. In *Gaynon* v. *Wood*, 1 Dickens 331, there was a bond debt of £200 and a legacy of £500 given to the creditor by a subsequent codicil, and the Master of the Rolls held that the legacy must be taken in satisfaction of the debt, and the fact that, since the death, the executor had paid the bond debt to the creditor made no difference in adjusting the rights of the parties. So again, *In re Fletcher*, *Gillings* v. *Fletcher*, 36 W. R. 841, 38 Ch. D. 373, before North, J., is an instance of a legacy being given in satisfaction of a debt, where the debt carried interest, and where no time was fixed for payment of the legacy. In that case the debt was in fact paid off by the testator in his lifetime, and the actual decision was that the legacy had been adeemed, but the learned judge first considered how the matter would have stood if the debt had not been so paid off. He said: "Suppose the debt had not been paid, could the widow have taken the debt as well as the legacy? I think clearly not." The fact, therefore, that the legacy is given generally, without any reference to time of payment or interest, will not exclude the rule. Reliance was also placed on the fact that the plaintiff was appointed executrix and could retain her own debt, but in my opinion this makes no difference. As I have already pointed out, in the case of *Gaynon* v. *Wood* the debt had been actually paid by the executor. I am, therefore, bound by the authorities to which I have referred to hold that, in the present case, the legacy is a satisfaction of the debt.

The distinctions between the cases on the satisfaction of debts by annuities are very slender, as may be seen by comparing *Atkinson* v. *Littlewood*, 18 Eq. 595, before Malins, V.C., and *In re Dowse*, 29 W. R. 563, 50 L. J. Ch. 285, before Hall, V.C., which latter case was followed by Stirling, J., in *In re Horlock*, 43 W. R. 410, [1895] 1 Ch. 516; but it is by the decisions on cases of legacies, which leave no room for doubt, that the present case is governed.

Solicitors, *Gribble, Oddie, Sinclair, & Johnson; Langford & Fisher.*

(*a.*) Reported by F. HARDINGE DALSTON, Esq., Barrister-at-Law.

Chan. Div.
Warrington, J. } Jan. 13.

In re No. 9, BOMORE-ROAD. (*a.*)

Company—Trustee—Dissolution—Vesting order—Outstanding legal estate—Leaseholds—Trustee Act, 1893 (56 & 57 *Vict. c.* 53), *ss.* 25, 26.

Where a company which up to its dissolution was trustee of property has ceased to exist, the court has power under section 25 *of the Trustee Act,* 1893, *upon the application of the beneficiary, to appoint a new trustee or trustees of the property, and to make an order under section* 26 *of the Act vesting the property in the new trustee or trustees.*

In re General Accident Assurance Corporation, 52 *W. R.* 332, [1904] 1 *Ch.* 147, *followed.*

In re Taylor's Agreement Trusts. 52 *W. R.* 602, [1904] 2 *Ch.* 737, *distinguished.*

In 1890 certain leasehold premises called 9, Bomore-road, Notting Hill, in St. Mary Abbott's, Kensington, were assigned to a company called Pitt & Norrish (Limited) for the residue of a term of ninety-nine years, subject to the payment of the rent and performance of the covenants reserved and contained in the lease.

In 1896 the company was wound up voluntarily and a new company of the same name formed, and in February of that year the liquidators of the old company entered into an agreement with the new company for the transfer to them of all the lands, buildings, and property of the old company for certain valuable considerations.

Under this agreement the new company were let into possession of the leasehold premises, 9, Bomore-road, and had ever since been in possession of them, but no assignment to the new company of the lease had ever been executed.

In October, 1896, the old company became dissolved under section 142 of the Companies Act, 1862, the liquidators having made the required return under section 143.

Upon the new company proposing to sell the property they discovered that it had never been legally assigned to them. They thereupon presented this petition in the matter of the property and in the matter of the Trustee Act, 1893, asking for a declaration that the old company was at and immediately before the date of its dissolution possessed of the leasehold premises as trustees for the petitioners upon a trust within the meaning of the Trustee Act, 1893, and that pursuant to section 25 of that Act a person who was named might be appointed trustee of the premises in the place of the old company, and that the premises might, pursuant to section 26 of the same Act, be ordered to vest in the person named for all the estate and interest therein vested in the old company immediately before its dissolution, upon the trusts upon which the same were held by the old company as aforesaid.

The petition was not served upon anyone.

J. G. Wood, for the petitioners.—Similar orders have been made by James, V.C., in *The King of Hanover* v. *The Bank of England,* L. R. 8 Eq. 350, 18 W. R. Dig. 110, by Malins, V.C., on the 19th of November, 1880, in the unreported case of *In re Trusts of Land at Farnborough,* Reg. Lib. A. 1882, p. 2297, and by Farwell, J., in *In re General Accident Assurance Corporation,* 52 W. R. 332, [1904] 1 Ch. 147. Buckley, J., refused to follow this last case in *In re Taylor's Agreement Trusts,* 52 W. R. 602, [1904] 2 Ch. 737, but Farwell, J., in *In re Richard Mills & Co. (Brierley Hill) (Limited),* W. N. 1905, p. 36, followed his own previous decision.

WARRINGTON, J.—The difficulty that arises is in consequence of some conflict of authority. In the first place, there is the case of *The King of Hanover* v. *The Bank of England.* In that case a large sum of Consols stood in the name of the Lords of His Majesty's Royal Regency of Hanover, and it appeared that on the taking over of the kingdom of Hanover by Prussia the body described in the report of the case as the corporation, or *quasi*-corporation, known as the Lords of His Majesty's Royal Regency of Hanover, ceased to exist, and it became necessary, as in this case, to do something to make a title to those Consols, and ultimately James, V.C., made an order under the section of the old Trustee Act corresponding to the 25th section of the Trustee Act, 1893, which order is set out at p. 352 of the report. It was to this effect. It declared that the body or person described in the bank books as "The Lords of His Majesty's Royal Regency of Hanover" were trustees of the £600,000 odd Bank Annuities mentioned in the pleadings for the persons entitled thereto under the family law in the Bill mentioned, and after declaring as follows: "And it appearing that it is expedient to appoint new trustees of the said sum of Bank Annuities and that such appointment cannot be made except by the order of this court" trustees were appointed and a vesting order was made. The next case is an unreported case, the note of which in the Record Office Mr. Wood has been good enough to give me, in which an order was made by Malins, V.C. That was a case relating to real estate, and the facts were for all practical purposes identical with the present. The estate had been vested in a company, the company was dissolved, and Malins, V.C., made an order appointing a new trustee, as I am asked to do in this case, and on that appointment making a vesting order in that new trustee. Then later on, in the year 1903, Farwell, J., in *In re General Accident Assurance Corporation* had to deal with a case on all fours with that with which I have now to deal, in which a mortgage of leaseholds had been vested in a dissolved company, and it was necessary to vest that mortgage in a purchaser from the dissolved company. In that case Farwell, J., was not asked to appoint new trustees; he was asked to act under sections 26 and 35 of the new Trustee Act, and to make a vesting order as on the footing that the premises had been vested in a trustee who could not be found. He thought it right to make the order. In a subsequent case of *In re Richard Mills & Co. (Brierley Hill) (Limited),* reported only in W. N. 1905, p. 36, Farwell, J., made a similar order. So far the authorities seem to authorize me to do what I am prepared to do, and I should have no hesitation at all but for the decision of Buckley, J., in *In re Taylor's Agreement Trusts.* I think that I need say very little about that case, because the subject-matter was different from that with which I have to deal. The learned judge was dealing there with a patent, and I think that his decision was determined largely by that fact. He was dealing with letters patent granted by the Crown to a patentee who had ceased to exist, and consequently the letters patent might be said to have merged and to have disappeared altogether. He did deal in a few words with the 25th section, on which I am asked to act, but I think that in his dealing with that section his judgment was directed, as was natural, mainly to the facts with which he had to deal. Now, section 25 is expressed in perfectly general terms. It empowers the court whenever it is found expedient, difficult, or impractic-

(*a.*) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

able so to do without the assistance of the court, to make an order for the appointment of a new trustee or new trustees. Now, is it expedient in this case to appoint a new trustee? There can be no doubt about that. Here is a property vested in a purchaser in equity with a legal estate outstanding; nobody knows where the legal estate is; and except by appointing a new trustee it is impossible to get that estate vested where it ought to be—namely, in the purchaser or a nominee of the purchaser. That being so, the section enables the court to do that which it is expedient to do, where it cannot, as in the present case, be done without the assistance of the court. The words "although there is no existing trustee," which are added, do not limit the powers given to the court in the previous part of the section, or make it incumbent upon persons who apply to the court to exercise its power to show that there is no existing trustee. The words merely prevent any limitation of the general power in the earlier part of the section in a case in which it is shown that there is no existing trustee. I think that there is no existing trustee at the present time, because even if these leaseholds vest in the Crown as trustee, we know that the Crown does not recognize its position as trustee where the legal estate is outstanding. But whether that is so or not, I think this is a case where it is expedient that a new trustee should be appointed, and that I can make the appointment. And if I appoint a new trustee there is no question that I may make a vesting order. It is not necessary that this order should be served upon the Crown.

Application granted.

Solicitors, *Edell & Gordon.*

K. B. Div. (Bigham, J.) May 23, 24; June 3, 1905.

PHŒNIX ASSURANCE CO. (LIMITED) v. SPOONER. (a.)

Insurance (Fire)—Subrogation of rights—Indemnity—Compulsory purchase of insured premises—Notice to treat—Fire after notice—Payment by insurers—Acceptance by vendor (assured) of a sum less by the amount paid for the loss.

During the currency of a policy against fire a corporation served on the assured a notice to treat for the purchase of the insured buildings, under the powers of the Lands Clauses Consolidation Act. Subsequent to the notice, but before anything further had been done under the notice, the premises were destroyed by fire. The insurers paid the agreed amount of the loss to the vendor. The corporation and the vendor agreed the amount of the purchase price, and in so doing took into account the amount which the insurers had paid the vendor, reducing the purchase price by that amount. The insurers sued the vendor to recover the amount which they had paid, alleging that the vendor might have received that amount from the corporation.

Held, that the corporation were not entitled to the benefit of the policy issued to the vendor. The contract was a personal one, and did not pass to the corporation. The contract being one of mere indemnity, the insurers, upon payment of the loss, became entitled to all the rights then vested in the vendor in respect of the destroyed property. Those rights included a right to be paid by the corporation the value of the property as at the date of the notice to treat. It was not legally possible for the vendor to deprive the plaintiffs of the benefit of this right by any agreement with the corporation, and the insurers were entitled to recover the amount.

Action tried in the Commercial Court.

The plaintiffs' claim was for the sum of £925 as money received or which might have been received by the defendant for the use of the plaintiffs or as the equivalent of the benefit received or which might have been received by the defendant from the Corporation of Plymouth or other persons in respect of a loss by fire against which the defendant was indemnified by the plaintiffs under a policy of fire insurance effected by the defendant, or of a right against the Corporation of Plymouth or other persons whereby the defendant might have protected or reimbursed herself for the loss, but which she renounced or had prejudiced to the damage to the plaintiffs.

The defendant owned a house and two shops in Plymouth. Those premises were insured against fire with the plaintiff company. During the currency of the policy the Plymouth Corporation, desiring to acquire the property, served, on the 1st of August, 1900, a notice to treat on the defendant under powers conferred by the Local Government Board's Provisional Order Confirmation Act, 1897, and the Lands Clauses Consolidation Act, 1845. Before any further steps were taken the insured premises, on the 14th of June, 1902, were destroyed by fire, and the plaintiffs, on the 2nd of July, 1902, paid £925 as the agreed amount of the loss. The corporation and the defendant finally agreed upon the purchase price. That sum was arrived at by taking into account the £925 paid by the plaintiffs to the defendant, the corporation agreeing to indemnify the defendant from any claims made by the plaintiffs. The plaintiffs knew of the notice to treat when the loss was paid by them. The defendant continued paying premiums after the notice to treat was given.

Cohen, K.C., and *Wood Hill*, for the plaintiffs.—When the loss was paid by the insurers they were subrogated to all rights which the assured had as against the corporation to the extent of £925. Those rights could not be renounced or prejudiced by the assured. If those rights were so renounced or prejudiced the insurers could recover a sum equal to the amount of the right so renounced or prejudiced: *West of England Insurance Co.* v. *Isaacs*, [1897] 1 Q. B. 226, 66 L. J. Q. B. 36, 45 W. R. Dig. 74. The assured became, as it were, a trustee of the rights for the insurers, when the latter paid the loss: *West of England Insurance Co.* v. *Isaacs*. The corporation cannot take the benefit of the policy. The assured could have recovered the value of the premises as and from the notice to treat; the assured could have recovered the value of the premises *rebus sic stantibus* at the time of giving the notice to treat: *Haynes* v. *Haynes*, 9 W. R. 497, 30 L. J. Ch. 578; *Morgan* v. *Metropolitan Railway Co.*, 17 W. R. 261, L. R. 4 C. P. 97; and *Penny* v. *Penny*, 16 W. R. 671, L. R. 5 Eq. 227.

Foote, K.C., and *Percival Clarke*, for the defendant.—In *Castellain* v. *Preston*, 31 W. R. 557, 11 Q. B. D. 380, there was an endeavour to keep the insurance money twice over; in the present case the assured has not been paid twice. This case is distinguishable from *West of England Insurance Co.* v. *Isaacs*. The statutory rights arising under a notice to treat are different to the contractual rights of vendor and purchaser. *Rayner* v. *Preston*, 29 W. R. 547, 18 Ch. D. 1, and *Castellain* v. *Preston*, are cases referring to vendor and purchaser, and therefore not in point. It is not clear what date is to be taken for the purposes of valuing the property. Assuming that the date is that when notice to treat was given, the assured, in effect, held the money as trustee for

(a) Reported by W. T. TURTON, Esq., Barrister-at-Law.

the corporation, and there was a settlement in account. The facts in the case of *Penny* v. *Penny* were different from those in the present case. The corporation, giving the notice to treat, is entitled to the property and to the benefit of contracts relating thereto, being placed in the same position as to existing contracts as the assured, to whom the notice was given. If the insurers, instead of paying the loss, had rebuilt the premises they could not have recovered the value paid by the corporation for the buildings so erected. The corporation could have insured, or insured in the defendant's name, and could have recovered. The defendant continued paying premiums to the insurers, and the insurers are therefore estopped from saying that the mere omission on the corporation's part to tell the defendant to continue insuring on behalf of the corporation would prevent the corporation from recovering. The insurers cannot recover the amount claimed.

Cohen, K.C., in reply.—The assured might have ceased paying the premiums. *Rayner* v. *Preston* is in point and is a complete answer to the defendant's contentions.

Cur. adv. vult.

June 3.—BIGHAM, J.—The facts in this case are not in dispute. They are to be found in the pleadings, and, shortly stated, they are as follows: The defendant, Mrs. Spooner, owned a house and two shops in Plymouth. These premises were insured by her against fire with the plaintiff company. During the currency of the policy the Plymouth Corporation determined to acquire the property, and on the 1st of August, 1900, by virtue of the powers of the Lands Clauses Consolidation Act, they served on the defendant a "notice to treat." Before anything had been done under this notice a fire took place, the buildings were destroyed, and the plaintiffs paid to the defendant £925, the agreed amount of her loss. After the fire the agreed amount to be paid by the corporation on taking over the property pursuant to their notice to treat was agreed between the defendant and the corporation at a sum arrived at by taking into account the money paid by the plaintiffs to the defendant under the policy, the corporation agreeing to indemnify the defendant against any claim which might be made against her by the plaintiffs. The plaintiffs now bring their action against the defendant, alleging that she has, or but for her wrongful act would have, received from the corporation the £925 so taken into account, and that the money is, or would have been, money received by her to the plaintiffs' use. The action is defended at the cost of the corporation, and in substance the question is whether the corporation are entitled to the benefit of the policy issued to the defendant. It appears to me that they are not. The plaintiffs' contract was a personal contract with the defendant; it never passed, either by assignment or by operation of law, to the corporation, and it amounted to nothing more than a promise to pay Mrs. Spooner a sufficient sum to indemnify her from any loss she might sustain by reason of her property being damaged by fire. The contract being one of mere indemnity, the plaintiffs, the assurers, upon payment of the loss became entitled to all the rights then vested in Mrs. Spooner in respect of the destroyed property. Those rights, in my opinion, included a right to be paid by the corporation the value of the property as at the date of the notice to treat—that is to say, the value before the fire; and it was not legally possible for her to deprive the plaintiffs of the benefit of this right by any agreement with the corporation. The arrangement made by her with the corporation was no doubt made at the instance of the corporation, and was entered into for the purpose of securing to the corporation the benefit of the insurance contract. But the risk of fire was the corporation's risk from the time of the notice to treat, and they must be satisfied to bear it. There must be judgment for the plaintiffs.

Solicitors for the plaintiffs, *Dawes & Sons.*

Solicitors for the defendant, *Crowders, Vizard, Oldham, & Co.*

Prob. Div. & Adm. Div.
Admiralty.
(Gorell Barnes, P.)

Oct. 30; Nov. 9.

"THE MARPESSA." (a.)

Ship—Collision—Demurrage—Principle of compensation for loss.

The defendants' vessel collided with and damaged the plaintiffs' dredger, which caused her to be laid up, and in respect of which damages were claimed.

The Court, following the principle laid down in The Greta Holme, [1897] *A. C.* 596, *held that the basis of the compensation for demurrage for detention of the dredger should be to award such a sum as would be sufficient to meet the out-of-pocket expenses properly chargeable against the dredger during the period and by reason of her detention, plus depreciation and loss of interest on capital, depreciation and interest being estimated on the value of the dredger at the time when the accident occurred.*

The plaintiffs were the owners of the steamship *G. B. Crow*, a suction dredger, which at the time that she was built was valued at £56,700.

She was regularly employed night and day throughout the year (Sundays, Christmas Day, and Good Fridays excepted).

The defendants were the owners of the steamship *Marpessa*, and on the 6th of October, 1904, the detendants' vessel collided with *The G. B. Crow*, in respect of which collision the plaintiffs commenced an action.

That action was, however, settled on the defendants admitting liability to the extent of 90 per cent., subject to the usual reference.

The claim by the plaintiffs amounted to £1,275 odd, and all the items were agreed to except for demurrage for nine days at £104 per day. The district registrar, however, only allowed £35 per day, and inasmuch as that item was the only item in dispute, he ordered the plaintiffs to pay the costs of the reference, and the plaintiffs appealed.

Aspinall, K.C., and *Leslie Scott*, for the appellants, cited *The Greta Holme*, [1897] A. C. 596, 46 W. R. Dig. 157.

Pickford, K.C., and *Greer*, for the respondents, cited *The Harrington*, 13 P. D. 45, 36 W. R. Dig. 187.

GORELL BARNES, P.—This was a motion in objection to the report of the district registrar of Liverpool, dated the 13th of July, 1905, upon a reference in an action brought by the Mersey Docks and Harbour Board, owners of the sand-pump dredger *G. B. Crow*, as plaintiffs, against the owners of the steamship *Marpessa*, defendants, so far as the same awards the sum of £315, or £35 per day, to the plaintiffs in respect of item No. 11 in the particulars of the plaintiffs' claim, and finds that the plaintiffs should bear the costs of the reference. The claim arose out

(a.) Reported by GWYNNE HALL, Esq., Barrister-at-Law.

of a collision between the dredger *G. B. Crow*, belonging to the plaintiffs, and the steamship *Marpessa* in the River Mersey in October, 1904. The defendants admitted liability to the extent of 90 per cent. of the plaintiffs' claim, to be assessed in the usual way. The only item in the claim which was disputed was No. 11, and the dispute resolved itself into a question of the principle upon which demurrage for the detention of the dredger should be calculated. The claim for demurrage was for nine days at £104 per day, making in all £936, of which the district registrar has allowed £315. *The G. B. Crow* is a suction dredger employed in dredging operations at the bar at the entrance to the River Mersey, and is a valuable vessel for the purpose. She is one of the largest dredgers in Europe, the other two being also owned by the plaintiffs. On the occasion of the collision the dredger was sheltering from the weather, but would have been set to work again immediately after the weather moderated. This dredger was built in the year 1895, and, according to the evidence, her life would have been about fifteen years, so that she had about five or six years more work in her. In consequence of the collision she was delayed nine days undergoing repairs, and her use to the plaintiffs was lost during that time, unless any part of the period would have been affected by her being prevented from being used by the weather. The contention on the part of the plaintiffs was that the value of the dredger to the plaintiffs at the time in question was the amount which they considered it proper to expend on her for maintenance and working expenses, in addition to sums to cover insurance, depreciation, and owners' profits, and upon this basis the actual claim presented at the reference amounted to £102 4s. 5d. per day. The contention on the part of the defendants was that the principle upon which the plaintiff's claim was put forward was wrong, and that the claim ought to have been based upon the principle indicated in the judgment in the House of Lords in the case of *The Greta Holme*, [1897] A. C. 596. In that case, owing to a collision with a ship, a steam dredger belonging to the present plaintiffs was injured, and the owners were deprived of the use of it for some weeks, and the dredging works were delayed. A claim was made for £1,500, being a sum calculated at the rate of £100 per week for the fifteen weeks during which the dredger was under repair and could not be used for any purpose by her owners, and £91 8s. 6d. as an allowance for a period of sixteen days, during which she could only be used as a hopper barge. The registrar reported against both these items of claim, and his report was sustained by the President of the Probate Division, whose decision was affirmed by the Court of Appeal, but the decision was reversed by the House of Lords as to the items of damage, and a sum of £500 was fixed upon by the learned lords in the House of Lords. The broad contention on the part of the defendants in that case was that the plaintiffs could recover no damages for the loss of the use of the dredger, but the learned lords held that the plaintiffs were entitled to recover damages, and perhaps the nearest indication of the principle upon which these damages should be assessed is to be found in the judgment of Lord Herschell, at p. 605, where he says: "How can they the less be entitled to damages because instead of hiring a dredger they invested their money in its purchase? The money so invested was out of their pockets, and they were deprived of the use of the dredger, to obtain which they had sacrificed the interest on the moneys spent on its purchase A sum equivalent to this at least they must surely be entitled to, but I think they are also entitled to general damages in respect of the delay and prejudice caused to them in carrying out the works entrusted to them. It is true those damages cannot be measured by any scale, but that would be equally true in a case of damages in respect of the deprivation of an individual of a chattel which he had purchased for the purpose of comfort and not profit." The district registrar has considered that the basis upon which the plaintiffs in the present case have put forward their claim is erroneous, and has, in substance, based the allowance which he has made to the plaintiffs upon the principle indicated by Lord Herschell in the case of *The Greta Holme* above referred to, and has allowed the plaintiffs demurrage at the rate of £35 a day; that is to say, for the nine days the sum of £315. Prior to the decision of the House of Lords, in the case just referred to, it had been held that damages for detention in such a case as the present could not be recovered; but that decision overruled this view. The case was primarily concerned with that broad question, and in the judgments there is not much to be found indicating any very precise method of ascertaining the damages. The passage above quoted from Lord Herschell's judgment seems to come nearest to doing so. Now, the method contended for by the plaintiffs was expressed by their counsel before the district registrar thus—he said: "If the board consider it worth their while to incur all the expenditure which they have to incur for the sake of the benefit which they derive, surely the benefit they derive is valued by the amount of expenditure they incur, and the damage to that through the loss of service is similarly calculated." Further on he argued that the plaintiffs were entitled "to see what the dock board think worth while to spend upon the vessel, because the vessel must be worth to the dock board at least not less than the amount they have thought it worth while to spend on keeping her up, and the measure of what they think worth while to spend on keeping her up is given by the working expenses, including superintendence and general charges of the engineer's department, and in effect depreciation." The same method was contended for by counsel before me. The defendants, on the other hand, maintained that the report allowed sufficient damages, and that nothing more was proved. The whole difficulty in this case arises from the practical impossibility of proving what is the actual loss sustained by the plaintiffs in such circumstances as those in question. No evidence was forthcoming of the exact monetary effect upon the plaintiffs' position of the work being done by dredging, or of any definite loss caused by the delay; indeed, such evidence would naturally be very difficult to give with certainty, and Mr. Lyster, the principal witness for the plaintiffs, appears to have admitted that he could not point to any definite injury or inconvenience occasioned by the loss of the services of the vessel. It is very clear that dredging operations must have the effect of improving the navigation, of preventing the channels from silting up, of deepening the channels and thereby permitting vessels to navigate them at times of tide at which they could not otherwise move and enter, and generally of increasing the facilities and capacities of the port. The plaintiffs' counsel therefore asked the court to make the assumption that the benefit which is derived by the plaintiffs from these operations must be at least equivalent to the expenditure upon them which the board consider it worth their while to make; in other words, that the benefit was measured by the expenditure which would have produced it. The basis for making this assumption was not rested upon any evidence of statistics or calculations of increased dues or other benefits to be derived, or of any materials which the board may have had before them when deciding to incur and continue their expendi-

ture, but was practically rested on argument, and the assertion that it must be so because the board consider it so. It is probably not unreasonable to suppose that the board are not likely, as a matter of business and good sense, to spend more on dredging than will result in producing an equivalent benefit to them, but I shall point out later that this assumption is of a very vague and ambiguous character, and moreover it must not be forgotten that the net or real benefit derived is only the excess of the benefit produced over the expenditure which produced it, and even if the assumption aforesaid be made, it is clear that, if the work should be stopped, while on the one hand the benefit produced by it being done is lost, or perhaps only retarded, on the other hand the expenditure is to a certain extent saved. I think that counsel for the plaintiffs in their arguments omitted to give full weight to this latter consideration, and also failed to notice the difference between expenditure which does not cease on an accident happening and expenditure which does. To take an illustration, if the dredger had been sunk and totally lost by the collision, it seems to me clear that the plaintiffs could only recover from the wrongdoer the value of the vessel at the time of the loss, whereas the plaintiffs' counsel contended that they could not only recover in such a case the vessel's value, but, in addition, the loss equivalent to the whole of the expenditure which would have been incurred by them from the time of the collision up to the time when they could have replaced her by some other vessel competent to do her work. Upon the assumption aforesaid, the benefit to be derived is to be treated as equivalent to the expenditure, but when a vessel is lost the wrongdoer in paying her value replaces at once the capital which then remains invested in the vessel, and all the expenditure from that moment ceases, so that while on the one hand the benefit of continued working is lost, any further expenditure equivalent to the benefit is entirely saved. Here one may ask why should damages for delay be charged on a greater value than the value which would be considered in case of total loss? Again, if a vessel or other property of a certain value is used for business purposes the cost of gaining any benefit by its use is measured by the outgoing current expenditure, together with depreciation upon the property and interest upon the value of the property, and if the only benefit to be produced by working the property is to be equivalent to the expenditure then it is obvious that by a cessation of the work the current expenditure would stop —except so far as is necessary to keep the property in safety—while on the other hand the depreciation—except so far as effected by the vessel or property being laid up—and the interest on capital continue to run on; so that, in my opinion, in a case like the present the out-of-pocket expenses which the owner is compelled to incur, notwithstanding the stoppage, and the depreciation and loss of interest on capital, measure his loss by the delay, assuming, of course, that the benefit derived by working is only to be treated as equivalent to the expenditure. Applying this reasoning to the present case and for the moment making the main assumption asked for by the plaintiffs, it follows that by the delay in question they lost the actual cost for insurance, wages, general charges, &c., properly chargeable against the dredger, during the delay, and the depreciation and loss of interest on capital for that time. The registrar has given them an allowance for these, and the only question really seems to be whether it is enough. No evidence was given before him, as I understand, as to the actual out-of-pocket cost, but he has taken certain figures from averages given by the plaintiffs and has probably exceeded the real cost. He has apparently based his allowance for depreciation and interest on the value of the vessel at the time of the delay, and I think the only real question in the case is whether he has allowed sufficient under these last two heads. This turns upon whether the vessel's value at the time of the loss ought to be regarded as her value based upon the original amount of capital invested in her, and here comes in a difficulty arising from the vagueness and ambiguity of the assumption which the plaintiffs ask the court to make. The plaintiffs start by asking the court to make the assumption that the benefit derived in the year 1904 from the working of the dredger is exactly the same as the benefit derived in the first year when the vessel was new, because they contend that, as the dredger, although depreciated in value, is doing as good work now as she was when first built, the benefit they are deriving from her now is to be taken as equivalent to the benefit which they derived from her when she was first built. They say that the benefit when she was first built if measured by the expenditure must be considered having regard to the original value of the vessel, and so taking the actual working expenses as about the same on the average they wish to charge, as expenditure in 1904, the annual average working expenses and also depreciation and interest or owners' profits practically on the original cost of the ship. When the whole claim is resting on hypothesis and assumption, I fail to see why the court should make any such assumption, especially as all the plaintiffs can really say is that the board think it worth while to make certain expenditure, and it ought logically to follow from that that the inquiry should be what expenditure was the board making in the year 1904. The plaintiffs, however, then say, "At any rate it should be assumed"—though, again, I say there is no evidence to support the assumption—"that the benefit is measured by the actual expenditure from time to time, and then the benefit for the year 1904 should be measured by the expenditure incurred in that year." The plaintiffs then, to support their claim, are driven to contend that the expenditure for the year 1904 is the same as the expenditure for the first year of her working, and they treat the value of the vessel as not diminishing, and base their claim upon some bookkeeping figures. It appears to me that if the expenditure is to be considered at the time in question their argument is wholly unsound, because if the matter is looked at from the ordinary point of view of business accounts, in keeping such accounts when a vessel is being worked for the purpose of producing profits it is usual to charge the profits first with depreciation, and secondly with interest on the capital before arriving at any net result. If there is no profit, then the depreciation and loss of interest are clear loss; if the profit is equivalent to them, then there is no net profit, because these losses exhaust the profit obtained. But, assuming that there are profits obtained equivalent to them, when the depreciation and interest are charged against these profits (observe it is only the excess, if any, which should be divided as profits), the sum charged for depreciation and interest is money in hand, which can be utilized in any other business manner, leaving the capital in the vessel merely the depreciated value of the vessel. So in this case the plaintiffs treat themselves as year after year making a benefit out of the working of their dredger equivalent to the expenditure upon her, and if they do so they will have to write off each year so much for depreciation and charge the depreciation and interest against the benefit received, so that they must be treated as having that amount in hand, just as an owner of a ship, having charged his profit and loss account with depreciation and interest, has

the amount in hand if he has made enough profit to cover the same. The expenditure, therefore, for the last year of the dredger's working, prior to the accident, would be the out-of-pocket expenses, the depreciation on her then value, and the interest on the capital remaining as representing her depreciated value. In the course of the evidence the vessel's depreciated value appears to have been worked out by figures, showing a result of some £33,300, but as she would have become useless and obsolete, according to the evidence, in about five years more, it would seem to me that her real value to the plaintiffs was considerably less, and that upon some fair actual value the registrar must have based the figures for depreciation and loss of interest. It appears to me not reasonable to ask the court to act upon the large assumption which the plaintiffs require to be made. It omits to take into account any depreciation of the vessel at all; it omits to take into account the chapter of accidents; it omits to take into account the possibility that a mere trifling delay of a few days will not substantially affect the ultimate operation of the works; and it leaves out of sight that no real evidence was given as to the exact benefit derived from the works, and the time at which that benefit will be received, or of any actual loss; and it seems to me, on the whole, reasonable to consider that where the damages are not really proved, the court is at liberty to assess them by awarding to the plaintiffs sufficient to compensate them for their actual out-of-pocket expenses, depreciation upon the vessel, and loss of interest upon the capital. The very wide claim made by the plaintiffs, as shown in their statement of working expenses, gives the benefit derived by them for owners' profits at 25 per cent. on the original value of the ship, though if they are obtaining from their work a benefit equivalent to expenditure, ordinary depreciation and interest on capital if charged annually would replace the capital and interest, and if this claim which they make were to be considered as a fair measure they would be in a position to supply themselves with a new dredger practically every few years out of profits. With regard to the evidence about other dredgers, that is of very little use in the present case, as it does not appear to have been suggested that the board ever really contemplated hiring a dredger in place of *The G. B. Crow*. I do not think that the point decided in *The Harrington*, 13 P. D. 48, 6 Asp. M. C. N. S. 282, and the similar point in *The Greta Holme* in the Court of Appeal, have any real bearing upon the present question, and in reading the judgments of those cases it is not at all clear to me whether the effect of annually charging interest and depreciation against profits was fully considered. I may also observe that in the passage above quoted from Lord Herschell's judgment, where he refers to interest on the money spent on the purchase of the dredger, I do not believe he had present to his mind any question of depreciation, otherwise he would have noticed that the money remaining invested in the dredger is arrived at by the depreciation being written off out of the profits of previous years. I am not quite clear how the figure allowed for depreciation by the district registrar has been arrived at, but I take it that he has based it on the value to the plaintiffs of the vessel at the time of the delay, which, I am informed, is in accordance with the practice in the principal registry, and it may be open to question whether for the very short delay there was any substantial deterioration, as the vessel was laid up. The deterioration is theoretical rather than real. He appears to have given more than the actual figures would probably show for out-of-pocket expenses. The item for insurance is taken from the plaintiff's tables, where the rate would seem to be given as if she were insured on the original value of the dredger, instead of on her value at the time of the accident. The item for wages is also taken from the same tables, and is the average cost of the wages when the vessel is at work, and is evidently not the actual wages paid while she was laid up, and while she was laid up the men appear to have been employed on useful work, so that their labour was not lost. The item for supplies is stated to be largely in excess of what the merchants considered would have been expended in supplies to a vessel in dock, but a liberal allowance has been made to cover superintendence and sundries. I notice, however, that a charge for superintendence and other general charges had been made and allowed in an undisputed item of the claim (No. 8). It may perhaps be said that depreciation ought to be calculated on the original cost, as the plaintiffs by their tables appear to spread the total depreciation from original value to nil over the estimated life of the dredger, but in my opinion this is unsound in principle. The plaintiffs, for their book-keeping purposes, spread the depreciation equally over the whole period, but this does not affect the question of what real depreciation is caused by the defendants to a vessel of the value which the vessel had at the time of the disaster, when once that value has been arrived at. Even if this point were conceded it would only add £5 or £6 a day to the amount allowed, but if the amount allowed for insurance, wages, and supplies should be reduced by more than this addition, which I think on the evidence ought in all probability to be the case, then this point is unimportant. I do not feel satisfied that the plaintiffs have made out any case for a larger allowance than that which the district registrar has made to them. Looking at this case broadly, the plaintiffs, without any evidence of distinct money loss, are seeking to recover for the loss of the use of the dredger at a rate which, leaving entirely out of consideration the insurance and other actual out-of-pocket expenses, would amount, in one year, to nearly, if not quite, the value of their dredger; and unless the court is to embark upon a sea of assumptions and possibilities I conceive that, applying the principles in the case of *The Greta Holme*, a business and reasonable view to take is that when the plaintiffs content themselves with such evidence as they gave in the present case, this tribunal, in assessing their damages, may say, as a jury would do, we must act with some reasonable certainty, and you, the plaintiffs, are reasonably compensated by being awarded a sum which we are fairly satisfied you may have lost, but we cannot follow you into mere speculation. The motion must be dismissed with cost.

Solicitor for the appellants, *W. C. Thorne*, Liverpool.

Solicitors for the respondents, *Hill, Dickinson, & Co.*, Liverpool.

House of Lords.

From C. A. (England). — Nov. 14.

PADDINGTON, MAYOR AND CORPORATION OF v. ATTORNEY-GENERAL AND ANOTHER. (*a*.)

Local government—Open space—Hoarding or screen—Adjoining landowners—Access of light—Building—

(*a*.) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

Metropolitan Open Spaces Acts, 1877 (40 & 41 *Vict. c.* 35), *s.* 1; 1881 (44 & 45 *Vict. c.* 34), *s.* 5; 1887 (50 & 51 *Vict. c.* 32), *s.* 4—*Disused Burial-grounds Act*, 1884 (47 & 48 *Vict. c.* 72), *s.* 3.

Under the Metropolitan Open Spaces Acts, 1877, 1881, *and* 1887, *and the Disused Burial-grounds Act*, 1884, *a local authority is entitled to erect a screen upon an open space of which it has the control, and thereby prevent an adjoining owner from acquiring by prescription a right to an access of light to his windows over such open space.*

Decision of the Court of Appeal (52 *W. R.* 114, [1903] 2 *Ch.* 556) *reversed, and that of* Buckley, J. (51 *W. R.* 109, [1903] 1 *Ch.* 109), *restored.*

Appeal from an order of the Court of Appeal (52 W. R. 114, [1903] 2 Ch. 556) (Vaughan Williams, Romer, and Cozens-Hardy, L.JJ.), reversing a decision of Buckley, J. (51 W. R. 109, [1903] 1 Ch. 109).

The respondent Boyce was the owner under a long lease of land in the parish of Paddington abutting on the churchyard of St. Mary's, Paddington, and he had erected blocks of flats which had numerous windows overlooking the churchyard. This churchyard had become a disused burial-ground within the meaning of the Metropolitan Open Spaces Acts, 1877, 1881, and 1887, and of the Disused Burial-grounds Act, 1884; and by virtue of those Acts, and of an indenture of April, 1892, and of a faculty granted by the Bishop of London, the Vestry of Paddington (now represented by the appellant borough) had the control and management of the churchyard.

In January, 1901, the borough council proposed to erect a screen in the churchyard in front of the windows of the respondent's flats, which would have interfered with the usual access of light, and the respondent thereupon brought this action for an injunction to restrain the council from erecting any screen, &c., so as to occasion nuisance, annoyance, or damage to him and the tenants of the flats.

By section 5 of the Act of 1881, the open space, &c., is to be held "in trust to allow, and with a view to the enjoyment of such open space, &c., in an open condition, free from buildings, and under proper control and regulation, and for no other purpose."

Haldane, K.C., and *H. Terrell, K.C.* (*J. A. Nash* and *C. A. M. Barlow* with them), for the appellants.

Astbury, K.C. and *Mark Romer*, for the respondents.

Earl of HALSBURY, L.C.—I confess I should have been better satisfied if the parties had thought it right to come to some agreement in this case, but of course they have a right to have the judgment of the court; and while on the one hand certainly there are public rights involved, on the other the question, as it arises here, is a question between a private speculator who wants to make the best of his buildings, and a public body whose only interest is to preserve that which is committed to their charge in as unincumbered a position as they received it.

Now in the first place I think it is necessary to consider what is the meaning of the prohibition contained in the Acts referred to. I am of opinion that it meant what it said—that the space was to remain unbuilt upon. Its use as a burial-ground is to cease, but it is not to be used as building ground—that is the meaning of it; and it appears to me that anything that approaches to the character of a building, whether temporary or permanent, is obviously within the prohibition. I entirely agree with Buckley, J., that in the books there may be found a great variety of cases where, with reference to the subject-matter of the covenant, and the meaning of what was in question between the parties, a screen or some erection of that nature might be considered a "building" with reference to some covenants, and might not be considered a building with reference to others. The subject-matter to be dealt with, and the subject which the covenant is supposed to be applied to, are all to be looked at in order to see what the word "building" means in relation to that particular subject-matter. It is impossible to give any definite meaning to it in the loose language which is used in some cases. Anything which is in the nature of a building might be within one covenant, and the same erection might not be a building with reference to another covenant. I think Buckley, J.'s, observation was very well founded.

But now I have to look at the word "building" here with reference to this subject-matter, and with reference to what the Act of Parliament was doing. It is very obvious, I think, that what was intended was to keep this disused burial-ground from being used as building ground, to keep it as a place of exercise, ventilation, and recreation, and what not; to prevent anything from being done in the nature of building which would interfere with or restrict the free and open use of these spaces, as constituted under the statute. But when I look at the question here, I am bound to say that I have to look at it under some difficulty, because I have not only to consider whether a screen is a building, but I have to consider whether an undescribed screen, of which neither the size nor the nature has been specified, would be a building within the meaning of the Act of Parliament. All I can say at present is, if you put the proposition in the abstract in that way, without any reference to any concrete facts, it must be put thus: That any screen is a building within the meaning of the Act of Parliament. I am not prepared to affirm that proposition. I think Buckley, J., was perfectly right I think it is not a building; and the decision that it is not a building appears to go to a great part of the argument, because the only mode in which it had been suggested that this injunction should be maintained—namely, that the ground should not be used for any other purpose than that which the Act of Parliament provides—seems to me to add nothing whatever. "Any other purpose" than what? Any other purpose than open ground—any other purpose than as a place for recreation, enjoyment, or what not. I find nothing in the letters which have been referred to which indicates the slightest restriction of any one of these purposes in the use of this ground.

If one looks at what is the real substance of the matter, it is obviously this—that this public body was doing what every private proprietor would do under the circumstances, because every private proprietor would prevent certain rights from being acquired over this space which would both prejudice the value and prevent the full use of it in future. If this particular space can be built round and rights acquired, you might have it so completely surrounded by houses of any height, that the light and even ventilation itself might be very seriously interfered with by the rights acquired by twenty years' user. Under these circumstances it appears to me that this public body was perfectly entitled for the protection of that which is under their guardianship to prevent this from being done. The parties may perhaps be commended for not having actually erected the screen, but for having raised the question on a mere threat; because, of course, where the object is simply to prevent the acquisition of a right, it would be convenient first of all to test the question of law; and although, as I have pointed out, it is rather inconvenient to have to pronounce judgment upon a hypothetical screen, on which the learned counsel has indulged his imagination as to a screen going completely round a space

of about a quarter of a mile, yet I think perhaps it was the most convenient form not to attempt to put the screen itself in operation, but to try the question of law whether any screen of any sort or kind would be admissible for the purpose of preventing prejudicial rights from being acquired.

I must say I lament that the parties should not have arrived at an agreement between themselves about this matter; but looking at the whole question, looking at what the meaning of the statute is, and at the condition of things that now exists between the parties, I am of opinion that the judgment of the Court of Appeal is unsound. The learned Lords Justices appear to me to assume a state of things which I do not find to be established here. I think the judgment of Buckley, J., is perfectly right; and under the circumstances I move that the judgment appealed from be reversed.

Lord ROBERTSON.—I agree with the Lord Chancellor that the case was rightly decided by Buckley, J. I think that there is great force in his initial observation, that it would be an extraordinary proposition that because an open space has been available to the public for enjoyment in an open condition, free from building, the result should be to give immediately or by the unavoidable operation of the Prescription Act, to the circumjacent owners, as a matter of right, an easement of light which theretofore they had not enjoyed. When these sections are examined, I find it impossible to trace the bringing about of that extraordinary result.

In the first place, I think that the vicar has never been ousted of his proprietorial rights; and when I turn to the administration of the body which is charged with preserving the place as an open space, it seems to me that, so far from being extraneous to the scope of that administration, what is proposed to be done is completely within it. I think that the erection of a screen is, or may be, entirely consistent with the purpose of maintaining this place as an open space for public enjoyment, and in furtherance of that purpose. No one can say that a recreation ground surrounded by flats seven storeys high, and looked into from all the windows of that building, is necessarily as good a recreation ground as one more open to the sun and less overlooked. Accordingly, just as Cozens-Hardy, L.J., says that these administrators could erect a tool-house, that being in furtherance of the primary purpose of the administration, so I think this erection is within that purpose. Of course I do not imply that it is the duty of all administrators of open spaces to surround their open spaces with screens; all that I say is, that it is within the rights which have never been taken away from the proprietors and administrators of these grounds; and it may be a step to be taken in furtherance of the purpose with which they are charged. I need hardly say that what I have said bears relation directly to the argument of Cozens-Hardy, L.J., which, indeed, was maintained by counsel for the respondents at the bar.

On the other question as to whether any screen is necessarily a building which, as the Lord Chancellor has pointed out, is the condition of the argument, I can only say that that proposition seems to me to be entirely inconsistent with the most obvious physical facts.

On these grounds I think the judgment of the Court of Appeal was wrong and the judgment of Buckley, J., right.

Lord LINDLEY.—I am entirely of the same opinion. The injunction granted by the Court of Appeal, to my mind, goes a great deal too far. There is not the slightest evidence to warrant the notion that the defendants, or any of them, intended to erect a building on this land, and accordingly the Court of Appeal have put in words which would cover building or screen. Screens are of all sorts and kinds, and I can imagine screens which are obviously not buildings, and which would obviously be justified by the statutory powers conferred upon these public bodies. This open space may be preserved, and *primâ facie* ought to be preserved, as a place of recreation, and as more or less of a garden. Now, just fancy an injunction to restrain these defendants from planting biggish trees in front of these windows which would interfere with already acquired rights of light. How could it be possible to maintain an injunction to restrain them from such planting? That shews that the Court of Appeal has gone too far.

I entirely adopt the view taken by Buckley, J. I think that he has put the true construction on the Acts, and I agree that the appeal ought to be allowed, with costs here and below.

Appeal allowed.

Solicitors for appellants, *J. H. Hortin.*

Solicitors for respondents, *Cheston & Sons.*

Court of Appeal.

From K. B. Div. (Vaughan Williams, Stirling, and Moulton, L.JJ.) — Feb. 6.

PLYMOUTH MUTUAL CO-OPERATIVE AND INDUSTRIAL SOCIETY (LIMITED) v. TRADERS' PUBLISHING ASSOCIATION (LIMITED). (a.)

Practice — Discovery — Interrogatories — Libel — Action against proprietor of newspaper—Plea of fair comment—Information on which libel founded—Name of informant.

Where in an action of libel against the proprietor of a newspaper the defendant pleads fair comment, the plaintiff is entitled to interrogate the defendant as to the information on which the alleged libel was founded, but not as to the name of the informant.

Appeal by the defendants, the Traders' Publishing Association (Limited), from an order made by Sutton, J., at chambers directing them to give further and better answers to certain interrogatories administered to them by the plaintiffs.

The action was brought to recover damages for libel.

The plaintiffs, a society registered under the Industrial and Provident Societies Act, 1893, carried on a large and extensive business for the supply and manufacture of all kinds of food, clothing, and household and other goods at about sixty shops and sundry farms, works, and factories situate in Plymouth and other places in the counties of Devon and Cornwall. The defendants the Traders' Publishing Association (Limited) were the proprietors and publishers of a weekly newspaper called *The Tradesman and Shopkeeper*. The Argus Printing Co. (Limited), who were the printers of the said newspaper, were also defendants to the action.

The issue of the said newspaper published on the 25th of February, 1905, contained the following article which the plaintiffs complained of as being a libel:

"Speedy Retribution.—Last week I predicted an

(a.) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

early crisis in the affairs of the Plymouth Society, and it has come even more speedily and more dangerously than I had dared to anticipate. At this moment the concern is in the throes of bankruptcy. An ugly run on it has set in, for a large section of the better informed portion of the membership have discovered the true state of affairs, and are naturally anxious to save themselves before the seemingly inevitable crash comes. During the last two or three weeks the run has been extending, and there appears to be no possibility of stopping it, all the indications tending rather to belief that it will get worse. Already immense sums have been drawn out, and the officials are at their wits' end for money. The enormous new bakery, which is being built at a cost of over £30,000, has had all work stopped upon it owing to the financial difficulties, and the machinery has not been put in, though it has been ready for some time past. I understand that an endeavour is being made to dispose of, either by letting or selling, the warehouse recently erected at North Quay, at a cost of about £12,500. No stone is being left unturned to obtain money with which to meet the terrible drain of withdrawals which is taking place. More to follow. The worst has yet to come, however. A number of committee meetings have been held during the last week in reference to far more serious questions. An employé of the society has been found to have misappropriated a large sum of money, and the directors dare not risk further frightening the members by instituting a prosecution. The committee have also discovered an enormous discrepancy in the last (December, 1904) balance-sheet, which I am given to understand, but cannot say definitely, involves thousands of pounds. It is more probable that these revelations are only the forerunners of much more terrible ones. A steady drain upon the society's resources has been going on for a long time, both in the matter of sales and share withdrawals, and now, when this has developed into a positive panic, none can say what will happen. It has been obvious for the past two years that the concern was rushing headlong to disaster, and the members who get hurt in the eventual climax will do me the justice to acknowledge that they have not been without warnings. The present position is only the realization of what I have foretold dozens of times since first my attention was drawn to the business more than two years ago."

The defendants the Traders' Publishing Association by their defence pleaded, *inter alia*, that, in so far as the words complained of consisted of expressions of opinion, they were fair comment made in good faith and without malice on a matter of public interest, and, in so far as they consisted of allegations of fact, they were true in substance and in fact.

The plaintiffs administered a set of interrogatories to the defendants containing, *inter alia*, the following: "(5) What information had you when you wrote or printed or published or caused to be written or printed or published the words and figures which induced you to believe that the expressions of opinion or any and which of them in the said words and figures contained, and which you allege in paragraph 5 of the defence herein are fair comment made in good faith and without malice, were true? Did you then in fact believe that the said opinions were true? . . . (7) From whom did you obtain the information upon which you relied in writing or printing or publishing the said expressions of opinion or any and which of them?"

The answers filed on behalf of the defendants the Traders' Publishing Association contained the following: "(5) In answer to the fifth interrogatory, I say that the defendant association had information of the facts alleged in the said words and figures, and those responsible for the publication of the said words and figures believed the said information, and that the said opinions were justified, and therefore true. . . . (7) I object to answer the seventh interrogatory on the ground that the same is irrelevant, and not administered *bonâ fide* for any purpose of this suit."

On the application of the plaintiffs, Sutton, J., made an order that the defendant association should give a further and better answer to the fifth interrogatory and should answer the seventh interrogatory.

The defendant association appealed.

Montague Lush, K.C., and *Frank Dodd*, for the defendant association.—Neither of the interrogatories is admissible. As to the fifth interrogatory, where the defendant in an action for libel pleads privilege, he may be asked on what information he published the libel, as such an interrogatory is relevant to the issue of malice: *Elliott* v. *Garrett*, 50 W. R. 504, [1902] 1 K. B. 870; *White & Co.* v. *Credit Reform Association and Credit Index (Limited)*, 53 W. R. 369, [1905] 1 K. B. 653. But where the plea is fair comment, such an interrogatory is irrelevant, there being no issue of malice. Fair comment is distinct from privilege and is really a defence of no libel: *Campbell* v. *Spottiswoode*, 11 W. R. 569, 3 B. & S. 769; *McQuire* v. *Western Morning News Co.*, 51 W. R. 689, [1903] 2 K. B. 100. Where a defendant pleads fair comment, his state of mind is not in question; he must shew that the words in themselves are nothing more than fair comment, and he does not get rid of the libel by proving good faith. As to the seventh interrogatory, it is a well-settled rule that in an action of libel against the proprietor of a newspaper, the defendant cannot be ordered to disclose the name of his informant: *Hennessy* v. *Wright (No. 2)*, 36 W. R. 879, 24 Q. B. D. 445n; *Hope* v. *Brash*, 45 W. R. 659, [1897] 2 Q. B. 188.

They also cited *Parnell* v. *Walter*, 38 W. R. 270, 24 Q. B. D. 441; *Caryll* v. *Daily Mail Publishing Co.*, 90 L. T. 307, 52 W. R. Dig. 134; *Joynt* v. *Cycle Trade Publishing Co.*, [1904] 2 K. B. 292, 52 W. R. Dig. 87; *Edmondson* v. *Birch & Co. (Limited)*, 54 W. R. 52, [1905] 2 K. B. 523.

Clavell Salter, K.C., and *Bartley Denniss* (*C. W. Mathews* with them), for the plaintiffs.—The fifth interrogatory is clearly relevant to the main issue in the case—viz., whether the words complained of were fair comment made in good faith and without malice. If the fifth interrogatory is admissible, it follows logically that the seventh must be admissible also: see the judgment of Collins, M.R., in *White & Co.* v. *Credit Reform Association and Credit Index (Limited)*. There is no ground for the suggestion that a proprietor of a newspaper who is sued for libel is legally in a different position from any other defendant.

VAUGHAN WILLIAMS, L.J.—The only question argued before us has been whether or not two of a set of interrogatories which have been administered by the plaintiffs to the defendants are interrogatories which ought to have been put. One of the interrogatories—viz., No. 5—has been answered without objection. The other—viz., No. 7—the defendants have objected to answer on the ground that it is irrelevant and not administered *bonâ fide* for any purpose of the suit. We are not now discussing in any way the sufficiency of the answer to No. 5. The only question is as to the right to put each of the interrogatories. I will first deal with No. 5, and I will do so on the assumption that the only question we have to discuss is whether such an interrogatory ought to be allowed. [His lordship read the fifth interrogatory.] Before I deal with the question whether this interrogatory ought to be allowed I will state shortly the nature of

the action. It is brought by the Plymouth Mutual Co-operative and Industrial Society (Limited), and the defendants are the Traders' Publishing Association (Limited) and the Argus Printing Co. (Limited). The paper of which the first-named defendants are the proprietors is not in the ordinary sense a newspaper; it is a periodical trade publication, and we have only to read the description of the plaintiff corporation and of the first-named defendant corporation to see that there would naturally be a certain amount of rivalry and hostile feeling between them. The alleged libel consists of a strong statement to the detriment of the plaintiffs. I do not propose to read it at length; it is sufficient to say that in substance it imputes that the plaintiffs' business is in a very bad way, that they are in the throes of bankruptcy, that they have spent enormous sums for which they have got no just return, and that the committee are aware of the state of things, and have discovered an enormous discrepancy in the balance-sheet, but do not dare to lay the truth before the shareholders. The defendants have put in a defence, the fifth paragraph of which is the only one material to the question. By that they plead that, so far as the words complained of consist of expressions of opinion, they are fair comment made in good faith and without malice on a matter of public interest, and, so far as they consist of allegations of fact, they are true in substance and in fact. That is a plea of fair comment coupled with a justification. I will not go into the question how far such an interrogatory as I am now considering would have been admitted years ago, when the only possible pleadings in an action of libel were, as far as the plaintiff was concerned, publication of the libel and its falsity, and, as far as the defendant was concerned, not guilty. I desire to guard myself against being supposed to say that such an interrogatory as No. 5 would clearly not have been allowed in those days. We are dealing with a case in which the defence is not, strictly speaking, that of privilege, but that of fair comment. I will not discuss how far fair comment is privilege; there is a difference of judicial opinion on that point. But this is certainly plain, that, if a plea of privilege is raised, the existence of express malice becomes a question of fact raised by the issues, and, if the defence is fair comment, then fairness is a question in issue. I will not go at any length into this question, but in the case of *Campbell* v. *Spottiswoode* Crompton, J., said that fairness or unfairness was always in issue where the defence of fair comment was raised. Therefore, the issue of fairness being raised in this case, the fifth interrogatory is plainly a question as to a matter relevant on this issue of fairness. I will only say further as to this, that if we look at *Elliott* v. *Garrett*, we find that in that case, where the defendant raised the plea of privilege, and an interrogatory similar to this was asked, it was allowed. The interrogatory there was this: "What information, if any, had you that induced you to believe that the words were true, or what steps, if any, had you taken before speaking the words to ascertain whether they were true or not?" That was allowed as being relevant to the issue of malice raised by the pleadings and directed to support the plaintiff's case. That case was followed and approved of in the case of *White & Co.* v. *Credit Reform Association and Credit Index (Limited)*. In my opinion, such an interrogatory as we are now dealing with is just as relevant where the defence is fair comment as where the defence is privilege. In either case there is an issue as to the state of mind of the defendant when he published the libel. In one case the question is asked whether the libel was published in a spirit of malice, in the other case the question is whether it was published in a spirit of unfairness. I am of opinion that in either case the interrogatory is admissible. Interrogatory No. 5, therefore, was rightly put.

I will next deal with interrogatory No. 7, which raises a much more difficult question. [His lordship read the seventh interrogatory.] If the only test that we had to apply in considering whether a particular interrogatory ought to be answered was the test whether it asked a question which was relevant to an issue in the action, it would be difficult to say that this interrogatory did not ask such a question. But besides the rule that a party is not entitled to put an interrogatory which is not relevant, there is also the rule that a party is not entitled to put an interrogatory the answer to which would be oppressive to the answerer, or to have answered interrogatories put for some purpose outside the action, such, for instance, as for the purposes of some other action. That is not disputed where it is plain that the interrogatory is put for some purpose outside the action. But it is argued by those who say this interrogatory ought to be allowed, that it is sufficient to show that it is relevant to the present action, and that it is no objection to putting it that the answer may possibly be used for other purposes. There is thus raised a dispute as to onus. The plaintiffs say that *primâ facie* and in the absence of any proof that such was the intention, this interrogatory ought to be allowed. The defendants, on the other hand, say that the onus is the other way, and that the *primâ facie* rule, at any rate with regard to interrogatories in actions of libel against newspapers, is that names ought not to be given. That is based on observations in the case of *Hope* v. *Brash*, where the plaintiff in an action of libel against a newspaper sought inspection of the original manuscript of the alleged libel. There Lord Esher said: "It appears to me that in the case of *Hennessy* v. *Wright* the very same question in substance as that in the present case came before the Court of Appeal—namely, whether the defendant in an action for a libel published in a newspaper ought to be forced to disclose who it was that supplied him with the materials for the libel which had been published. To the judgment in that case I was a party; and Lindley, L.J., after being informed that the general practice of the judges of the common law courts had been for a long series of years not to order inspection in such a case, or to force the defendant to disclose who gave the information on which the libel was published, accepted that practice as binding upon him, and did not dissent from the view taken by myself and Lopes, L.J. Therefore in that case the Court of Appeal recognized the existence of a general rule that inspection of such a document as this should not be given to the plaintiff in an action for libel. It is not necessary to say that the court will never under any circumstances allow such inspection, but, in the exercise of its discretion, it will not, as a general rule, in the absence of any special reason to the contrary, allow it." And A. L. Smith, L.J., said: "It has been the ordinary rule of practice, as laid down by Lindley, L.J., in *Hennessy* v. *Wright*, that in a case such as this an order will not be made by which the plaintiff may obtain discovery of the name of the person who originally wrote the libel published in a newspaper. I do not say that the rule so laid down is one which can never be departed from, but there must be something exceptional to take a case out of it." And Bigby, L.J., said: "Independently of the law laid down in *Hennessy* v. *Wright*, I doubt whether a case for inspection was here made out; but in that case an exception from the general law as to discovery was made in the case of libel, and I am bound by the rule there laid down." It seems to me that we ought to ask

ourselves whether there are any special circumstances in this case to justify us in departing from the general rule of practice as to refusing disclosure of names in an action of libel against the proprietors of a newspaper, and whether there is an exception to that rule where a periodical trade publication sets up a plea of this sort. I do not myself find any such special circumstances here. It is true that in this case the natural rivalry to which I have referred between the plaintiffs and the defendants does to a certain extent take the defendants out of the class of persons to whom the rule applies. But the defendants' paper is a periodical publication which is of interest to a great number of persons, and, in my opinion, it ought for this purpose to be treated as an ordinary newspaper. And I find nothing else in the case which constitutes any special circumstances requiring departure from the rule to which I have referred. I am therefore of opinion that interrogatory No. 7 ought not to be allowed. The result is that the appeal is allowed as to No. 7 and dismissed as to No. 5.

STIRLING, L.J.—I am of the same opinion. This is an action of libel against the proprietor of a newspaper, and the defendants plead that the words complained of were fair comment made in good faith and without malice on a matter of public interest. Good faith and absence of malice, therefore, constitute part of the defence. What interrogatories are the plaintiffs in such a case entitled to put to the defendants? I will refer to the judgment of Lord Esher, M.R., in *Hennessy* v. *Wright*. He said: "The objection taken by the defendant is that the answers to the interrogatories in question cannot disclose anything which can be fairly said to be material to enable the plaintiff either to maintain his own case or to destroy the case of his adversary. It must be admitted that if the answers could be material for either of these purposes, the interrogatories ought to be answered, but I think it must equally be admitted that, if the answers could not be material for either of these purposes, we ought not to order the defendant to answer." Interrogatories, then, are admissible, if they are directed to destroying the case of the defendants—that is, to showing that the fair comment was not made in good faith or without malice. Nothing contrary to the idea that malice is in issue where fair comment is pleaded was said in *McQuire* v. *Western Morning News Co.* In that case there was no evidence of malice. Collins, M.R., in his judgment said that it was not suggested that there was any evidence of actual malice, and he proceeded to discuss the case as one from which the question of malice was eliminated. How are we to apply the rule that interrogatories are admissible which are directed to showing that the comment was malicious as to the two interrogatories in question? The fifth interrogatory asks what information the defendants had when they published the libel which induced them to believe that the words complained of were true. Interrogatories of that kind were allowed in the two cases of *Elliott* v. *Garrett* and *White & Co.* v. *Credit Reform Association and Credit Index (Limited)*, as being relevant to the issue of malice. Further, the defendants have chosen to answer this interrogatory, and their answer is insufficient. I think they must make a further and better answer. As to the seventh interrogatory, which asks from whom the information was obtained, I agree that it falls within the rule laid down in *Hennessy* v. *Wright* and *Hope* v. *Brash*. In my opinion we are not at liberty to depart from the rule there laid down, as no special circumstances have been disclosed.

MOULTON, L.J., concurred.

Order varied.

Solicitors for the plaintiffs, *Law & Worssam*, for *Bond & Pearce*, Plymouth.

Solicitors for the defendants, *Sydney T. James*.

From K. B. D. (In Bkcy.).
(Vaughan Williams, Stirling, and Cozens-Hardy, L.JJ.) — Dec. 15, 18.

In re MILLS.
Ex parte MILLS. (*a*.)

Bankruptcy—Deed of assignment—Petitioning creditor—Estoppel by assent to the deed—Petition founded on act of bankruptcy other than the deed.

A creditor who has assented to a deed of assignment but who is not bound by it, although he may be prevented from alleging that the assignment for the benefit of the creditors was an act of bankruptcy, is not prevented from presenting a petition founded on an independent act of bankruptcy.

Appeal from a receiving order made by one of the registrars in bankruptcy.

The receiving order was made on the petition of L. C. Baines for noncompliance by the debtor with a bankruptcy notice to pay a judgment debt, which was served on the 28th of July, 1905.

The petition was presented on the 5th of August, and the receiving order was made on the 16th of November.

On the 25th of July a resolution of the creditors was passed, that the debtor should assign his property to a trustee for the benefit of the creditors. Baines was present, but did not vote one way or the other, though he expressly stated he would not assent to the deed. A trustee was proposed by the solicitor on behalf of the debtor, but upon the suggestion of Baines a Mr. Berry was duly elected. There was a conflict of evidence on this point, it being asserted that the resolution appointing Mr. Berry was actually proposed by Baines, although he did not vote on the resolution, whereas Baines asserted that he only suggested the name of an independent chartered accountant. The deed of assignment was executed on the 27th of July.

The registrar having made the receiving order, the debtor now appealed.

Pollock, K.C. (*Hansell* with him), for the debtor.—The petitioning creditor was estopped by his conduct from bringing his petition. He would clearly have been prevented from treating the assignment itself as an act of bankruptcy: *Ex parte Alsop*, (1859) 1 D. F. & J. 289, 298; *Ex parte Stray*, L. R. 2 Ch. 374; *In re Woodroff*, 4 Manson 46; and *Ex parte Mendelsohn*, [1903] 1 K. B. 216; 51 W. R. Dig. 158.

McCall, K.C., and *Cooper Willis* were not called upon.

VAUGHAN WILLIAMS, L.J.—I will deal with this case upon the basis that the petitioning creditor did something more than shout out at the meeting that a nominee of the debtor was not a proper person to be appointed trustee of the deed; that he went on to offer his advice that Mr. Berry was a proper person to appoint, and that his advice was acted upon by the creditors. It may be that the effect of that conduct was to make the petitioning creditor a privy to the execution of the deed in this sense—that he could not afterwards use the execution of the deed upon

(*a*.) Reported by MAURICE N. DRUCQUER, Esq., Barrister-at-Law.

which to found a bankruptcy petition against the debtor. But one thing, to my mind, is plain —viz., that the petitioning creditor did not in any way so act as to be bound by the deed, and if he is not bound by the deed there is nothing to prevent him from recovering any debt due to him in any way that he legally can, and therefore in my view there was nothing to prevent him from presenting a petition in bankruptcy founded upon any independent act of bankruptcy. I expressed an opinion to that effect in *In re Woodroff*. That observation of mine was not necessary to the decision in that case, but I think it was well founded, and I am prepared to act upon it now. I am confirmed in that view when I look at the judgment of Lord Cairns, L.J., in *Ex parte Stray*, in which he said, at p. 381, this: "I have no doubt at all that the facts I have thus stated bring the case entirely within the principle of the cases to which I have referred, and I cannot look upon Mr. Goody otherwise than as a person who assented to the execution of this deed, was taking advantage of the deed for the purpose of shielding the estate for a certain length of time, and was willing, if certain other arrangements such as were contemplated could have been made, to take still further advantage from the deed. I again repeat that I think nothing passed actually to bind Mr. Goody entirely to abide by the deed and to come in under the deed as a person who would take no other proceedings for the recovery of his debt; but what I think Mr. Goody is estopped from saying is, that this deed, at the moment it was executed under the circumstances I have mentioned, was a fraudulent deed and one of which he can complain for the purpose of alleging an act of bankruptcy committed by the debtor." In my opinion that observation of mine in *In re Woodroff* is entirely supported by the passage in the judgment of Lord Cairns, L.J., which I have just read.

STIRLING and COZENS-HARDY, L JJ., concurred.

Appeal dismissed.

Solicitors for appellant, *Culross & Holt.*

Solicitors for respondent, *Goldberg, Barrett, & Newall.*

From Chan. Div. (Vaughan Williams, Stirling, and Cozens-Hardy, L.JJ.) — Nov. 28, 29; Dec. 16.

In re ALSOP'S PATENT. (*a.*)

Patent — Specification — Amendment — Disclaimer — Patents, Designs, and Trade-Marks Act, 1883 (46 & 47 *Vict. c.* 57), *s.* 19.

Where there is an application under section 19 *of the Patents Act*, 1883, *for leave to apply to the Patent Office for leave to amend a specification by way of disclaimer, and the court is not satisfied that the amendment is not by way of disclaimer, leave should not be refused to apply to the Patent Office, which is the statutory tribunal for the decision of the question.*

This was an appeal from a decision of Buckley, J.

It appeared that the owner of letters patent for a process of treating flour by air had alleged in his specification that by his treatment the proteids which the flour contained increased in quantity and the flour was purified; the owner of another patent petitioned for the revocation of the other patent on ground that the allegations of the specification as to the increase of the proteids was not correct.

At the hearing of the petition the owner of the first patent applied under section 19 of the Patents Act, 1883, for liberty to apply to the Patent Office for leave to amend the specification by way of disclaimer by striking out therefrom the claims as to increased formation of proteids and admitting that the claim therefor was incorrect.

Buckley, J., held that it was not an amendment by way of disclaimer and refused leave.

The patentee appealed.

Haldane, K.C., Bousfield, K.C., and *J. C. Graham*, for the appellant, cited *In re Armstrong's Patent*, 14 R. P. C. 753; *In re Chatwood's Patent*, 16 R. P. C. 370; *In re Dellwick's Patent*, 13 R. P. C. 591; *In re Geipel's Patent*, 21 R. P. C. 379; *In re Owen's Patent*, 15 R. P. C. 755.

Moulton, K.C., Astbury, K.C., and *A. J. Walter*, for the respondents, cited *Cropper* v. *Smith*, 33 W. R. 338, 28 Ch. D. 148; *Luddington Cigarette Machine Co.* v. *Baron Cigarette Machine Co.*, 48 W. R. 505, [1900] 1 Ch. 508, 17 R. P. C. 745.

Cur. adv. vult.

Dec. 16.—COZENS-HARDY, L.J.—This is an appeal from Buckley, J., who in a proceeding for revocation of a patent has declined to give liberty to the patentee to apply at the Patent Office for leave to amend his specification by way of disclaimer. The application was made under section 19 of the Patents Act, 1883. It has been held that the power given by that section is limited to amendment by way of disclaimer as distinct from correction or alteration. Now, it is plain that the court, which cannot itself amend a patent, has a discretion in the matter, and in order to guide the court in the exercise of this discretion it is convenient, and indeed necessary, that the court should be informed generally as to the nature of the amendment desired. If the court sees clearly that what is proposed is not an amendment by way of disclaimer, the court ought not to give leave. If the application is made at a stage in the proceedings when the court has had evidence and is in a position fully to appreciate the nature of the invention, the court may reasonably refuse leave if satisfied that the desired amendment by way of disclaimer can produce no good result to the patentee. It was argued that the court has no jurisdiction to grant the application unless it is satisfied affirmatively that what is desired will be amendment by way of disclaimer. I feel no doubt of our jurisdiction to give leave in the precise language of section 19. In my opinion it is not desirable where the court feels uncertain whether the proposed amendment is by way of disclaimer to refuse to send it to the proper tribunal appointed by statute to decide that question. This was the view of Byrne, J., in *In re Chatwood's Patent*, 16 R. P. C. 371. In the present case there are six claims in the patent, and the patentee wishes to strike out three of those claims, and also to strike out certain passages in the body of the patent relating to the claims so struck out. *Primâ facie* this will be an amendment by way of disclaimer. It is, however, contended that the patent is really for one single process, and that the disclaimer will leave the process just where it was before without in any way reducing the ambit of the claim, and that the patentee wants only to say that one of the two results which he asserted that his process would produce cannot in truth be produced. Buckley, J., has adopted this view, and has in effect held that what is desired is amendment by correction or explanation, and not by way of disclaimer. I am not satisfied by the mere reading of the specification that this is so. And I think the patentee ought to be allowed to apply to the proper tribunal—that is, the Patent Office—where

(*a.*) Reported by HENRY STEPHEN, Esq., Barrister-at-Law.

there will be the opportunity of securing such explanation of the process and of the language used as may be necessary to enable the tribunal to decide whether amendment by way of disclaimer only ought to be allowed. This being so, I think it better not to indicate any view of my own. The application will be dealt with on its merits and without any intimation from this court as to the course the Comptroller ought to take. It will be necessary for us to hear arguments upon the terms as to costs and otherwise which ought to be imposed upon the patentee as a condition of this liberty.

STIRLING, L.J.—I entirely agree. I think that upon an application to the court under section 19 of the Patents, &c., Act, 1883, for liberty to apply at the Patent Office for leave to amend a specification by way of disclaimer the court has no concern with the terms of the proposed disclaimer except for the purpose of guiding it in the exercise of the discretion conferred by the section as to whether liberty shall or shall not be given; for the decision whether a disclaimer shall be allowed or not, rests with the Patent Office, and not with the court. I understand that this was the view taken by Kekewich, J., and the Court of Appeal in *In re Armstrong's Patent*, 14 R. P. C. 753, and Byrne, J., in *In re Chatwood's Patent*, 36 R. P. C. 371, and I did not intend to take any other view in the case of *In re Owen's Patent*, 15 R. P. C. 755, to which I still adhere. I should like also to point out that disclaimer is, according to the definition given by Lord Chelmsford in *Ralston* v. *Smith*, 11 H. L. Cas. 223, p. 254: "The renunciation of some previous claim actually or apparently made or supposed to be made." In the present case the patentee proposes to disclaim three out of six heads of claim contained in the specification, and the proposed disclaimer *primâ facie* falls within the definition. But whether this be so or not, and I am not expressing any concluded opinion upon it, I am unable, from mere perusal of the specification, to satisfy myself that the proposed amendment is not one by way of disclaimer within the meaning of the statute. And in these circumstances I think the patentee ought to be allowed to submit the question to the statutory tribunal by which such questions are to be decided.

VAUGHAN WILLIAMS, L.J., agreed.

Appeal allowed with costs on terms.

Solicitors for the appellants, *Hollams, Sons, Coward, & Hawksley.*

Solicitors for the respondents, *Wilson, Bristows, & Carpmael.*

From K. B. Div. (Collins, M.R., and Romer and Mathew, L.JJ.) — Nov. 10.

RISDON IRON AND LOCOMOTIVE WORKS v. FURNESS. (a.)

Conflict of laws—English company—Business carried on in foreign state—Debts incurred abroad—Company wound up—Shareholder personally liable for debts under law of foreign state—Attempt to enforce payment in English court.

An English company, incorporated under the Joint Stock Companies Acts as a limited company, was formed for the purpose of acquiring and working mines in (among other countries) the United States of America. By the articles of association the directors were empowered to do all things necessary to comply with the requirements of the law of any country where the company might carry on business. The company acquired and worked mines in the State of California, and for that purpose the company had to be registered and was duly registered there, and it incurred debts there in the purchase of machinery from the plaintiffs in that state. By the law of the State of California each stockholder of a corporation is made individually liable for debts contracted for by the corporation according to the proportion which his holding bears to the whole of the subscribed capital of the company. The company having become insolvent, the plaintiffs sued the defendant, a shareholder of the company, in this country, for his proportion of the price of the machinery.

Held, that the defendant was not liable, as the facts did not show that he authorized the company to enter into contracts in California so as to pledge his personal credit for the price of the goods supplied, and the general power given by the memorandum and articles of association to the directors to carry on business in foreign countries was subject to the fundamental condition of a limited liability on the part of the shareholders, the company being registered in England as a limited joint stock company.

Decision of Kennedy, J. (1 *K. B.* 304, 53 *W. R. Dig.* 26), *affirmed.*

Appeal by the plaintiffs from a judgment of Kennedy, J.

The plaintiff company sought to recover from Sir Christopher Furness, M.P., as a shareholder in the Copper King (Limited)—a company incorporated and registered in England as a joint stock company under the Companies Acts, 1862 to 1898, which owned mining property and carried on business in California—a sum of money in respect of work done for, and goods supplied to, that company in California by the plaintiff company.

The plaintiff company was incorporated in California and there carried on the business of general machinery manufacturers.

In 1902 the plaintiff company supplied machinery to and did work for the Copper King (Limited) to the value of 10,000dols. which had not been paid for when that company was wound up. According to Californian law a shareholder, although he had paid all his calls, remained personally and individually liable in proportion to his holding for the debts of the company in which he was a shareholder; and the plaintiff company claimed that the Copper King (Limited) having conformed to the laws of California, Sir Christopher Furness as a shareholder was responsible for his portion of the debt mentioned above.

For the defence it was contended that the question of liability must be determined entirely by English law, and that as the liability of the shareholders in the Copper King (Limited) was limited strictly to paying up in full for their shares under the Companies Acts, the action was not maintainable.

At the trial Kennedy, J., held that the defendant's liability was limited by the Companies Acts under which the Copper King (Limited) was registered, and that an English court could not recognize, therefore, as a valid cause of action a claim in respect of debts of the company arising by virtue of the law of a foreign country which was inconsistent with the shareholders' liability according to English law, and that any proceedings by the plaintiff company to enlarge the liability of a shareholder beyond that fixed by the constitution of the company must be held in an English court to be *ultra vires*. He accordingly gave judgment for the defendant.

From that judgment the company appealed.

Montague Lush, K.C., and *Ernest Pollock, K.C.*, for

(a.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

the plaintiffs.—The cause of action against the defendant is a transitory cause of action, and as he clearly would be liable to contribute to the debt in California, he is clearly liable here. Under the laws of that state a company must be registered there before it is allowed to carry on business, and the Copper King (Limited) was so registered. Instead of adopting the roundabout procedure of obtaining a judgment against the defendant in California and then suing on that judgment here, the plaintiff company have brought the action here. The articles of association "empower the company to carry on business abroad and to take any such step as might be necessary to comply with any statutory enactment, rule or regulation in any country, colony, or place where the company might carry on business." The articles of association are binding on the defendant, and by those articles, the company being empowered to carry on business in California, and for that purpose being registered there according to Californian law, the defendant along with the other shareholders is rendered liable personally for the debts of the company contracted there in accordance with Californian law. The fact that the company had been registered and was carrying on business in California would *per se* be sufficient to make the defendant as a shareholder personally liable for its debt without any specific notice being given him as to his increased liability: *Bank of Australasia* v. *Harding*, 9 C. B. 661; *Bank of Australasia* v. *Nias*, 16 Q. B. 717; *Copin* v. *Adamson*, 24 W. R. 85, L. R. 9 Ex. 345, 1 Ex. D. 17. The defendant in fact made the company his agent to incur legal liability on his behalf. The memorandum of association is wide enough to support this proposition, for it includes power to do "all other things incidental or conducive to the attainment of the above objects"—*i.e.*, the carrying on of the mining business in, among other parts of the world, the State of California. In Lindley on Companies (6th ed.), vol. 2, p. 1222, it is said "the right of a corporation to sue in a foreign country, as well as its right to contract in a foreign country, are both based, not on the law of the state creating the body corporate, but on the extent to which the foreign country chooses to recognize that law." The learned author adds "that it is curious, however, that this point should never have been discussed or formally decided in this country": see also Story on Conflict of Laws (8th ed.), s. 106, p. 175, note. The point that has really to be decided is whether the law of California imposed upon the defendant a liability inconsistent with the constitution of the company; for, if it was inconsistent, it would not be enforceable in this country. It is impossible to hold that the law of California is inconsistent with the constitution of the company, having regard to the object with which that company was formed. The case of *Pinney* v. *Nelson*, (1901) 183 U. S. Rep. 144, is in point. Kennedy, J., overlooked a passage at p. 146 of the report which shows that under the law of the State of Colorado there is a limitation of liability of shareholders of a company. It is clear that if the defendant knew the law of California and agreed to the company trading there, he would be bound by that law, although it was not expressly mentioned in the articles of association. The defendant as a shareholder authorized the directors to take all necessary steps to comply with any statutory enactments in any country where the company might carry on business, and whether the defendant knew of this personal liability cast on him by the law of California or not he is bound by it: *Lloyd* v. *Guibert*, (1865) L. R. 1 Q. B. 115; *Mostyn* v. *Fabrigas*, 1 Smith's Leading Cases (11th ed.), p. 627.

J. A. Hamilton, K.C., and *D. C. Leck*, for the defendant, were not heard.

COLLINS, M.R.—This is an appeal from a judgment of Kennedy, J., upon what is the modern equivalent for a demurrer, as a question of law has been raised upon the pleadings before the facts of the case are definitely ascertained. We have, therefore, to decide this point upon the facts as they are stated in the pleadings, and those facts are shortly these: The defendant was a member of a limited company registered under the Companies Act, 1862-1898, and among the objects for which the company was incorporated were these: "(*a*) To acquire any gold, copper, silver, or other mines, mining rights, and auriferous land in the United States of America, Australasia, and elsewhere, concessions, grants, decrees, rights, powers, privileges, or contracts from any government, company, state, sovereign, or authority, supreme, municipal, local, or otherwise, which might seem to the said company capable of being turned to account and to work, develop, carry out, exercise, and turn to account the same; (*b*) to search for, prospect, examine, and explore any territories and places in the United States of America, Australasia, and elsewhere, and to employ and equip expeditions, explorers, experts, and other agents; (*c*) to search for, crush, win, get, quarry, smelt, calcine, refine, dress, amalgamate, manipulate, and prepare for market, auriferous quartz and ore and mineral substances of all kinds, whether auriferous or not, and to carry on any metallurgical operations which might seem conducive to any of the said company's objects; (*d*) to purchase, hire, or otherwise acquire, use, maintain, sell, exchange, or otherwise deal with or dispose of and turn to account engines, wagons, steam and other ships, barges, plant, machinery, live and dead stock, hides, skins, fat, and other animal products, implements, stores, and materials of every kind requisite for any of the purposes of the said company, and to acquire by purchase, lease, or otherwise any lands or buildings, real or personal property, easements, rights, or privileges which the said company might think suitable or convenient for any purposes of its business; (*e*) to carry out all or any of the foregoing objects in any parts of the world, and either as principals or agents, or in partnership or conjunction with any other person, firm, association, or company; (*f*) to do all such other things as were incidental or conducive to the attainment of the above objects."

By article 87 of the articles of association the directors were empowered (D) "to appoint, in order to execute any instrument or transact any business abroad, any person or persons, the attorney or attorneys of the board or the said company, with such powers as they deem fit, including power to appear before all proper authorities and make all necessary declarations so as to enable the company's operations to be validly carried on abroad. (L) To do all such other things and take such steps as might be then or might at any time become necessary so as to comply with any statutory enactment, rule, or regulation in any country, colony, or place where the company might carry on business, or where all or any of the property and undertaking of the company might be situate."

The company, with a view to carrying on business in California, caused itself to be registered there, and the law of that state imposes on companies trading there certain conditions, one of which is that no corporation organized outside the limits of the state shall be allowed to transact any business within the state on more favourable conditions than are prescribed by law to similar corporations organized under the laws of the state. Therefore the company, as a condition precedent to its carrying on business in

California, had to be, and was, registered in California. Another condition was that each stockholder was individually and personally liable for such proportion of its debts and liabilities as the amount of stock or shares owned by him bears to the whole of the subscribed capital, stock, or shares of the corporation, and any creditor of the corporation may institute joint or several actions against any of its stockholders for the proportion of the claims payable by each. There is, further, a provision to this effect: "The liability of each stockholder of a corporation formed under the laws of any other state or territory of the United States, or of any foreign country, and doing business within this state, shall be the same as the liability of a stockholder of a corporation created under the constituti n and laws of this state."

It appears, therefore, that by the law of the State of California a remedy is given to a creditor of a company not merely against the company with which the contract was made, but against the individual shareholders in proportion to their holdings in the company. That individual liability could not, and does not, arise by reason merely that the person is a shareholder of the company, and if it is to be held that by reason of the company of which he is a member entering into contracts and carrying on business in California, his liability as a member of that company is altered, it must be on the ground that he had authorized the company to carry on business there on the terms that he should become liable according to the law of California, and not according to the constitution of the company of which he was a member. I do not express any opinion as to how the case would stand if the defendant were shown to have in fact assented to the company carrying on business in California on the the terms that he should incur personal liability in accordance with the law of that state. If it were shown, or if facts were proved from which it could be inferred, that he had authorized the mode of trading under the particular conditions which imposed liability on him, the case might be different. It is not, however, necessary to decide that point, because in this case it is sought to infer liability merely from the provisions in the memorandum of association under which the company caused itself to be registered in California and carried on business there. But can the court from the provisions in the memorandum and articles of association of the company, and the fact that the company did carry on business in California, infer there is this personal liability on the defendant? In my opinion, upon these facts the court cannot do so, and ought not to infer that the defendant had given authority to the directors to pledge his credit, as has been suggested by Mr. Lush for the plaintiffs. In my opinion it is not proved as a fact, nor do the facts as stated ground any such inference. I entirely agree with my brother Kennedy that it might be that there was a general power given to the company to carry on business in a foreign country, but underlying that power was the fundamental fact that the company was a limited liability company, and that such power must be taken as not inconsistent with the constitution of the company. It could not be inferred from the mere fact of those powers that the company was released from the underlying condition of its existence. The memorandum and articles of association of the company authorized the limited company to carry on business abroad, and they only authorized it subject to that condition of limited liability. Certain authorities have been cited. All the English authorities are consistent with the view which I have expressed. In two of the cases—*Bank of Australasia* v. *Harding* and *Bank of Australasia* v. *Nias*—the shareholders were held liable, but in each case the shareholder was made liable as having expressly authorized the act. In *Copin* v. *Adamson* it was held that the defendant's liability was to be measured by the authority given by him to the company or its directors. It was then said that a decision in the American courts went the other way. That case—*Pinney* v. *Nelson*—is distinguishable, in my opinion, upon the ground stated by Kennedy, J. There, by the constitution of the company itself, there were provisions from which the court inferred an express contract that the business of the company should be carried on in a named foreign state, and every member of the company must be taken to have authorized the company to carry on business there with all the attendant liabilities. That was the inference of fact which was drawn in that case, whether it was right or wong. There are no facts here from which we can, or ought to, draw such an inference. It seems to me, therefore, that the decision of the learned judge was right and this appeal must be dismissed.

ROMER, L.J.—I agree with the judgments of my brother Kennedy and my lord. The sole question is whether in the circumstances stated in the pleadings the defendant must be taken by implied authority to have contracted with the plaintiffs to be liable individually for a portion of the debt due to them from the Copper King Co., of which he was a shareholder. I need only say that in my opinion the facts fail to establish any such authority or contract. There are, admittedly, no facts that could be relied upon in support of that proposition beyond the mere fact that the defendant became a shareholder in the company with the powers conferred upon it by the memorandum and articles of association, and that the company carried on business in California. In my view the memorandum and articles of association, rightly construed, cannot be treated as an authority by every shareholder of the company to the company or its directors or agents to carry on business in a foreign country so as to make the shareholder liable beyond the limited liability under which he came as a member of the company by virtue of the English law. If this be the correct view—and it appears to me clear that it is—the appeal fails. If there was no authority to the company to enter into a contract with the plaintiffs so as to render the defendant liable as suggested, there is clearly no contract rendering him liable to the plaintiffs; and, if so, there is no way by which the defendant can be made liable in this country. As has been frequently pointed out, the shareholder and the company are different entities. A judgment obtained against a company does not affect the shareholder. It is not a judgment against the shareholders. If the shareholders and the company are regarded as two different entities, no foreign country could make a law which would be enforceable in this country if the company traded in that foreign country, to the effect that the shareholders would from that fact alone be held to contract personally so as to render themselves liable upon the engagements of the company. The decision of the learned judge appears to me to be perfectly right, and consequently the appeal fails.

MATHEW, L.J.—I am of the same opinion. The fundamental rule under which the company of which the defendant is a member is carried on in England is that the personal credit of a shareholder cannot be pledged. It is said that the memorandum and articles of association rescind that fundamental principle and enable the company to carry on its business abroad as if the company were not registered in England as a limited company, and therefore as if the liability of the shareholders was unlimited. To

establish that proposition—and I will assume that it could be established—it would be necessary to show an implied authority—for there is clearly no express authority—given by the shareholders to the company to enter into contracts abroad so as to render them personally liable thereon to the foreign creditors. The plaintiffs in this case fail to show even knowledge on the part of the defendant of the existence in California, where the work of the company was being carried on, of a law having that effect, and they are unable to show any request or assent by the defendant. I am wholly unable to find any implied authority of that sort, much less any request to the company to enter into contracts abroad with that result. That being so, it seems clear that the appeal fails.

Appeal dismissed.

Solicitors for the plaintiffs, *Balfour Allan & North.*

Solicitors for the defendant, *W. A. Crump & Son.*

High Court of Justice.

Chan. Div. Kekewich, J. } Jan. 26; Feb. 1.

In re GASKELL AND WALTERS' CONTRACT. (*a.*)

Convict—Felony—Administrator of convict's property—Estate tail—Power of administrator to disentail—Forfeiture Act, 1870 (33 & 34 *Vict. c.* 23), *ss.* 10, 12.

A person appointed under the Forfeiture Act, 1870, *to be administrator of a convict's property for the term of the convict's disability is not competent to disentail an estate tail vested in him as administrator.*

Adjourned summons.

This was a purchaser's summons under the Vendor and Purchaser Act, 1874.

The facts were as follows:

On the 15th of March, 1905, Charles Francis Thomas was convicted of felony and sentenced to three years' penal servitude.

On the 1st of June, 1905, the then Home Secretary committed the custody and management of the convict's property to Frank Hill Gaskell (hereinafter called the vendor) during his Majesty's pleasure for the purpose of dealing with the estate and interest of the convict in the manner prescribed by the provisions of the Forfeiture Act, 1870. The property of the convict at the date of his conviction included a rent-charge of £300 a year to which he was entitled for an estate tail.

By an indenture of the 5th of July, 1905, the vendor purported to bar his estate tail in this rent-charge.

By a contract for sale dated the 3rd of November, 1905, the vendor agreed to sell, and William Walters agreed to purchase, the rent-charge in fee simple.

The said William Walters objected to the title of the vendor on the ground that the Forfeiture Act does not confer power on the administrator of a convict's property to disential an estate tail of the convict, and he took out this summons for a declaration that the vendor had not shown a good title.

The question to be decided turned upon the construction of sections 10 and 12 of the Forfeiture Act. Section 10 provides that "upon the appointment of any such administrator in manner aforesaid all the real and personal property, including *choses in action,* to which the convict named in such appointment was at the time of his conviction, or shall afterwards, while he shall continue subject to the operations of this Act, become or be entitled, shall vest in such administrator for all the estate and interest of such convict therein."

Section 12 provides that "the administrator shall have absolute power to let, mortgage, sell, convey, and transfer any part of such property as to him shall seem fit."

Tyldesley Jones, for the purchaser.—Express words are necessary to enable the administrator of a convict to disentail his estate tail. Under the Bankruptcy Act, 1883, the trustee in bankruptcy is given the power by section 56, sub-section 5, to deal with the estate tail of the bankrupt "in such manner as the bankrupt might have dealt with it." It is evident, therefore, that the Legislature considers such express words to be necessary. In the Forfeiture Act no such express words are used, and the vendor was not, therefore, competent to disentail the estate tail: *In re Starkie,* 3 Myl. & K. 247; *Sturgis* v. *Morse,* 8 W. R 737. 2 D. F. & J. 223.

S. R. Earle, for the vendor.—The powers given to the administrator of a convict's estate by the Forfeiture Act are very wide and must be taken to include the power to disentail an estate tail. The clause in the Bankruptcy Act, 1883, appeared in the first Bankruptcy Act, and has been copied into every Bankruptcy Act since. No inference can, therefore, be drawn by its appearing in the Act of 1883: *Carr* v. *Anderson,* 51 W. R. 165, [1903] 1 Ch. 90.

KEKEWICH, J., in giving a considered judgment, said that the proper answer to the objection depended on the construction of the statute. It was competent for Parliament to provide that the administrator should have the right claimed by him, but undoubtedly express words were required for the purpose. What was vested in the convict was an estate in fee determinable by the entry of issue, and according to all canons of construction no general words would suffice to vest in the administrator a fee simple absolute. As a general rule, in construing an Act of Parliament purporting to amend the law, it is right to ascertain and bear in mind what the law was prior to the amendment, but in this case the old law does not render much assistance in determining the intention of the Legislature. The old law, which will be found stated in Viner's Abridgment under the head of "Forfeiture (*k*)" does not lend any countenance to the view that the Legislature contemplated the vesting in the administrator the extensive power which is contended for on his behalf. Section 10 of the Act provides that all the real and personal property of the convict shall vest in the administrator for all the estate and interest of such convict therein, and section 12 gives him absolute power to sell, convey, and transfer any part of such property. It is clear on the construction of section 12 that the administrator can sell, convey, and transfer only that which is vested in him, and that, according to the equally clear construction of section 10, is only the real and personal property of the convict which is vested in the administrator for all the estate and interest of such convict therein, and not for any other estate or interest. The legal consequence of this is that the administrator has vested in him and can sell a fee simple determinable and not a fee simple absolute. The Bankruptcy Act, 1883, following the lines of such preceding statutes as contain similar provisions, expressly enables the trustee to deal with any property to which the bankrupt is beneficially entitled as tenant in tail in the same manner as the bankrupt might have dealt with

(*a.*) Reported by P. JOHN BOLAND, Esq., Barrister-at-Law.

it, and it is a sound argument that this would not have been done if the provision for vesting the property of the bankrupt in the trustee, which is couched in as wide language as that employed in the Forfeiture Act, had already given the trustee the power thus conferred. This view is strongly confirmed by the authorities: see *In re Starkie* and *Sturgis* v. *Morse*, and especially the concluding remarks of Turner, L.J., in the latter case.

Objection upheld.

Solicitors for the purchaser, *Field, Roscoe, & Co.*, for *Collins & Woods*, Swansea.

Solicitors for the vendor, *Gibson & Weldon*, for *Gaskell*, Cardiff.

Chan. Div. Swinfen Eady, J. } Jan. 16, 20, 30; Feb. 8.

In re LONDON UNITED TRAMWAYS ACT, 1900. (*a.*)

Lands Clauses Acts—Vendor and purchaser—Sale of copyholds—Vendor dying before completion—Fine on admittance of vendor's heir—Vendor's costs of title—Lands Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 18), *s.* 82.

A company agreed to purchase copyholds under the Lands Clauses Acts. Vendor died before completion.

Held, that the company were bound to pay the costs of constituting a proper person to convey, including the costs of procuring the admission of the vendor's heir as tenant and the fine payable thereon.

In re Liverpool Improvement Act, 16 *W. R.* 667, 5 *Eq.* 282; In re Dublin (South) City Market Co., 25 *L. R. Ir.* 265; In re Lloyd and North London Railway Act, 1861, 44 *W. R.* 522, [1896] 2 *Ch.* 397; *and* In re Bear Island Defence Works and Doyle, [1903] 1 *Ir. R.* 164, *applied.*

Summons to review taxation.

This was a summons asking that it might be decided whether the master was right in allowing in the taxation of a purchase under the Lands Clauses Acts a sum of £255 16s. 6d. paid for fine and fees to the Steward of the Manor of Hampton Court on the 30th of December, 1904.

By an agreement dated the 16th of February, 1903, and made between Charles Kernot Butt as vendor of the one part and the London United Tramways (1901) (Limited) of the other part, the vendor, as trustee of the will of William Babb, agreed to sell and the company agreed to purchase the inheritance, according to the custom of the Honor and Manor of Hampton Court, of certain lands. The premises were expressed to be sold subject to all quit and other rents and incidents of tenure affecting the same, and the purchase was to be completed by the 4th of April, 1903, and, if not then completed, the company were to be at liberty to take possesion at any time after that date upon depositing the purchase-money and compensation in Parr's bank. Lastly, the company were to pay "the vendor's costs of title and conveyance as provided by the Land Clauses Act, 1845."

The purchase was not completed on the 4th of April, 1903, but the company took possession of the property under the contract. The reason for the delay was chiefly that on delivery of the abstract objections were taken to the title which the vendors alleged were unnecessary.

On the 27th of October, 1903, the vendor died, and on the 20th of December, 1904, the vendor's customary heir was admitted in order that he might surrender to the use of the purchasers. The fine payable thereon was £250, and there were also costs of the admittance.

The question raised was whether this amount came within the expression in the contract "vendor's costs of title and conveyance as provided by the Lands Clauses Act, 1845."

Christopher James, for the company, contended that the fine and fees were expenses which must have been paid by the vendors even without a sale and were not costs incurred for the purpose of making a good title only, and were thus costs to be paid by the vendors: *Paramore* v. *Greenslade*, 1 Sm. & G. 541. Secondly, the fine was not payable until after admittance; so soon as a tenant had been admitted there was a person qualified to convey and title could be given. The payment of the fine was an ulterior matter of no concern to the purchaser.

L. Mossop, for the executors of the vendor, argued that the fine was part of the necessary costs of conveyance and could not be disassociated from the act of admission to the roll, which it was admitted was a necessary preliminary to conveying to a purchaser. The fine and fees were on the same footing as the costs of taking out administration, which had been held to be a part of the purchaser's liability in several cases.

Cur. adv. vult.

SWINFEN EADY, J., in a considered judgment, stated the above facts, and then continued: It has frequently been held in purchases under the Lands Clauses Consolidation Act, 1845, that the company is bound to pay the costs of constituting a proper person to convey the property to them. Thus in *In re Liverpool Improvement Act*, 16 W. R. 667, L. R. 5 Eq. 282, where the corporation took some leasehold property after the death of the testator's executor and executrix, and it was necessary to obtain a grant of administration *de bonis non* in order to constitute a person to convey, Lord Romilly held that the corporation were bound to pay the costs of taking out this administration, and he overruled his own previous decision in *In re The South Wales Railway Co.*, 14 Beav. 418. In this latter case the trustee of copyholds had died, leaving an infant as his customary heir; proceedings were taken to obtain the appointment of a proper person to surrender the property in place of the infant, and the property was surrendered to one Henry Young, who was admitted feoffee in trust for the tenant for life and remainderman. The taxing-master allowed the costs of all the proceedings to obtain a conveyance, which amounted to £55. I have endeavoured to ascertain whether this amount included the fine payable on Henry Young's admittance, but I have been unable to do so, as the order does not appear to have been drawn up. Lord Romilly overruled the taxing-master and said that he ought not to have allowed these costs. When, however, on a subsequent occasion, Lord Romilly stated that he had come to the conclusion that the case of *In re The South Wales Railway Co.* was wrongly decided, and in terms overruled that decision, which he said he believed stood alone, it was a distinct statement of his opinion that the £55 ought to have been allowed. The Master of the Rolls in Ireland took the same view of the statute in *In re The Dublin (South) City Market Co., Ex parte Keatley*, 25 L. R. Ir. 265. In that case a vendor of leaseholds in possession, in order to make a title, had to procure a grant of administration *de bonis non* to a former assignee of the lease, and an assignment from such administrator *de bonis non* to himself. The taxing-master allowed the costs of taking out administration,

(*a.*) Reported by C. H. CARDEN NOAD, Esq., Barrister-at-Law.

but not of the assignment; the Master of the Rolls, reversing the taxing-master, allowed also the costs of the assignment, as a formal link requisite to complete the title, stating that the costs of formally completing the title should be borne by the company. This decision was followed in other Irish cases, and these again were followed by Stirling, J., in *In re Lloyd and the North London Railway (City Branch) Act*, 1861, 44 W. R. 522, [1896] 2 Ch. 397, where the costs payable by the company were held to include the costs of taking out administration *de bonis non* to the testator, and administration to each of eleven legatees who had died. The learned judge there said (p. 402): "It is very desirable that the practice should be the same in both countries and I therefore follow the Irish courts." This decision came before the Court of Appeal in Ireland in *In re Bear Island Defence Works and Doyle*, [1903] 1 Ir. R. 164. The Master of the Rolls, affirming the taxing-master, had allowed, as part of the costs of deducing title under section 82, the costs of taking out probate or letters of administration, where necessary, and also the death duties. The War Department appealed to the Court of Appeal as regards the death duties, but the appeal was dismissed. Holmes, L.J., in delivering the judgment of the Court of Appeal, referred to Lord Romilly's decision in 1868 in *In re Liverpool Improvement Act*, which he said had been followed in Ireland again and again. He then referred to Stirling, J.'s, decision in *In re Lloyd and the North London Railway (City Branch) Act*, 1861, and added that notwithstanding Stirling, J.'s, doubt, he had been unable to find any trace of difference in the practice of the two countries. He further said that the attempt to distinguish between the duty paid to the Crown and the other costs of administration, on the ground that the former is a charge on the property, had, he believed, never been suggested before, and was wholly illogical. Under these circumstances I consider that the construction of the statute is too well settled to be now open to question, at all events before me, and that the company is liable to pay the costs and expenses of proceedings taken for the purpose of constituting a proper person to convey or assure the property to them, including the costs of procuring the admission of a tenant of copyholds in order that he may surrender to them. A distinction was sought to be drawn between the steward's fees and the fine, on the ground that the latter did not become payable until after the admittance, and that, as soon as there was an admitted tenant, a person had been duly constituted to surrender to the company, and that the payment of the fine was a subsequent matter with which the company had no concern. In my opinion this distinction is not well founded. The fine which becomes payable on admittance is as much part of the expenses of procuring a proper person to surrender as the steward's fees and legal expenses. A trustee, taking admittance and paying the fine, is entitled to have the fine declared a charge upon the copyhold estate—*Cole* v. *Jealous*, 5 Hare 51—and could not be required to surrender the property to a purchaser or to the company without provision being made for the payment of the amount. The result is that the summons fails and must be dismissed with costs.

Solicitors, *Stanley, Wasbrough, Doggett, & Baker; T. G. Bullen.*

Chan. Div.
Swinfen Eady, J. } Feb. 1, 2.

In re PARKER'S POLICIES.
PARKER *v.* PARKER. (*a.*)

Married woman—Life assurance—Policy—Appointment—After-married wife—Married Women's Property Act, 1870 (33 & 34 *Vict. c.* 93), *s.* 10.

Policies were taken out by a married man with trusts (expressed to be in accordance with the Married Women's Property Act, 1870) *for his "widow or widow and children" as he should appoint. He appointed to an after-married wife.*

Held, that she was a "wife" within the statute.

Held, also, that if she was not within the statute then the policies were not within the Act either, and she took by appointment without reference to the Act.

In re Browne's Policy, 51 *W. R.* 364, [1903] 1 *Ch.* 188, *followed.*

Adjourned summons.

The question asked to be determined by this summons was who was entitled to the moneys secured by two policies upon the life of Robert William Parker, a solicitor, effected with the Scottish Provident Institution.

The policies were taken out on the 6th of May, 1879, and it was recited that Parker had been duly admitted a member of the institution and that he was desirous of insuring his life in accordance with the provisions of the Married Women's Property Act, 1870, for the sum of £1,000 on each policy. The policies further certified that, under the provisions of the said Act his "widow or widow and children or some or one of them in such share and proportions and interest and generally in such manner as the said Robert William Parker shall by any will or codicil thereto or by deed revocable or otherwise appoint shall be entitled to receive out of the funds of the said institution at the end of six months after the decease of the said R. W. Parker the sum of £1,000."

When the policies were effected Parker was married to a wife who died in 1881 leaving three children, the defendants to the summons. In 1886 Parker remarried, and his second wife, Louisa Agnes, survived him and was the plaintiff in this summons. There was one child of the second marriage.

In 1903 Parker by deed appointed the policy moneys to his wife Louisa Agnes Parker if she should survive him and become his widow for her own use and benefit absolutely, with gifts over on the failure of this event to the daughters of the appointor. Parker died in 1905.

R. Hughes, for the plaintiff.—These policies are taken out in accordance with section 10 of the Married Women's Property Act of 1870, which provides that "a policy of insurance effected by any married man, and expressed upon the face of it to be for the benefit of his wife, or of his wife and children, or any of them, shall enure and be deemed a trust for the benefit of his wife for her separate use and of his children or any of them according to the interest so expressed, and shall not, so long as any object of the trust remains, be subject to the control of the husband or to his creditors or form part of his estate." This is not confined to a wife living at the date of the policy. The words of the policy itself are "widow or widow and children," and if the second wife is outside the Act, then the policy, though expressed to be made in accordance with the Act, is also outside it, since "widow" must include an after-married wife,

(*a.*) Reported by C. H. CARDEN NOAD, Esq., Barrister-at-Law.

and the widow takes the policy money in either event.

F. Russell, for the defendants.—The appointment to the second wife is bad as not being under the Act, and the children take as in default of appointment. "Wife" in post-nuptial settlement has been decided to mean existing wife only.

R. Hughes in reply.

SWINFEN EADY, J., in giving judgment, stated the facts and continued: It is admitted that the child of the second marriage takes with the children of the first marriage. The question therefore is whether the widow takes the fund as appointed, or the children take it equally as unappointed. Now it was contended that "wife" under the statute of 1870 meant wife at the date of the policy only. But there would be as much reason, so far as the statute is concerned, to make provision for a later wife as for an earlier one. Kekewich, J., decided in *In re Browne's Policy*, 51 W. R. 364, [1903] 1 Ch. 188, that a second wife was within the provisions of the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75). Now there are small differences between the corresponding sections of the two Acts; section 10 of the earlier Act speaks of a policy of insurance effected by "any married man," whereas section 11 of the Act of 1882 says "any man." The language has been pruned in the latter Act, but I can make no difference between them. If a subsequent wife is thus within the statute, the appointment in this case is valid. But if my view is wrong, and the second wife is not within the terms of the Act, what is the alternative? The only alternative is that the settlor has introduced into the policies a stranger who is not a wife within the meaning of the Act, and has attempted to make provision for a stranger. This would not be within the Act of 1870 at all, though it would be within the words of the trusts of the policy—namely, "widow or widow and children." In that case the policy, though expressed to be in accordance with the Act, is not so, since it includes a class not included by the Act, for in my judgment "widow" means the person who at the death shall become the widow. The assured has appointed to the plaintiff by deed, and so, *quacunque viâ*, whether she is or is not within the statute she takes by appointment, and I so decide.

Solicitors, *Hughes & Masterman*.

Chan. Div. } Warrington, J. } Feb. 8.

HASKELL GOLF BALL CO. v. HUTCHISON. (a.)

Practice — Costs — Taxation — Patent — Infringement — Pleas of invalidity and non-infringement — Action dismissed with costs — Costs of issues — Patents Designs, and Trade-Marks Act, 1883, *s.* 29 (6)—*R. S. C.*, 1883, *ord.* 32, *r.* 4; *ord.* 65, *r.* 2.

Where in an action for infringement of a patent the defendant pleads both invalidity and non-infringement, and is successful upon the former plea but not upon the latter, in the case of a judgment dismissing the action with costs, it is the duty of the taxing-master to tax the defendant's costs as in an ordinary action, and to allow his costs not only with regard to the items in the particulars of objections certified by the judge under section 29 (6) *of the Patents, Designs, and Trade-Marks Act*, 1883, *but also with regard to the plea of non-infringement and all the other costs incurred by the defendant, except such as relate to the particulars of objections as to which no certificate is given.*

Summons to review taxation.

The question raised by the summons was whether the master had properly disallowed the costs of the defendants in an action for patent infringement, in which the defendants were successful upon the plea of invalidity, except the costs of the pleadings, and with regard to two of the particulars of objections, as to which a certificate was granted at the trial.

On the 23rd of December, 1904, the plaintiffs commenced an action to restrain the defendants from infringing their patent, No. 17,554 of 1898, for "improvements in the manufacture of golf balls." The defendants raised four grounds of defence—namely, (1) That the plaintiffs were not the registered owners of the patent; (2) that the original claims in the specification were not framed in good faith and with reasonable skill and knowledge; (3) that they (the defendants) had not infringed or threatened to infringe the letters patent; (4) that the letters patent were invalid for the reasons set out in the particulars of objections.

In their particulars of objections the defendants objected to the validity of the patent upon three grounds:

1. Prior publication (*a*) by prior specifications and a dictionary, (*b*) by the manufacture of similar balls suitable for golf, racquets, and other games, and by the sale and use thereof in public by certain specified persons at certain specified dates and places, (*c*) by the exhibition and use in public of balls made according to the plaintiffs' alleged invention, which were imported into this country shortly prior to the date of the plaintiffs' letters patent by the plaintiffs or their agents or other persons.

2. That the specification did not sufficiently describe and ascertain the nature of the invention upon certain specified grounds.

3. For want of sufficient subject-matter to support letters patent.

Under objection 1 (*a*) and (*b*) a mass of particulars were set out particularizing specific prior publications and instances of prior user.

The action came on for trial on the 29th of May, 1905, and on the 28th of June, 1905, Buckley, J., held that the plaintiffs had failed upon the issue of novelty, and dismissed the action with costs. His lordship also granted a certificate under the Patents, Designs, and Trade-Marks Act, 1883, s. 29 (6), that two of the instances of prior user by G. F. and D. S., numbered 1 *b* 10 and 1 *b* 15, in the particulars of objections, were proper and reasonable.

The defendants subsequently carried in their costs for taxation, the bill as delivered amounting to the sum of £4,283. The plaintiffs objected to certain of these costs, and in the result the taxing-master allowed the bill at £796 or thereabouts. The defendants objected to the taxation upon the ground: (1) That such costs only had been allowed "as would have been incurred in an action where the sole issue was the question of prior publication of the plaintiffs' invention by G. F. and D. S."; (2) that the taxing-master had not allowed the defendants the costs of proving certain facts which they had given a notice to the plaintiffs to admit.

In his answer to these objections the taxing-master stated that he had taxed the costs on the footing that there were more issues than one of prior publication, and that he had held that the defendants were entitled to the general costs of the cause, but had found the amount to be a comparatively small one having regard to the fact that the defendants had not

(a.) Reported by E. WAVELL RIDGES, Esq., Barrister-at-Law.

recovered on the two important defences set up in the statement of defence (paragraphs 3 and 4) as to non-infringement and invalidity. The taxing-master also stated that he had read the judgment and thought it clear that the judge considered that the defendants did infringe, but that there was practically no contest at all under this head. In his (the taxing-master's) opinion, the defendants had not succeeded on the issue of infringement, and the evidence of Professor B. and other witnesses of that class dealt with matters mentioned in the third head of the particulars of objections and in respect of which no certificate had been given.

With regard to the facts, which the defendants had given notice to admit, the taxing-master stated that the admission of certain of them should not have been asked for, as the plaintiffs had already admitted them, whilst with regard to the remainder they had not been admitted but were proved at the trial by witnesses whose names (with one exception) were in the particulars of objections, and in respect of whom no certificate had been given. He had therefore disallowed the costs in respect of such witnesses.

On the 21st of November, 1905, the defendants issued this summons asking that their objections to the taxation might be allowed, and the matter referred back to the taxing-master to vary his certificate accordingly.

Bousfield, K.C., and *J. C. Graham*, for the defendants.—This is an objection to the principle of the taxation, and therefore under ord. 65, rr. 39, 41, there is no need to set out particular items. The taxing-master has no power to say that the defendants should be deprived of the costs of the issue upon which they failed. He should have followed the formal order which dismissed the action with costs, and not have referred to the oral judgment. He has no power to say "the court found against you on certain issues." *Jenkins* v. *Jackson*, 37 W. R. 253, 40 Ch. D, 71, is not an authority in point, because in that case there were two distinct causes of action, as shown by the plaintiff's statement of claim, and the defendants were successful upon one issue only. Here there is only one main issue and the defendants succeeded upon it. The general costs of the evidence relating to the general state of public knowledge and other matters bearing upon the construction of the patent cannot be excluded, because they are necessary to put the judge into a state of knowledge with regard to the facts. It would be impossible to fight a patent action without going into the construction of the patent. Here very difficult questions as to the nature of the plaintiffs' ball arose, and a large part of the brief was concerned in considering what the patent really was, so as to put the court into a position to construe the specification. In *Holliday* v. *Heppenstall Bros.*, 37 W.R. 662, 41 Ch. D. 109, the Court of Appeal said that you must not give particulars in the particulars of objections as to the state of general knowledge, but that is not saying that you must give no evidence at all with regard to it. All that section 29 (6) of the Patents Act, 1883, says is that the costs only of the uncertified particulars should not be allowed. But if witnesses whose names appear in the particulars of objections are used to prove the state of general knowledge and matters relating to the construction of the specification, the costs relating to that part of their evidence should be allowed. In any case the taxing-master should have construed the order as it stood, and should not have gone into the reasons of the judge.

Norton, K.C., and *A. J. Walter*, for the plaintiffs.—The taxing-master was quite right in disallowing all costs except those with regard to the two certified items and the costs of the pleadings. It was open to the defendants to have pleaded invalidity only, but by their defence they raised the distinct issue of non-infringement. When that is done, and the defendants, as here, are not successful on the ground of non-infringement, they cannot have the costs occasioned by the plea of non-infringement: *Phillips* v. *Ivel Cycle Co.*, 62 L. T. 392, 38 W. R. Dig. 52. By ord. 65, r. 2, "the costs of the several issues respectively, both in law and fact, shall, unless otherwise ordered, follow the event." *Jones* v. *Curling*, 32 W. R. 651, 13 Q. B. D. 252, was an action for the recovery of several closes of land, and it was held that the costs of the different issues were distributable. Here, as in that case, the defendants have succeeded upon one issue, but they have failed upon others; therefore the costs of the various issues are distributable. The taxing-master has only followed the rule adopted in *Jones* v. *Curling* and also in *Jenkins* v. *Jackson*.

Bousfield, K.C., replied.

WARRINGTON, J.—This is an application to review the taxation of the defendants' costs in an action for patent infringement, the taxing-master having treated the matter as if the only issue was whether the patent was anticipated by two of the instances of prior user set out in the particulars of objection. Is that the right principle? In their defence the defendants deny that the claims in the plaintiffs' specification were framed in good faith and with reasonable skill and knowledge; they also deny infringement, and allege that the patent is invalid for the reasons set out in the particulars of objections. [His lordship read the particulars of objections as set out above.] In the result the plaintiffs failed on the issue of novelty, and the action was dismissed with costs, the judge granting a certificate that two of the items in the particulars of objections relating to prior user—namely, 1 *b* 10 and 1 *b* 15, were proper and reasonable. By section 29 (6) of the Patents, Designs, and Trade-Marks Act, 1883, it is enacted that "they" (the plaintiff or defendant) "respectively shall not be allowed any costs in respect of any particulars delivered by them unless the same is certified by the court or a judge to have been proven or to have been reasonable and proper without regard to the general costs of the case." What is the result of this sub-section in the present case? I think it was the taxing-master's duty to tax the costs just as in an ordinary action, except that he must not allow the costs with regard to the particulars not certified. His duty as to disallowances is limited to that. Here the taxing-master has considered not only the formal order, but the judge's reasons, and although the general costs were given to the defendants he has disallowed all except those which relate to the two particulars certified. Ord. 65, r. 2, has been cited in support of the plaintiff's contention, and this is a composite order. The first part dates from 1883, and was intended to be merely declaratory of the previous practice. The second part was introduced in 1902, and provides for the case where a party is given costs except "so far as they have been occasioned or incurred by or relate to some particular issue or part of his proceedings." It is the first part of the rule which relates to the present question, but I do not think the rule has any application at all to a case like this. "The costs . . . shall . . . follow the event," means that where there is a distinct issue the costs of proving all facts material to that issue follow the event of the issue. *Jones* v. *Curling* was an action with regard to several closes of land, and the defendants were right with regard to some and wrong with regard to others. Such a case would clearly be within ord. 65, r. 2. It is suggested here

that where the defence consists of two parts, non-infringement and invalidity, that the defendant has raised two distinct issues. I do not think that is so; there is only one issue—namely, has the defendant infringed the plaintiffs' legal right?—though the action is defended upon two grounds. The taxing-master has disallowed all the costs of the professional witnesses, though part might have been allowed without reference to the particulars of objections. I think the taxing-master should look further into this matter. The taxing-master has also disallowed the costs of proving certain facts which the defendants gave notice to admit, and which the plaintiffs did not admit, on the ground that these facts were proved at the trial by witnesses whose names appeared in the particulars of objection. I do not understand what the taxing-master means. If the facts as to which the notice to admit was given were in connection with the objections set out in the particulars, then I think he would have been right. But if the defendants were right in giving the notice to admit, and if, through the plaintiffs not having admitted them, they were forced to call witnesses to prove them, then I think it is immaterial whether the names of the witnesses appear in the particulars of objections or not. I must, therefore, remit the matter to the taxing-master for reconsideration, and to allow the defendants' costs except those incurred with respect to the particulars of objections as to which no certificate was granted. The plaintiffs may have leave to appeal.

Solicitors, *Burton, Yeates, & Hart; Wilson, Bristows, & Carpmael.*

K. B. Div. (Bigham, J.) — Nov. 27, 28.

JAMES JOICEY & CO. AND EDEN'S EXECUTORS v. NORTH-EASTERN RAILWAY CO. (a.)

Railway—Compensation for leaving coal unworked under railway—Basis of compensation—Railway Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 20), *s.* 78.

Where the lessee of coal mines lying under or adjacent to a line of railway is desirous of working such mines, and the railway company has, under section 78 *of the Railway Clauses Act,* 1845, *notified him that they are willing to pay him compensation for not working such mines,*

Held, that the measure of compensation payable by the railway company was the profit which would have been made on the reserved coal, and not the loss which the owner or lessee might suffer by reason of the interference of the railway company with the working of the mine.

Award stated by an arbitrator in the form of a special case.

By the North-Eastern Railway Act, 1887, the railway company were authorized to make and maintain a railway upon certain lands in the county of Durham, of which the predecessors in title of S. A. D. Eden were the owners for an estate for life. Messrs. James Joicey & Co. (Limited) (hereinafter called the coal company) were by virtue of a lease dated the 6th of February, 1886, entitled to hold and to win, work, and carry away all the coal within and under the said lands for a term of twenty-one years from the 1st of January, 1886.

The Act incorporated (*inter alia*) the Railway Clauses Consolidation Act, 1845, and the railway company duly took a portion of the said lands and constructed a railway thereon.

On the 11th of August, 1892, the coal company being then desirous of working the coal under or within the prescribed distance from three separate bridges forming part of the said railway, duly gave notice to the railway company in conformity with section 78 of the Railway Clauses Consolidation Act, 1845, and the railway company, on the 2nd of November, 1892, by notice required the coal company to leave certain percentages of coal unworked as mentioned in the said notice for the support of the said railway (thereinafter called the reserved coal), and expressed their willingness to pay to the persons entitled all such compensation as might be payable according to law.

At the dates at which the right to such compensation accrued, the reversion expectant on the determination of the said lease (thereinafter referred to as the said reversion) was vested in the said S. A. D. Eden as owner in fee, and he and the coal company according to their respective interests claimed compensation from the railway company for the reserved coal.

S. A. D. Eden died on the 15th of July, 1904, and the claimants were his executors. The quantity of the reserved coal is 6,156 tons, and forms part of a seam called the Shield Row Seam. If the reserved coal had not been required to be left unworked it would in the ordinary way and regular course of working have been worked by the coal company at various dates previous to the 31st of December, 1903, and the coal company would have made out of the working of such coal a profit of £730, and the said S. A. D. Eden would also have received as rent in respect thereof the sum of £155.

The special case proceeded in the following terms:

"(11) The average annual quantity of coal produced by the coal company out of the said seam continued unaltered until about the month of May, 1894, but since that month the output has been sensibly diminished. A diminution of output would have occurred in the ordinary course, even if the reserved coal had not been required by the railway company to be left unworked, but the effect of leaving unworked the reserved coal has been to accelerate such diminution, and also to accelerate the time when it became necessary for the coal company in the ordinary prosecution of their workings to work coal more expensive to get. It is admitted that the effect of such acceleration has been to subject the coal company to increased expenses and loss, and for the purposes of this case these are agreed at £100. There is left unworked in the said Shield Row Seam under the said lands a quantity of coal which the coal company would not in the ordinary course be able to exhaust within the term of the before-mentioned lease, which expires on the 1st of January, 1907.

12. Under these circumstances the railway company contend that the coal company have only suffered loss to the extent of £100, and that this amount and no more is the compensation to which the coal company are entitled in respect of the reserved coal having been left by them in conformity with the requirements of the railway company.

13. The coal company, on the other hand, contend that the proper measure of compensation which they are entitled to receive from the railway company is the amount of money which they would have made by the working of the reserved coal if such coal had not been required by the railway company to be left unworked—viz., the above-mentioned sum of £730.

14. The railway company admit that the persons entitled to the said reversion are entitled to compensation in consequence of the service of the said notice of the 2nd of November,

(a.) Reported by ALAN HOGG, Esq., Barrister-at-Law.

1892; but they contend that the measure of such compensation is not the rent which the said S. A. D. Eden would have received in respect of the reserved coal if it had been worked, but the diminution in the value of the said reversion at the date of the service of the said notice in consequence of such service, that it is to say, the difference between the value of the said reversion on the 2nd of November, 1892, had the said notice not been served, and the value of the said reversion immediately after the service of the said notice.

15. It is admitted by all parties that if the contention of the coal company set out in paragraph 13 is well founded, the executors of the said S. A. D. Eden are entitled to receive the sum of £155, and no more, being the rent or royalty which would have been payable by the coal company to the said S. A. D. Eden in his lifetime in respect of the reserved coal, if that coal had been worked by them, and that nothing is payable to the other persons interested in the said reversion.

16. If the contentions of the railway company as set out in paragraph 14 are well founded, the compensation payable in respect of the lessors' interest is for the purposes of this case agreed at £310, but it is a question to whom such compensation ought to be paid.

17. If the court should be of opinion that the contention of the coal company set out in paragraph 13 is well founded, then I award that the railway company shall pay to them the sum of £730 and shall pay to the said executors the sum of £155.

18. If, on the other hand, the court should be of opinion that the contentions of the railway company set out in paragraphs 12 and 14 are correct, then I award that the railway company should pay to the coal company the sum of £100, that the railway company shall pay to the person interested in the said reversion the sum of £310, and I submit to the court whether such compensation is payable to the said executors, or to the tenant for life, or to the trustees of the estates settled by the will of the said S. A. D. Eden as capital moneys."

By the Railway Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 78: "If the owner, lessee, or occupier of any mines or minerals lying under the railway or any of the works connected therewith, or within the prescribed distance, or where no distance shall be prescribed forty yards therefrom, be desirous of working the same, such owner, lessee, or occupier shall give to the company notice in writing of his intention so to do thirty days before the commencement of working, and upon the receipt of such notice it shall be lawful for the company to cause such mines to be inspected by any person appointed by them for that purpose, and if it appear to the company that the working of such mines or minerals is likely to damage the works of the railway, and if the company be willing to make compensation for such mines or any part thereof to such owner, lessee, or occupier thereof, then he shall not work or get the same; and if the company and such owner, lessee, or occupier do not agree as to the amount of such compensation the same shall be settled as in the cases of disputed compensation."

C. A. Russell, K.C. (*W. D. Benson* with him), for the claimants.—Section 78 provides that the railway must pay compensation for "such mines." The claimants are, therefore, entitled to recover the amount which they would have made by working the reserved coal.

He cited *Bwllfa and Merthyr Dare Steam Collieries* v. *Pontypridd Waterworks Co.*, 52 W. R. 193, [1903] A. C. 426, and *Smith* v. *Great Western Railway Co.*, 26 W. R. 130, 3 App. Cas. 165.

Cripps, K.C. (*Ryde* with him), for the respondents.—The measure of compensation due is not the amount of profit which would have been made on working the reserved coal. The coal company are entitled to be compensated for the increased cost incurred in working other coal, and the reversioners are entitled to be compensated not only for the mere loss of royalties on the reserved coal, but for the injury to the reversioner due to the fact that the coal company have taken an amount of coal which would not have been reached if the coal company had been able to work out the reserved coal.

He cited *Great Northern Railway Co.* v. *Inland Revenue Commissioners*, 49 W. R. 261, [1901] 1 K. B 416.

BIGHAM, J.—This case is one of difficulty, but I do not think that it would be of any advantage if I were to take time to consider my judgment. The question that I have to decide turns on section 78 of the Railway Clauses Consolidation Act, 1845. [The learned judge read the section, and continued:] Now what is it that the railway company are to pay for? They are to be willing to make compensation for "such mines"—that is to say, in this case for the coal which the coal owner is precluded from working by reason of the railway company having given him notice not to work it. The section does not say that the owner of the mine is to be compensated for the loss which he may suffer by reason of the interference of the railway company with the working of the mine; if it did, I think there would be a good deal to be said for Mr. Cripps' contention that all the surrounding circumstances must be looked at. But those are not the words of the Act. He is to be paid for the coal which he is prevented by the action of the railway company from bringing to the surface. I must, therefore, find in favour of the claimants and direct that the railway company shall pay to Messrs. Joicey & Co. the sum of £730, and to the executors the sum of £155.

Judgment for claimants.

Solicitors for claimants, *Rawle & Johnston*, for *Cooper & Goolger*, Newcastle-on-Tyne.

Solicitor for respondents, *A. Kaye Butterworth*, York.

Court of Appeal.

From K. B. Div. (Vaughan Williams and Stirling, L.JJ.) — Feb. 16.

DARTFORD BREWERY CO. (LIMITED) v. MOSELEY. (a.)

Practice — Costs — Writ of possession — Jurisdiction — Judicature Act, 1890 (53 & 54 *Vict.* c. 44), *s.* 5.

The Court has power, under section 5 of the Judicature Act, 1890, *to allow the successful plaintiff in an action for the recovery of land the costs of and incidental to a writ of possession.*

Appeal from an order of A. T. Lawrence, J., allowing the plaintiffs in an action for recovery of land the costs of a writ of possession.

The action was brought by landlords against a tenant, and the claim indorsed on the writ of summons was for possession of a house and premises, rent, and mesne profits.

On a summons under order 14, an order was made

(a.) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

that the plaintiffs should be at liberty to sign judgment for possession with the costs of the application, the claim for rent being allowed to stand over. Judgment was signed accordingly, and a writ of possession was issued in the form given in Appendix H, No 8, to the Rules of the Supreme Court.

The plaintiffs proceeded to issue execution for the costs, and, being desirous that their writ of *fi. fa.* should cover the costs of the writ of possession, they took out a summons asking for an order that the costs of and incidental to the writ of possession issued in pursuance of the judgment might be taxed and paid by the defendant to the plaintiffs.

The master refused to make an order, but the judge reversed his decision and made the order asked for.

The defendant appealed.

C. N. Tindale Davis, for the defendant.—There was no jurisdiction to make this order. No statute or rule gives any power to allow a successful plaintiff in an action brought to recover possession of land the costs of the writ of possession. Such costs are not part of the judgment debt; they do not constitute a debt due from the defendant at all: *Marquis of Salisbury* v. *Ray*, 8 W. R. 462, 8 C. B. N. S. 193; *In re Long, Ex parte Cuddeford*, 36 W. R. 346, 20 Q. B. D. 316. By ord. 42, r. 15, which embodies section 123 of the Common Law Procedure Act, 1852: "In every case of execution the party entitled to execution may levy the poundage, fees, and expenses of execution over and above the sum recovered." That applies to ordinary execution, such as *fi. fa.* There is no corresponding provision in order 47, which deals with the writ of possession. The plaintiffs will rely on section 5 of the Judicature Act, 1890, as conferring jurisdiction to allow these costs. But the Judicature Acts and order 65 were not intended to confer any new jurisdiction to award costs. [STIRLING, L.J.—In *In re Fisher*, 42 W. R. 241, [1894] 1 Ch. 450, it was pointed out that one of the objects of section 5 of the Judicature Act, 1890, was to remedy the want of power to make any order as to the costs of the payment out of court of money which had been paid into court under the Lands Clauses Act.] At any rate the section does not cover this case. It only deals with "the costs of and incident to all proceedings in the Supreme Court." A writ of possession is not a proceeding in the Supreme Court.

J. R. Atkin, for the plaintiffs.—Section 5 of the Judicature Act, 1890, gives the court power over all costs of and incident to proceedings in the Supreme Court. *In re Fisher* shows that this section is an enabling section, which enlarges the jurisdiction of the court over costs. A writ of possession issued in pursuance of a judgment is clearly a proceeding in the Supreme Court. It is not necessary to consider whether the court had power over such costs before the Act of 1890. [VAUGHAN WILLIAMS, L.J.—In Watson on Sheriffs, at p. 112, it is said: "In general the party at whose suit the writ is issued must bear the expenses of execution, and has no remedy against his debtor, except by express agreement, as usual in a judge's order, warrant of attorney, or cognovit."]

VAUGHAN WILLIAMS, L.J.—I think it is desirable to set out the proceedings in this case up to the date of the order appealed against. By a writ of summons issued on the 21st of November, 1905, the plaintiffs claimed possession of a house and premises and rent and mesne profits, the defendant having come into possession of the premises as tenant of the plaintiffs. The plaintiffs were enabled under the provisions of order 14, the scope of which is now extended so as to apply to an action by a landlord against a tenant to recover possession of premises where the term has expired or has been duly determined by notice to quit, to make an application under that order for summary judgment. They accordingly made such application, and on the 15th of December an order was made that the plaintiffs should be at liberty to sign final judgment against the defendant for possession of the premises set out in the indorsement of the writ of summons with the costs of the application. The claim for rent was ordered to stand over. Then, on the next day, the 16th of December, final judgment was signed. By that judgment, after reciting that the plaintiffs had obtained the order just mentioned, it was adjudged that the plaintiffs should recover possession of the premises and should recover the costs of the application to be taxed. Up to this point no mention had been made of any costs of a writ of possession. But the plaintiffs, having on the 20th of December issued a writ of possession, and being desirous to recover the costs incurred thereby, applied at chambers on the 29th of December for an order that the costs of and incidental to the writ of possession issued on the 20th of December in pursuance of the judgment dated the 16th of December should be taxed and paid by the defendant to the plaintiffs. The Master refused to make an order, but there was an appeal to the judge, and on the 5th of January A. T. Lawrence, J., made an order as prayed. That is the order appealed against.

It now appears to be clear that up to the Judicature Acts, and indeed up to the year 1890, there was no jurisdiction to make such an order. I have examined the forms of orders applicable to a case like the present, and I have also referred to Watson on Sheriffs. These show that formerly there was no such jurisdiction. But in 1890 the Judicature Act of that year, by section 5, provided as follows: "Subject to the Supreme Court of Judicature Acts and the rules of court made thereunder and to the express provisions of any statute whether passed before or after the commencement of this Act, the costs of and incident to all proceedings in the Supreme Court, including the administration of estates and trusts shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and to what extent such costs are to be paid." That section has been relied on, and in my opinion properly relied on, by the plaintiffs as giving jurisdiction to make such an order as that now appealed against. On reading the words of the section I myself was not quite sure that they were intended to give power to the court to order payment of costs which could not have been ordered before, I was inclined to think that they were only intended to regulate the exercise of existing jurisdiction. But Stirling, L.J., called attention to the case of *In re Fisher*, and after looking at that case it seems to me to be quite plain that the object of the section was to confer jurisdiction. Lindley, L.J., after mentioning the unfortunate state in which the law had been with regard to the costs of the payment out of court of money which had been paid in under the Lands Clauses Acts, and the attempt to get over the difficulty made in *Ex parte Mercers' Company*, 27 W. R. 424, 10 Ch. D. 481, said: "However, in *In re Mills' Estate*, 35 W. R. 65, 34 Ch. D. 24, that case was not followed, and the reason why it was not followed was that the court held that no jurisdiction was conferred upon it by the rules to order the payment of costs in cases where before the Judicature Act it would have had no power to do so. That difficulty was felt to be one that ought to be got rid of by legislation, and section 5 of the Judicature Act, 1890, was passed for the purpose, amongst other

things, of getting rid of what was admitted to be an unjust anomaly." Knowing now that the section was intended to confer a new jurisdiction to order costs not existing before, I must look to see whether it confers jurisdiction in the present case. The section purports to place in the discretion of the court or judge "the costs of and incident to all proceedings in the Supreme Court." It has been argued that this was not a proceeding in the Supreme Court. I am of opinion that it was, and therefore I think the appeal should be dismissed.

STIRLING, L.J., concurred.

Appeal dismissed.

Solicitors for the plaintiff, *Nicholson, Graham, & Beesly.*

Solicitors for the defendant, *Morris & Rickards.*

From P. D. & Ad. Div. (Vaughan Williams, Stirling, and Moulton, L.JJ.) — Feb. 2.

"THE SCARSDALE." (a.)

Ship—Seaman—Wages—End of voyage—Agreement—Port within home trading limits as required by master—Port where cargo is discharged—Merchant Shipping Act, 1894 (57 & 58 *Vict. c.* 60), *ss.* 113, 114 (2) (a), 115 (5), 116.

A seaman shipped at Cardiff under an agreement for "a voyage not exceeding one years' duration to any ports or places within the limits of seventy-five degrees north latitude and sixty degrees south latitude, commencing at Cardiff, proceeding thence to Malta, thereafter trading to ports in any rotation, and to end at such port in the United Kingdom or Continent of Europe within home trading limits as may be required by the master." The vessel sailed from Cardiff for Malta and then to a Black Sea port, where she loaded a cargo for Southampton. On arrival at Southampton she discharged the whole of her cargo, and the seaman demanded his wages and his discharge upon the ground that the voyage was at an end. The master refused, stating that the voyage was not at an end until the ship got back to Cardiff, and that the seaman would have to go on with the ship to that port.

Held, that the master had, by the agreement, the power of fixing at what port within home trading limits the voyage was to end, and that the voyage did not necessarily end at the port within home trading limits where the cargo was finally discharged.

Appeal from the judgment of Bargrave Deane, J.

Charles Baxter, who was employed on board the steamship *Scarsdale* as a fireman, took proceedings, under section 164 of the Merchant Shipping Act, 1894, before a court of summary jurisdiction, to recover from the master of *The Scarsdale* the sum of £4 3s. 9d. wages and £2 as compensation. After having heard the evidence the court referred the claim to the Admiralty Division of the High Court under section 165, sub-section 3, of the Merchant Shipping Act, 1894.

On the 5th of August, 1904, Baxter signed an agreement for service on board *The Scarsdale*, the material clause of which was as follows: "On a voyage not exceeding one year's duration to any ports or places within the limits of 75 north latitude and 60 degrees south latitude, commencing at Cardiff, proceeding thence to Malta, thereafter trading to ports in any rotation, and to end at such port in the United Kingdom or Continent of Europe within home trading limits as may be required by the master."

The Scarsdale sailed from Cardiff to Malta, then from Malta to the Black Sea, where she took in a cargo of grain for Southampton, and she arrived at Southampton on the 28th of September, 1904, where she discharged the whole of her cargo.

Baxter demanded his wages and his discharge at Southampton upon the ground that the voyage was at an end, but the master refused to give them to him, stating that the agreement was not at an end, and that Baxter would have to go on with the ship to Cardiff.

Baxter accordingly instituted these proceedings, and the Board of Trade obtained leave to intervene.

Bargrave Deane, J., was of the opinion that the agreement was an agreement for a particular voyage; that the voyage was at an end at the port within home trading limits where the cargo was discharged, or if there was more than one port of discharge, at the port where the last portion of the cargo was discharged; that the master by accepting a cargo from the Black Sea for Southampton exercised his power to end the voyage at Southampton as his final port of discharge, making it thereby his final port of destination, and that, having so exercised his power, he had no right to require Baxter to proceed further with the ship, and Baxter was entitled to his discharge and his wages at Southampton. He accordingly gave judgment for Baxter.

The master appealed.

Sir Edward Clarke, K.C., and *Lewis Noad*, for the master.

Sir William Robson, S.G., Sir Robert Finlay, K.C., Sir Edward Carson, K.C., and *S. A. T. Rowlatt*, for the Board of Trade.

S. T. Evans, K.C., and *Morgan Morgan*, for Baxter.

VAUGHAN WILLIAMS, L.J., read the following judgment: The question in this case turns on the construction of an agreement entered into between Charles Baxter, a seaman, and Colin McDiamid, the master of the steamship *Scarsdale*. The case began by a summons being taken out under section 164 of the Merchant Shipping Act, 1894, by Charles Baxter, the plaintiff, against the defendant, McDiamid, the master of the steamship *Scarsdale*, for £4 3s. 9d., being the balance of wages owing to him, the plaintiff, while employed on the defendant's said steamship as a fireman. At the hearing of the summons the plaintiff was represented by Mr. Charles Ansell Emanuel for the Seamen and Firemen's Union, and Mr. Charles Lamport appeared for the Shipping Federation. The ship's articles showing the terms upon which the crew were engaged were put in evidence, and the material terms were as follows: "On a voyage not exceeding one year's duration to any ports or places within the limits of 75 degrees north latitude and 60 degrees south latitude, commencing at Cardiff, proceeding thence to Malta, thereafter trading to ports in any rotation, and to end at such port in the United Kingdom or Continent of Europe within home trading limits as may be required by the master." Home trading limits include the United Kingdom, the Channel Islands, and the Isle of Man, and the Continent of Europe between the River Elbe and Brest inclusive. The plaintiff signed on board *The Scarsdale* at Cardiff on the 5th of August, 1904, and proceeded in that vessel to Malta, then to the Black Sea, where *The Scarsdale* took in grain, and then went to Southampton under charter-party, arriving on the 28th of September at Southampton, where the ship discharged the whole of her then cargo. Baxter at Southampton demanded his

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

discharge, but the defendant refused to give it to him, saying that the agreement was not at an end, and telling Baxter that he would have to go on to Cardiff. It was admitted by the master that Southampton was the final port of discharge for the cargo. I find that the cargo in this admission meant the cargo which the master then had on board. It was contended on behalf of the plaintiff that, as the vessel was going to discharge the whole of her cargo at Southampton, the voyage entered into under the articles was completed, and the plaintiff was entitled to his discharge at Southampton. It was contended on behalf of the master that the voyage was not ended, and the captain could require the plaintiff to go to Cardiff. The question whether the voyage mentioned in this agreement terminated at Southampton, or whether the master could require the voyage to end at Cardiff and refuse to give Baxter his discharge or to pay him his wages until arrival at Cardiff, depends upon the true construction and meaning of the agreement in question. In my opinion, if one looks merely at the words of the agreement, the master would seem to be entitled to require the voyage to end at Cardiff as being a port in the United Kingdom. I can find no words within the four corners of the agreement which would lead me to say that the voyage mentioned in the agreement determined at Southampton by reason of the discharge of the cargo then on board *The Scarsdale* at Southampton, a port within the United Kingdom, and therefore a port within the limits within which the master is by the agreement entitled to require the voyage to end. The voyage mentioned in the agreement is a voyage of the ship and not of the cargo. It was urged by Sir Robert Finlay that the agreement provided for the ship commencing its voyage at Cardiff, proceeding thence to Malta, and thereafter making a circular voyage trading to ports in any rotation, but necessarily ending the voyage by the arrival of the ship at any port within home trade limits—that is to say, within the United Kingdom or within the Continent of Europe between the River Elbe and Brest. He argued that the trading to ports in rotation meant ports exclusive of those within home trade limits. I see nothing in the words of the agreement to justify the contention that the voyage intended by this agreement necessarily came to an end by the arrival of the ship in ballast or with cargo at a port in the United Kingdom, or within home trading limits. On the contrary, it seems to me that the words of the agreement give the master a right of election as to which of the ports within the limits of the prescribed district shall in fact be the final port of destination of the ship. And even if the words of the agreement, looking only to what one finds within the four corners of the agreement, were much less clear than they seem to me to be, I should have hesitated long, having regard alike to the interests of seamen and shipowners, before I held that the true construction of this agreement necessitated the engagement of a new crew in the case of a British foreign-going ship arriving at Hamburg before she could proceed with the cargo from Hamburg to any port, whether within or without home trade limits.

I will next consider the construction of this agreement, taking into consideration the provisions of sections 113, 114, 115, and 116 of the Merchant Shipping Act, 1894, and also the provisions and language of that Act generally. Section 113 requires that the master of every ship, except coasting ships of less than eighty tons registered tonnage, shall enter into an agreement (called the agreement with the crew) with every seaman whom he carries to sea as one of his crew from any port in the United Kingdom. Sub-section 2 of section 114 prescribes what the agreement with the crew shall contain as terms thereof. Sub-section 2 (*a*) runs thus: "The agreement with the crew shall contain as terms thereof the following particulars: (*a*) Either the nature, and, as far as practicable, the duration of the intended voyage or engagement, or the maximum period of the voyage or engagement and the places or parts of the world, if any, to which the voyage or engagement is not to extend." It was argued by the Solicitor-General and Sir Robert Finlay that if the construction above mentioned, which was the construction contended for by Sir Edward Clarke, was put on the agreement, this construction in effect turned the agreement into a time agreement, and that a time agreement would not be an agreement in accordance with section 114 of the Merchant Shipping Act, 1894, or with the provisions of that Act taken as a whole. And then they argued, if the words of the agreement were capable of two constructions, one of which resulted in an agreement which was void under the Act and inconsistent with its provisions, and the other consistent with its provisions, the court ought to adopt the construction consistent with the provisions of the Act even though such construction should be a non-natural construction or not the construction which *primâ facie* one would give to the words of the agreement. I agree entirely with this contention; but I do not think that a time agreement, as distinguished from a voyage agreement, would be inconsistent with the provisions of section 114 or with the provisions of the Act taken as a whole. First let me take section 114, sub-section 2 (*a*). That clause contains alternative particulars either of which will satisfy clause (*a*) of sub-section 2 of section 114. Under the first alternative the agreement must contain particulars of the nature and, as far as practicable, of the duration of the voyage or engagement. It will be observed that this alternative provides not only for particulars of a voyage, but alternatively for particulars of the engagement, which, I take it, is not a synonym for a voyage. The second alternative also deals both with an agreement which contemplates a voyage and also with an agreement which contemplates an engagement. Under this latter alternative the particulars must be of the maximum period of the voyage or engagement and of the places or parts of the world, if any, to which the voyage or engagement is not to extend. The difference between these two alternatives is this: That under the first the contractual employment extends to the whole duration of the voyage or engagement as the case may be; whereas under the second alternative the contractual employment must not exceed the maximum period of the voyage or engagement, but may be determined on an event or at a time happening before the determination of the maximum period. It seems to me that the word "engagement" in both of these alternatives covers a time agreement as distinguished from a voyage agreement. Under the first alternative the agreement has to be for a fixed time, under the second for a maximum period of time. I am inclined to think that where the agreement is for a maximum period of time the agreement would lack that precision for the information of the sailor which the statute contemplates unless it stated the occasion or occasions on which the employment might fall short of the maximum period. We have not got to decide this, but, assuming this to be the true construction of clause (*a*), it is fully satisfied by the choice given to the captain as to the port within the limits prescribed at which the voyage is to end, and the time at which within the twelve months the vessel shall arrive at the port within the home trade limits where he requires the ship to end its voyage. But then it is said that there are

to be found in section 115 provisions relating to running agreements which by express statement of occasions on which the agreement may be based on time exclude agreements based on time in respect of foreign-going ships except on those occasions defined under the head of running agreements. The sub-sections of section 115 which are in particular relied upon are sub-sections 5, 6, and 7. Sub-section 5 runs thus: "The agreements may be made for a voyage, or if the voyages of the ship average less than six months in duration may be made to extend over two or more voyages, and agreements so made to extend over two or more voyages are in this Act referred to as running agreements." Now sub-section 5 provides that an agreement may be made by a foreign-going ship for a voyage—*i.e.*, may be made under so much of section 114 as relates to a voyage as distinguished from an engagement. But an agreement for a voyage may be made for a maximum period provided it states the places or parts of the world, if any, to which the voyage is not to extend. That being so, it seems to me that, if the agreement under consideration is a voyage agreement which complies with these conditions, we are not to trouble ourselves with the provisions as to running agreements, which, as sub-section 5 states, are agreements made to extend over two or more voyages. I do not think that this agreement under consideration does extend to two or more voyages. It is a single agreement for one voyage of the ship. Indeed both the Solicitor-General and Sir Robert Finlay admitted that this agreement, so far as it related to a tramping voyage in the Mediterranean or outside the limits for selection of the port of final destination, was for one voyage under a single agreement within the meaning of section 114. They only contended that arriving at a port within those limits or at all events arriving at such a port and discharging the whole of the cargo constituted necessarily a determination of the voyage of the ship. I cannot agree. But I would observe that they did not contend that the agreement was a running agreement, but only that such arrival at a port within the district where the voyage might end terminated the voyage under an agreement made under section 114. With regard to section 116 I have only to say that it does not contemplate agreements for a voyage, and certainly not agreements for a voyage of a foreign-going ship. It deals with agreements for service of crews of home trading ships in a particular ship, or of a service in two or more ships belonging to the same owner; so I do not think we need consider the effect of sub-section 4 of section 116. Having thus far dealt with the question of the validity of the agreement and the meaning of the word "voyage" in the agreement, I now propose to deal with the meaning of the words in the agreement as to the end of the voyage. The words are "to end at such port in the United Kingdom or Continent of Europe, within home trading limits, as may be required by the master." Bargreave Deane, J., after dealing with the meaning of the word "voyage" in terms with which I entirely concur, said that "the further question that then arose was that, given that the voyage ended within those home limits, at what place within them did it end? The Merchant Shipping Acts from 1729 down to the present date did not in terms define the 'end of the voyage'; but there were three expressions which afforded a fairly sure guide to what might be taken to be the place where a voyage ended. 'The place of unlivery of the cargo,' 'the final port of discharge,' and 'the final port of destination' were terms which were to be found in the various Merchant Shipping Acts, and he thought they were intended to be correlative terms, each pointing to what must be taken to be the end of the voyage; and, reading them in that light, he thought that the end of the voyage was the place where the final or home passage of the whole voyage terminated by reason that it was the place at which the cargo brought home was to be finally discharged. In the case where the home cargo was consigned to more than one place 'finally' would mean that place where the last portion of the cargo was discharged, and the adventure of the ship outward and homeward was at an absolute end, and where she was fully discharged on her return within the home trade limits." I cannot agree that in this agreement the end of the voyage means the place where the final or home passage of the whole voyage terminates by reason that it is the place at which the cargo brought home is to be discharged finally, or that place where the last portion of the cargo is discharged, and the adventure of the ship outward and homeward is at an absolute end, and where she is finally discharged on her return within the home limits. The voyage to be ended is the voyage of the ship, not of the cargo. The adventure of the ship outward and homeward does not terminate until the ship returns to the port, within the limits of home trade, where the master elects, within the period of twelve months mentioned in the voyage agreement, to end her voyage and prepare for a fresh voyage. I agree also with the criticism by Sir Edward Clarke upon this part of the judgment of the learned judge, that discharge is a word which applies not only to cargo, but also to crew and to ship. And I cannot agree that the place of "unlivery of the cargo," "the final port of discharge," and "the final port of destination," are either correlative or synonymous terms. Lastly, I would say that, although I think that the argument of Sir Robert Finlay made it necessary for him to say that an express agreement that the voyage should begin at Cardiff and proceed to Bilbao and back to Cardiff, with liberty to call at Southampton and there discharge her cargo, would not be a voyage ending at Cardiff within the meaning of this agreement, it seems to me that that contention would produce a most strained construction of the simple words of this agreement. I only wish to call attention for a moment before concluding to the judgments of Lord Stowell in *The George Home*, 1 Hagg. Adm. 370 and of Dr. Lushington in *The Westmorland*, 1 W. Rob 216. Dr. Lushington, in the latter case, cites the judgment of Lord Stowell in the former case; and without going minutely into statements made by those great judges, it will be seen plainly in both cases that the judges took the view that what the Legislature really required was that an agreement of service between a sailor and the master of a ship should be so expressed as to give sufficient information to the seaman about to be carried in the ship as to the voyage about to be undertaken; and, in my view, if an agreement sufficiently does this—that is to say, if it gives in sufficiently clear terms the information which the various Merchant Shipping Acts have required to be given to sailors, that is all that the law requires. Provided that this is done, a sailor is, in my opinion, to be treated in all other respects as a free man capable of taking care of himself and of entering into any agreements he chooses with shipowners, provided that the agreement gives him sufficient information as to the voyage, and in particular the information contained in the particulars required by the Merchant Shipping Act, 1894. I think that this appeal must be allowed on the usual terms.

STIRLING, L.J., read the following judgment: The question which we have to decide turns on the construction of the agreement entered into by the

plaintiff with the master of the steamship *Scarsdale* in accordance with the Merchant Shipping Act, 1894. By that agreement the plaintiff was engaged "on a voyage not exceeding one year's duration to any ports or places within the limits of 75 degrees north latitude and 60 degrees south latitude, commencing at Cardiff, proceeding thence to Malta, thereafter trading to ports in any rotation and the end at such port in the United Kingdom or Continent of Europe within home trading limits as may be required by the master." It was admitted by the learned counsel for the Board of Trade that the voyage contemplated was one which might be divided into various stages —as, for example, from Cardiff to Malta, from Malta to the Black Sea and from the Black Sea to Southampton, and that a full cargo might be taken in and discharged at these various places as circumstances might require. It was admitted also by them that the agreement for a voyage of this nature was perfectly valid provided that the "ports" to which the ship might trade "in any rotation" were ports beyond home trading limits. I assume without deciding that this is the true construction of the words. It was, however, contended that the voyage contemplated by the agreement came to an end when the ship arrived at the final port of discharge of cargo within home trading limits (in this case Southampton), and that the master could not require the plaintiff to proceed to Cardiff with the ship in ballast, though it was not disputed that, if the cargo had been only partially discharged at Southampton, the master mght have required the plaintiff to proceed to Cardiff in order that the rest might be discharged there. The most material portions of the Act are section 114, sub-sections 2 (*a*) and 3, and section 115, sub sections, 5, 6, and 7. The agreement in question falls within the second branch of sub-section 2 (*a*) of section 114. Unless, therefore, it contains some provision which is contrary to law, effect ought to be given to it under sub-section 3. The agreement is admittedly not a running agreement within the meaning of section 115 of the Act. It must therefore, under section 115, sub-section 5, be for a voyage; and if it provides for more than one voyage it is bad, and it was argued that on any other construction than that adopted by Bargrave Deane, J., it does provide for more than one voyage. In order to meet the argument put forward on behalf of the Board of Trade, the case was put to counsel of a voyage "commencing at Cardiff, proceeding thence to Malta, thereafter to the Black Sea, and thence with cargo to Southampton, and, if required by the master, from Southampton to Cardiff in ballast"; and it was said (as I think the case of the Board of Trade required) that that would have been not one voyage, but two. I am unable to agree. I think it was only one voyage longer or shorter as the master might require. I also agree with the contention of Sir Edward Clarke that the voyage contemplated was that of the ship, not of the cargo. In the present case the master is by the terms of the agreement entrusted with the power of determining at what place within home trading limits the voyage is to end. The parties to an agreement of the kind with which we have to deal appear to be left by the Act at perfect liberty to fix the commencement and ending of the voyage as they see fit. I think that the master could not use this power so as really to convert a single voyage into two; but in my judgment he has not done so. In my opinion, therefore, the appeal ought to be allowed.

MOULTON, L.J.—I am of the same opinion. The decision depends upon the true interpretation of the agreement entered into between the master and the seaman. It appears to me that if the agreement had been free from any complication introduced by statute law, it would be clear that it was an agreement for what may be called a tramp voyage, not exceeding one year's duration, commencing at Cardiff, having its first port of call at Malta, then with freedom to trade to any ports in any rotation within such wide limits as practically to include all the ports of the world, and to end at such port within home trading limits as might be required by the master. It is conceded by the Solicitor-General that the voyage was for a tramp voyage, and that it was contemplated that the voyage should consist of trips from port to port for the successive taking in and discharge of cargo either in whole or in part. The Solicitor-General, however, contends that as soon as the vessel arrived at a port within home trading limits and completely discharged her cargo the agreement of service came to an end. I cannot agree. The visit of the vessel to a port within home trading limits might occur in one or two ways. It might occur by reason of the right of the master to trade to ports, including ports within home trading limits, in any rotation, or it might occur by reason of the right of the master to name a port within home trading limits as the port of termination of the voyage. I see nothing to estop the master from saying that the visit of the vessel to Southampton was a visit to that port under the first of the above rights, and to compel us to say that it was under the second of the two rights. The agreement says that the master must terminate the voyage at a port within home trading limits; it does not say that if the master brings the vessel to a port within home trading limits the voyage is *ipso facto* terminated. In my opinion, therefore, the master had the same right to go to ports within home trading limits as he had to go to ports outside those limits. Counsel for the Board of Trade admitted that their contention practically amounted to a reading into the agreement after the words "thereafter trading to ports in any rotation," the words "other than ports within home trading limits." If those words could be properly implied in this agreement, the contention of the respondent would be made out, because then the vessel could only lawfully come to a port within home trading limits for the purpose of terminating the voyage. Consequently the master by taking the vessel to Southampton would have elected to end the voyage there. I can see no ground for reading those words into the agreement. They would not be consistent with the words of the agreement, "thereafter trading to ports in any rotation," which include any ports within home trading limits. Two points were urged upon us. It is first of all said that, as the whole of the cargo was discharged at Southampton, the voyage necessarily came to an end there. The agreement, however, contemplates a succession of cargoes being taken in and discharged, and as it is conceded that the complete discharge of a cargo at a port outside home trading limits would not terminate the voyage, so it seems to follow that a complete discharge of cargo at a port within those limits cannot have that result. It is next said that, if the agreement were construed in the manner contended for by the appellant, it would amount to an agreement for a period not exceeding one year, and that the agreement would be invalid upon the ground that time agreements for seamen are not allowed by law. Upon this point I have formed no opinion and I desire to express none. In the first place the question whether time agreements, other than the running agreements referred to in section 115, and the time agreements specified in section 116, are legal

may be a question of enormous importance to the mercantile marine and to sailors, and I should be loth to decide it except in a case where it was necessary for the decision. In the present case it is not necessary to decide it. If the agreement is illegal and void, there was no agreement upon which the justices could found jurisdiction, and therefore the appellant must succeed. But, further, if the agreement on the one interpretation is illegal, so would it also be on the other interpretation. The two interpretations only differ in this, that they allow a different choice in the matter of trading ports. They both extend over a period not exceeding one year, and the suggested difficulty that the master would have the power of extending the service for any time he might choose within the limit of the year would apply equally to one as to the other. I base my decision solely upon this, that the respondent has failed to show that there was a valid agreement which was terminated by the call of the vessel at Southampton. In my opinion, therefore, the appeal must be allowed.

Appeal allowed.

Solicitors for the appellant, *Botterell & Roche.*

Solicitor for the respondent, *P. J. Nicholls*, for *C. A. Emanuel & Emanuel*, Southampton.

Solicitor to the Board of Trade.

From P. D. & Ad. Div. (Collins, M.R., and Romer and Cozens-Hardy, L.JJ.) — Jan. 31.

"THE MARPESSA."

MERSEY DOCKS AND HARBOUR BOARD *v.* OWNERS OF STEAMSHIP "MARPESSA." (*a.*)

Ship—Collision—Vessel not used for profit—Demurrage—Measure of damages.

The damages to be awarded to a dock board, charged with the duty of maintaining a harbour but not entitled to distribute profits, in respect of delay in their work, which they have suffered by reason of damage done to one of their dredgers in a collision caused by the negligence of the defendants' servants, may rightly be taken to be the equivalent to the cost of the work to the owners had that work been done.

Judgment of Barnes, P. (ante, p. 314, [1906] *P.* 14), *affirmed.*

This was an appeal from a decision of the President of the Probate Division (reported *ante*, p. 314, [1906] P. 14).

The case raised the question of the principle on which a claim in the nature of demurrage for the temporary loss of the use of a dredger damaged by collision is to be calculated.

The G. B. Crow, owned by the plaintiffs, is a suction dredger built in 1895 at a cost of £56,700, and was designed for, and is employed in, the dredging of the bar and the sea channels of the Mersey as part of the conservancy work of the dock board. This is one of the three largest dredgers in Europe, being capable of carrying 3,000 tons of sand to the dumping ground and of dredging to the depth of fifty-five feet. Her average output is 12,800 tons per day at an estimated cost of a fraction over 2d. per ton of sand raised. She works continuously night and day throughout the year, except Sundays, Christmas Day, and Good Friday, but is occasionally prevented from working by stress of weather.

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

On the 6th of October, 1904, *The G. B. Crow* was run into by the steamship *Marpessa*, owned by the defendants, and sustained the damage which formed the subject of the plaintiffs' claim. Her value, allowing for depreciation at 7 per cent., was estimated at the time of the collision at £33,736, and her life was considered to be good for some five or six years longer.

An action for damage by collision was brought by the plaintiffs, and was settled on the defendants admitting liability to the extent of 90 per cent., subject to the usual reference.

The plaintiffs filed particulars of their claim, consisting of eleven items amounting to £1,275 12s. 6d. All the items were agreed except the last item of £936, being demurrage for nine days at £104 per day.

According to the evidence of the plaintiffs' engineer, given at the reference, "the services of the dredgers are indispensable to the port in order to maintain its present condition," and "to replace them the board would have to do the best they could in the way of hire, or the alternative would be for the port to suffer prejudice and damage."

In 1901 a sand-pump suction dredger called *The Laga*, valued at £13,000 and capable only of an output of 2,750 tons per day, was hired to replace one of the board's own vessels at a charge of £19 12s. 10d. per day, representing an owner's profit per week of £67 10s., or 27 per cent. per annum on the value of the vessel after allowing for depreciation at the rate of 7 per cent., or £17 10s. per week. On similar lines in the case of *The G. B. Crow* the rate per working day was calculated at £102 9s. 5d.

The witness could not say that any vessel suffered detriment from the fact that *The G. B. Crow* was not available during the nine days for which demurrage was claimed, and he admitted that the harbour authorities could only suffer through the vessels. But he claimed that by building the vessels the board had produced improvement in the port, and its value to the port must be at least the expenditure incurred in producing it. Accordingly when deprived of the services of the vessels they were deprived of an advantage, which ought to be reckoned in this case at the daily or current value to them of *The G. B. Crow.*

In respect of the claim of £936 for demurrage, the district registrar allowed only £315, or £35 per day, assigning in his report, dated the 13th of July, 1905, the following reasons:

"The only item in the claim which was disputed was No. 11, and the dispute resolved itself into the question of the principle on which demurrage should be calculated. The plaintiffs in the claim, as filed, charged £104 per day for demurrage, but at the reference they reduced this amount to £102 9s. 5d. There was no dispute as to the number of days for which the defendants were liable to pay demurrage. Counsel for the plaintiffs contended that the value per day of the vessel to the plaintiffs was the amount which they considered it proper to expend on her for maintenance and working expenses, in addition to sums to cover insurance, depreciation, and owners' profits, and the engineer to the dock board was called to prove these amounts. This witness had prepared a statement showing the annual cost for the past nine years under the following heads: Insurance, repairs, wages, supplies, depreciation, and expenses of engineer's department, together with a charge to represent owners' profits. The amount claimed by the dock board, £102 9s. 5d., represented the average expenditure during that period in maintaining and working this vessel, including a charge of 25 per cent. for owners' profits. The figures of expenditure were not seriously disputed by the defendants, but

they contended that the principle was wrong, and that, in addition to the amount to be allowed for standing expenses, as distinguished from working expenses—namely, insurance, wages, and a sum to cover depreciation—the plaintiffs were not entitled to anything further except owners' profits, which they contended were, in this case, covered by interest on the present value, and some amount to represent general damage, and in support of this contention defendants' counsel relied on the judgment of Lord Herschell in *The Greta Holme*. On the question of general damages, counsel for the defendants contended that the plaintiffs were only entitled to a nominal amount, as the plaintiffs were deprived of the use of their vessel for only nine days, and the engineer to the dock board, in his evidence, admitted that he could not point to any injury or inconvenience occasioned by the loss of the services of the vessel. I am of opinion that the principle contended for by the dock board is not one that should be adopted, and, furthermore, I think that the claim of 25 per cent. for owners' profits, calculated on the original outlay, is excessive. In arriving at the amount to be allowed, the merchants and I considered that, in view of the fact that, according to the figures of the engineer to the dock board, a sum of £33,736 is standing to the depreciation account of this vessel, which originally cost £56,700, the plaintiffs are only entitled to a percentage calculated on the depreciated value, in which we have included £9,427 expended last year, and not charged under the head of repairs in the statement of the engineer to the dock board above referred to. Furthermore, the plaintiffs are paying not more than 4 per cent. on their outlay, and the merchants and I am of opinion that 7 per cent., calculated on the depreciated value as above, is a proper allowance to make to cover establishment charges, owners' profits, and general damage. In addition to this we have allowed the standing expenses substantially on the basis of the figures of the engineer to the dock board, and we consider that £35 per day is a proper allowance to cover the whole of the plaintiffs' loss, which sum would include any supplies consumed while the vessel was under repair."

By a further report, dated the 26th of October, 1905, the district registrar, in stating how the figure of £35 per day was arrived at, explained that: "The plaintiffs based their claim solely upon the principle that the value per day of the vessel to them was what they 'thought worth while' to spend upon her, and their evidence was practically limited to a justification of this principle and corroboration and explanation of the figures contained in the statement of working expenses prepared by their engineer, upon which their claim of £102 9s. 5d. per day was arrived at. The merchants and I being of opinion that the principle was wrong, dealt with the engineer's figures upon the lines laid out by Lord Herschell in the case *The Greta Holme*. In the absence of evidence of the actual expenses incurred by the plaintiffs during the time the vessel was laid up, the merchants and I, in arriving at the amount to be allowed, could only deal with the figures contained in the engineer's statement." With reference to "supplies," the report stated that "this figure is largely in excess of what the merchants considered would have been expended in supplies to a vessel in dock, but a liberal allowance has been made to cover superintendence and sundries."

No allowance was made in respect of "repairs," as the defendants were paying for the repairs rendered necessary by the collision. Graving dock rates and superintendence and other general charges, which in ordinary course would be included in the engineer's figures under the head of "repairs," were admitted by the defendants and allowed as separate items in the claim.

In the result the allowance was as follows: Insurance, £3 7s.; wages, £14 2s.; supplies, £5 3s.; depreciation, £6 4s.; owners' profit, 4 per cent.; general damage and establishment charges, 3 per cent., £6 4s.; total, £35.

The plaintiffs moved in objection to the registrar's report.

Gorell Barnes, P., dismissed the motion with costs.

The plaintiffs appealed.

Aspinall, K.C., and *Leslie Scott*, for the appellants.

Pickford, K.C., and *Greer*, for the respondent.

The following cases were referred to: *Clydebank Engineering Co.* v. *Castaneda*, [1905] A. C. 6, 53 W. R. Dig. 36; *The Greta Holme*, [1897] A. C. 596, 46 W. R. Dig. 157; *The Harrington*, 13 P. D. 48, 36 W. R. Dig. 187; *The Kate*, 47 W. R. 669, [1899] P. 165; *The Harmonides*, 51 W. R. 303, [1903] P. 1.

COLLINS, M R.—This is an appeal from the decision of the President of the Admiralty Division, and the question is as to the proper measure of damages in a case where a steam dredger, the property of the plaintiffs, the Mersey Docks and Harbour Board, was disabled for nine days, the defendants being admittedly responsible for the damage consequent upon the injury. In beginning the discussion we must remember that damages are not a matter of nice mathematical adjustment. Damages, until a recent period, were exclusively the province of juries, who were not supposed to measure them on strictly mathematical lines, but were supposed to give them by the best method that business men of ordinary and common sense would fix upon as a money compensation for the damages sustained.

In this case the result of what, I must assume, was the defendants' negligence, led to the fact that this steam dredger was put out of action for some nine days, and the learned President, from whose decision the plaintiffs are appealing, came to this conclusion, which is summarized in the headnote to the report in [1906] 1 K. B., although it is really taken verbatim from a passage in the judgment: "The court will award in the absence of proof of direct pecuniary loss in respect of that part of their claim which is in the nature of demurrage—such a sum as will be sufficient to compensate the board for the actual out-of-pocket expenses properly chargeable against the dredger during the period of her detention for repairs, together with depreciation and loss of interest on capital during the delay, such depreciation and interest being calculated on the capital value of the dredger at the time of the accident"; and he says at the end of his judgment: "Applying the principles in the case of *The Greta Holme*, a business and reasonable view to take is that, when the plaintiffs content themselves with such evidence as they gave in the present case, this tribunal, in assessing their damages, may say, as a jury would do: 'We must act with some reasonable certainty, and you (the plaintiffs) are reasonably compensated by being awarded a sum which we are fairly satisfied you may have lost, but we cannot follow you into mere speculation.'"

The standard which the appellants desire us to assume as applicable so far as I understand the case, is this—they say:

"We can show you the first cost of this dredger to us—we will assume that the life of the dredger is fifteen years—and we can also calculate for you the total expenses which we should be put to over these fifteen years in keeping this vessel in a condition to

carry on its work, and we also claim a sum in the shape of interest on the total sum expended by us, and also a sum for owners' profit, and having regard to the aggregate sum represented by all these items put together, which would be the amount at the end of the fifteen years, we now ask you to assess the damages in respect of nine days' detention of this vessel at the expiration of ten years out of her life of fifteen years.

"We ask you to assess the damages payable to us in respect of the use of this vessel for nine days on the theory that every day throughout the whole period of this vessel's existence is to be deemed to be of equal value to us; that is to say, that the cost which we should incur in the course of every day throughout the whole of the fifteen years would be the same; and, as we cannot assign any actual money damage that we have lost by reason of any particular consequence following on our inability to use the dredger during these particular times, we ask you to say that the damages to us must be at least equivalent to that sum of money which we, as reasonable persons, have been willing to devote to keeping this dredger in existence on such given day, and that that sum is to be arrived at by treating the share of each particular day simply as representing the aliquot part of that particular year by dividing the number of days into the number of pounds." It seems to me that that suggested mode of assessing the damages involves at least two assumptions which are not proved.

First of all it involves this: That the cost to the plaintiffs for every day during the whole period of fifteen years in respect of this dredger is to be taken to be the same.

That does not appear to be a self-evident proposition, and there is no other evidence in support of it.

We are dealing here with a perishing subject-matter, and when damages are sought to be got upon a calculation which is based upon the actual original cost of the vessel, with all those other sums added to it, it seems to me that in each succeeding day of the year, in the whole period of fifteen years, that that is a fluctuating factor.

There is depreciation continually going on; and if you are going to introduce as a factor into the calculation a sum representing the value of the vessel at a given date, I think you are bound to take into account the necessary depreciation between the value of the vessel which at the date of its first purchase was an equivalent for the sum paid for it, but which, now you have gone two-thirds of the way through its career, must, it seems to me, on all ordinary principles of bookkeeping, if you are desirous of putting into figures in your books the actual state of your adventure, be subject to a depreciation.

That is the first point, and the chief point upon which they impugn the decision of the court below.

They say that the President's decision involves the taking into account depreciation from day to day, from month to month, and from year to year of this vessel, whereas their calculation is that, inasmuch as the benefit which this vessel was able to confer upon them each week in the whole fifteen years was the same, there must be attributed to the loss of the use of it in any particular week the same sum

This last proposition brings me to the second fallacy, as I regard it, in this contention.

They have first assumed that the aliquot parts of the cost ought to be treated as equally applicable to every week, and they have assessed their damages in this particular week by reference to the aliquot part of the cost so arrived at. But they have also assumed that, throughout the whole period of fifteen years this vessel is equally adequate to the work which has to be done so that they must be deemed to receive the exact equivalent benefit for their expenditure throughout the whole period of fifteen years.

That, again, is not a self-evident proposition to me, and there is no evidence to support it, and therefore I do not think that the learned President was wrong in not regarding that as proved.

Furthermore, I am also asked to assume that the life of this vessel remains the same, and will terminate on the same day, notwithstanding the fact that it has been laid up, and not put to use for the period of nine days during which it was undergoing repairs. That does not appear to me either to be a self-evident proposition; and, as I say again, there is no evidence to show that it is so, or that there may be no extension of its life by reason of the fact that it has not been worked as it would be worked in the ordinary course during the period of nine days while it was undergoing repairs.

Taking all those considerations together, and remembering that we are dealing with, after all, that which is a matter of what is called "rule of thumb" calculation, an adjustment by business men of something which is not capable of mathematical calculation, it seems to me that counsel for the appellants ask us to assume a most artificial and technical mode of arriving at a figure which it appears to me has been arrived at by ordinary business methods on a proper business calculation, when the elements which the learned President referred to, and which are first dealt with by the district registrar, and upon which he forms the basis of his own judgment, have been taken into consideration.

The learned President is of opinion that it has not been made out to his satisfaction that anything else ought to be taken into consideration, and he introduces a most important argument into the view which he has followed, an argument to which I have not really heard any satisfactory answer in the able arguments which have been addressed to us to-day, and that is this. He says: "On your theory, which you are asking me to adopt in assessing the damages, you actually show, claiming as you do about £100 a day, that at the end of one year you, practically, in one single year out of your receipts will be able to supply a new vessel. The value of the vessel taken as it is now, is put not quite as high, but certainly nearly as high as £33,000, and yet you, upon your calculation of £100 for every day or the year, show that, practically at the end of the year, at any rate, you have replaced very nearly, if not quite, the whole of that value. It shows, whatever is the true standard, that cannot be the right standard of assessing the damages. It is contrary to common sense."

It seems to me, therefore, that in this court we are not called upon to lay down any exact standard of mathematical calculation as the basis upon which these damages are to be assessed.

It seems to me that the learned President in directing the lines upon which they were assessed came to as near an accurate definition, and to a proper definition, as it was possible to obtain on such a subject-matter.

It seems to me, therefore, that this appeal fails and must be dismissed.

ROMER, L.J.—I have arrived at the same conclusion. The only question here is one concerning the loss accruing to the owners of the dredger injured, which has been caused owing to what is called "demurrage"—that is to say, the delay they have been put to in the use of the dredger, owing to the accident.

She was properly repaired, and the question of the repairs is not before us to-day; they have been allowed to the owners of the dredger, and if they

have not been paid already they will be paid by those who caused the accident.

In my opinion the appeal fails on the broad ground which has been put by the learned President. He says, at p. 33 of the report of this case in the Law Reports: "I do not feel satisfied that the plaintiffs have made out any case for a larger allowance than that which the district registrar has made to them."

I am exactly of that opinion. Of course, if the district registrar in arriving at the amount specified in his report, had pursued throughout a wrong principle, I might have felt compelled to say that the matter must be or ought to be referred back to him, but I think that cannot properly be said.

This is a peculiar case, where the owners of the chattel injured never meant using it for profit, and where the evidence does not establish, and it cannot be properly inferred that the chattel could have been used by them for profit.

In that state of things I think the loss they suffered by the delay, which would be the loss to them of the advantages otherwise accruing by the work that would otherwise have been done but for the injury, might rightly be taken to be equivalent, roughly speaking, to the cost of the work to the owners had that work been done, and upon that principle the district registrar has proceeded.

The appellants contend that, in addition, they ought to have credited to them something in the nature of imaginary profits. I say "imaginary" because, on the facts before us, it is not shown that any such profits could have been made, or would have been made.

The President, in his judgment, has pointed out several reasons why this contention of the appellants should not be acceded to, and I agree with him, and I will not repeat his reasons.

In this state of things, as the district registrar has proceeded upon a right principle and has awarded a sum that is just, speaking for myself, I decline to let the amount he has arrived at be upset because he may not, as regards each subsidiary item, have proceeded on a strictly logical or mathematical basis according to the plaintiffs' contentions, especially when I find that those contentions are based upon certain assumptions or speculations which I am not prepared to accede to; as, for example, that the dredger would work just as well at the end of its life as it would when it was new, or that the expenditure on the cost of the dredger ought to be and it would be rightly taken, and would in fact be the same uniformly throughout the whole life of the dredger; and, lastly, that the life of the dredger was shortened exactly by the period of the delay during the repairs.

Looking at the matter broadly, and I think it ought to be looked at broadly, I can only say in conclusion that I agree again with what the learned President said at the same page of the report of the case that: "A business and reasonable view to take is that when the plaintiffs content themselves with such evidence as they gave in the present case, this tribunal, in assessing their damages, may say, as a jury would do: 'We must act with some reasonable certainty, and you, the plaintiffs, are reasonably compensated by being awarded a sum which we are fairly satisfied you may have lost, but we cannot follow you into mere speculation.'"

On these short grounds I think the appeal fails and must be dismissed.

COZENS-HARDY, L.J.—I agree. I have nothing to add.

Solicitors, *W. C. Thorne*, Liverpool; *Hill, Dickenson, & Co.*, Liverpool.

High Court of Justice.

Chan. Div. Kekewich, J. — Jan. 31.

In re JOSEPH SAMPSON, DECEASED. SAMPSON *v.* SAMPSON. (*a.*)

Trustee—Appointment of new trustees—Personal representative of last surviving trustee appointing himself—Appointment invalid—Trustee Act, 1893 (56 & 57 *Vict. c.* 53), *s.* 10, *sub-section* 1.

The testator appointed his wife and three sons to be the executors and trustees of his will. The last surviving trustee died in 1905, *and the executors whom he appointed having renounced probate, his eldest son took out letters of administration to his father's estate and then appointed himself and his brother to be the trustees of the testator's estate under the powers conferred by section* 10, *sub-section* 1, *of the Trustee Act,* 1893. *There was no power to appoint new trustees under the original will.*

Held, that the appointment was invalid, as the words of the section, "another person or other persons," meant some person other than the person appointing.

Adjourned summons.

Joseph Sampson, by his will dated the 12th of August, 1849, appointed his wife, Elizabeth Sampson, his sons Joseph Sampson, John White Sampson, and Sydney Sampson to be his executors, and gave and bequeathed to them all his estate and effects whatsoever upon certain trusts therein mentioned. The will contained no express power to appoint new trustees.

The testator died on the 13th of August, 1849, and his will was proved by the four executors therein named. John White Sampson, the surviving son and executor named in the will, died on the 10th of March, 1905, having by his will dated the 28th of October, 1904, appointed his wife Ada Sampson and W. M. Wilson to be his executors, and they having renounced probate, letters of administration with the will annexed were, on the 25th of June, 1905, granted to his eldest son Elisha John Sampson, who, as such administrator, by deed dated the 8th of July, 1905, appointed himself and his brother Albert Ernest Sampson trustees of the will of the testator Joseph Sampson in exercise of the power purported to be given to him for that purpose by section 10, sub-section 1, of the Trustee Act, 1893.

This was an originating summons taken out by Elisha John Sampson and Albert Ernest Sampson, and one of the questions asked was that it might be determined whether the applicants had been duly appointed trustees of the testator's said will, and, if necessary, that their appointment might be confirmed by the court.

Section 10 (1) of the Trustee Act, 1893, provides that "where a trustee, either original or substituted, and whether appointed by the court or otherwise, is dead or remains out of the United Kingdom for more than twelve months, or desires to be discharged from all or any of the trusts or powers reposed in or conferred on him, or refuses or is unfit to act therein, or is incapable of acting therein, then the person or persons nominated for the purpose of appointing new trustees by the instrument, if any, creating the trust, or if there is no such person, or no such person able and willing to act, then the surviving or continuing trustees or trustee for the time being, or the personal representatives of the last surviving or continuing trustee, may, by writing, appoint another person or

(*a.*) Reported by R. FRANKLIN STUBBING, Esq., Barrister-at-Law.

other persons to be a trustee or trustees in the place of the trustee dead, remaining out of the United Kingdom, desiring to be discharged, refusing or being unfit or being incapable, as aforesaid."

Section 10, sub-section 4: "The provisions of this section . . . relative to a continuing trustee include a refusing or retiring trustee, if willing to act in the execution of the provisions of this section."

Austen Cartmell, for the applicants.—The appointment of the new trustees was a good appointment notwithstanding that E. J. Sampson appointed himself. In *Montefiore* v. *Guedalla*, 52 W. R. 151, [1903] 2 Ch. 723, Buckley, J., held that there was no rule that a donee of a power to appoint new trustees was unable to appoint himself. He said (p. 726): "In my opinion the result of the cases is that it is competent to persons who have a power of appointment of new trustees to appoint one of themselves, where the language of the instrument creating the power allows them to do so, although, as I have said before, it is a most salutary rule that they should do so only in exceptional circumstances." Section 10 (1) of the Trustee Act enabled the personal representative of the last surviving trustee to appoint new trustees in place of trustees that were dead. The words in the section "another person or other persons" must be held to refer not to the appointor, but to the person in whose place a new trustee was appointed. The power in *In re Skeats' Settlements*, 37 W. R. 778, 42 Ch. D. 522, was very similar to the words of the section, and Kay, J., decided that a man ought not to appoint himself unless the circumstrances were exceptional, but he did not decide that he had no power to appoint himself; the words "any other" in that case must have been used in reference to the person in whose place the new trustee was appointed. In *In re Newen, Newen* v. *Barnes*, 43 W. R. 58, [1894] 2 Ch. 297, where Kekewich, J., decided that a donee of a power of appointing new trustees could not appoint himself, it was pointed out that the court was exercising a discretionary power. Until the decision in *Montefiore* v. *Guedalla* no one supposed that a donee of a power could appoint himself.

W. J. Whittaker, for the defendant C. W. Buggy, the legal personal representative of Jane Burling, deceased;

Waddilove, for the defendant Mary Sampson, both of which defendants claimed to be beneficially interested under the testator's will.

KEKEWICH, J.—If it had not been for the decision of Buckley, J., in *Montefiore* v. *Guedalla*. I should have had no hesitation about this case. The facts are these: The last surviving trustee of the testator's will having died, the power of appointing new trustees belonged to his personal representative by virtue of section 10, sub-section 1, of the Trustee Act, 1893, there being no express power under the will to appoint new trustees. That being the state of facts, the donee of the power appointed himself, and the question is whether that was a good appointment. Certainly in *In re Newen* I expressed a decided opinion that a donee of a power could not make such an appointment, and that contention was given up by Mr. Warmington on the ground that the power was to appoint "any other person or persons" and that you cannot be another person than yourself, and I explained what I conceive the law to be, that even without any such words as that, no trustee having a fiduciary power of appointing trustees could exercise that power by appointing himself either alone or together with any other person. The point came before Buckley, J., in the case of *Montefiore* v. *Guedalla*. In that case there was a power in the will for the executors or administrators of the last acting trustee to appoint a new trustee or trustees in the place or stead of such trustee so dying, refusing or becoming incapable to act, or wishing to retire as aforesaid," and Buckley, J., held that the executors of the last surviving trustee, and it follows also the personal representative of the last surviving trustee, could appoint one of themselves to be a new trustee, and he was clearly of opinion that it had not been laid down that donees of a power were outside of the class who were capable of being appointed, and that the appointment in that case was within the language of the power. But he distinguished the case where the power was to appoint some "other" person. He said on p. 725, "The first step is to look at the language of the power. Where you find that the power is to appoint some 'other' person the question may arise whether that means some other person other than the appointor. In such a case the donee of the power may not be amongst the persons capable of being appointed." I must therefore take what Buckley, J., held was the first step, and see what is the power which is contained in section 10, sub-section 1, of the Trustee Act, 1893. The power is that "the person or persons nominated for the purpose of appointing new trustees by the instrument, if any, creating the trust, or if there is no such person or no such person able or willing to act, then the surviving or continuing trustee or trustee for the time being or the personal representative of the last surviving or continuing trustee—which includes a refusing or retiring trustee—may by writing appoint another person or other persons to be a trustee or trustees in the place of the trustee dead, &c." What does "another person or other persons" mean? Does it mean some other person than the trustee who is dead or become incapable of acting, or does it mean some other person than the person appointing. Whatever it means, it must mean the same, whether the person appointing is the surviving or continuing trustee or whether he is the personal representative of the last surviving or continuing trustee. Now let us go back. The power is given to the person nominated by the instrument, if any, creating the trust to make the new appointment. He is to appoint "another person or other persons" to be trustee or trustees in place of the trustee dead. Surely that must mean some person other than the person appointing. If there is no such person expressly nominated, then the surviving or continuing trustee is to act. It would be strange indeed if the surviving or continuing trustee could appoint himself. In any of the cases mentioned in the section the surviving or continuing trustee could not appoint himself, because in the one case he is already a trustee, and in the other case he is a retiring or refusing trustee. It is clear, therefore, that the words must mean some other person than the surviving or continuing trustee exercising the power, and therefore some other person than the personal representative of the last surviving or continuing trustee, because what it means in the one case it must mean in the other. Without expressing any difference of opinion as to the decision of Buckley, J., about which I will only say that it may require further consideration hereafter, I find that this case comes within the exception to which he there refers, and I hold that the appointment of E. J. Sampson was a bad appointment. I cannot comply with the applicant's request and confirm an appointment which is bad, but I will appoint him a trustee under the powers which the court has.

Solicitors, *Barlow, Barlow, & Lyde.*

Chan. Div. } Farwell, J. } Feb. 15.

QUINION v. HORNE. (a.)

Vendor and purchaser—Conditions of sale—Condition as to requisitions—Unwillingness to comply with requisition—Vendor's right to rescind.

A condition of sale empowering the vendor to rescind the contract in the event of his being unable to remove or comply with any objection or requisition made by the purchaser will not justify the vendor in exercising such power of rescission arbitrarily or without reasonable cause, and, in the event of the vendor purporting so to exercise it, the purchaser can enforce the contract.

Trial of action.

In this action the plaintiff was the purchaser of certain property at Hounslow, which was put up for sale by auction on the 11th of October, 1905.

The defendant was the vendor, and sold as trustee of the will of one Joseph Sexton.

By his will Joseph Sexton gave and devised (*inter alia*) the property in question to trustees, upon trust to pay the rents and profits arising from the same to Maria Ann Sexton Knevett (afterwards Mrs. Maria Ann Sexton Wells) for her life, and after her death upon trust to sell, and hold the net proceeds of sale in trust for the child or children of M. A. S. Knevett who should be living at her death and have attained or attain twenty-one years of age in equal shares. The testator further provided that if M. A. S. Knevett died without leaving any child surviving her the trustees should convey the property to J. S. K. and S. K. as tenants in common.

The result of these provisions of the testator's will was that the trust for sale only held good in the event of M. A. S. Knevett having left a child who was still living

The sale was conducted subject to printed conditions of sale, and condition No. 11 was in the following terms: "11. Within seven days after the delivery of the abstract, each purchaser shall furnish to the solicitor to the vendor at his office as aforesaid a statement in writing of his requisitions and objections (if any) in respect of the title to the lot or lots purchased by him, and all matters appearing on the abstract, particulars, or conditions, and every requisition not so stated within the time aforesaid shall be considered as waived, and for the purpose of any objection or requisition the abstract shall be deemed perfect if it supply the information suggesting the same although otherwise defective, and if no requisition or objection is so stated the title shall be considered accepted, and in these respects time shall be deemed of the essence of the contract, and if any purchaser shall make any objection or requisition either as to title, the form of the conveyance, or other assurance to the purchaser, or any matter appearing in the particulars, conditions, or abstract or otherwise, which the vendor shall be unable or unwilling to remove or comply with, the vendor shall (notwithstanding any previous negotiation or litigation or attempt to remove or comply with the same) be at liberty to annul the sale, in which case the sale shall be annulled, such purchaser being in that event entitled to a return of his deposit, but without interest, costs of investigating title, or any compensation or payment whatsoever, and he shall return the abstract of title or any other papers in his possession received from the vendor or his solicitor."

In these circumstances the purchaser's solicitors delivered (*inter alia*) the following requisitions, and received thereto the adjoining replies:

No.	Requisitions.	Replies.
3.	What children survived the said M. A. S. Knevett and what are their names and addresses?	Mrs. M. A. Sexton Wells left six children her surviving.
4.	When and where was M. A. S. Knevett married? A certificate of such marriage should be produced.	The information is not in the vendor's possession, but can be obtained, if required, at the purchaser's expense.
5.	If M. A. S. Knevett had no child, why was not this property conveyed to J. S. K. and S. K.?	See reply to No. 3.

A short correspondence then ensued in connection with these requisitions and the replies thereto. The plaintiff's solicitor was informed of the names of the six children, but all requests for information as to the date and place of birth of one only of these children met with no response beyond an intimation that the vendor had not such information in his possession.

Ultimately, by a letter dated the 2nd of November, 1905, the solicitor of the vendor gave notice that the vendor rescinded the contract, owing to his unwillingness to procure the required information, which, he contended, did not affect the title.

Thereupon the purchaser offered to withdraw the requisition in question, which offer was not accepted. He accordingly commenced this action.

By his statement of claim he asked for (1) a declaration that the defendant was not entitled under the circumstances to rescind the agreement, and that the same is still a valid and subsisting agreement; (2) specific performance of the said agreement, or, in the alternative, damages; (3) costs; (4) further or other relief.

The defendant, by his defence, alleged that neither the defendant nor his solicitor had any knowledge, or had in their possession any information as to the date and birth of any of Mrs. Wells's children, and such information could not have been obtained without trouble and expense. The information asked for was not necessary, nor would it have been effectual to complete the plaintiff's title.

The defendant rescinded the contract for sale *bonâ fide* in order to avoid trouble and expense, and because he considered the plaintiff's requisition vexatious and unreasonable.

Jenkins, K.C., and *J. Samuel Green*, for the plaintiff.—The vendor has acted capriciously and unreasonably. The requisition was one which could easily have been answered. The court will see that the requisitions are such as a reasonable conveyancer might make. In this case it was vital for the purchaser to know that the trust for sale had arisen. The purchaser has been harshly and arbitrarily treated.

Upjohn, K.C., and *J. R. Brooke*, for the defendant.—The defendant is a trustee, and his beneficiaries limit him in the matter of expense. It is sufficient if there was an honest reason for rescinding The vendor took advice and acted on it, and he cannot therefore be said to have acted arbitrarily. There was an honest belief, and no caprice. The vendor was at liberty to rescind for the purpose of avoiding

(a.) Reported by F. HARDINGE DALSTON, Esq., Barrister-at-Law.

trouble and expense. As regards his beneficiaries, a trustee is not justified in going to expense in answering a requisition by the mere fact that a requisition involving expense has been made.

Jenkins, K.C., replied.

FARWELL, J. (after stating the above facts).—The cases certainly show that some limitation is to be put upon the word "unwilling." It is not merely intended to indicate the caprice of the vendor in the sense that it is enough for him to say, "I will it, and there is an end of it." Cotton, L.J., in *In re Dames and Wood*, 33 W. R. 685, 29 Ch. D. 626, states this to be the result of the cases in his opinion. Chitty, J. (as he then was), commented upon this in *In re Starr-Bowkett Building Society and Sibun's Contract*, 38 W. R. 1, 42 Ch. D. 375. I think that so far as the comments of the learned judge extend to the giving of reasons they do not apply to the present case I take him to be suggesting that the Lord Justice was talking about reasonableness, and shewing reasonable ground, when it had already been decided that no reasons at all need be given. In any case, so far as I am concerned, the trustee and his solicitor have, in the present case, gone into the witness box, and have given their reasons, and been cross-examined about them, so that I am not concerned to consider whether or not they were bound to show or give reasons. Having heard their reasons, I have now to consider whether they were reasonable or not. I am not prepared to say that the Court of Appeal, in the *Starr-Bowkett case*, having had the advantage of hearing Chitty, J.'s, judgment, commenting upon their own former decision, in any way intended to withdraw from what they had said before. They do not say so, and Lopes, L.J., uses this expression: "provided it was not done capriciously, and provided the unwillingness or inability was reasonable." These are two distinct propositions. When the vendor has himself appeared as a witness and given his reasons in the box, then I have to see whether those reasons are a mere arbitrary exercise of his own will or whether they rest upon any rational foundation on which any ordinary reasonable man is entitled to rely.

When the courts once begin to interfere with the strict wording of a contract they always find themselves in a difficulty, but I am only following the lead which is set me, and I have to do the best I can with what has been done before. It is said that you are not to act capriciously—meaning, I suppose, without any apparent reason, and that it is not a question of seeing whether there was reasonable ground or not, because here no possible reason can be suggested. That does not appear to me to be altogether satisfactory. I rather prefer the word which Mr. Upjohn, I think, suggested—"arbitrarily"—which I take to mean without any reasonable cause, and that word indicates the test which I propose to apply to the present case.

Now, the only ground suggested was the fear of expense. I was told that these beneficiaries were very urgent that no expense should be incurred, and I have gone through the correspondence, which shows that no extra expense was invited to be incurred. It was not suggested that they should put their hands into their pockets for one penny. The requisition and the subsequent requests for the desired information were of a very moderate nature, and the answer could have been given as simply as possible by referring the inquirers to the beneficiary, whose address in Belgium was known, or to the solicitors for the other beneficiaries. But the vendor and his solicitor seem to have persuaded themselves that there was some risk of costs underlying this innocent and necessary inquiry, and they absolutely refused to answer it. To my mind that was not reasonable. Unless the vendor is so much the master of the situation that he is entitled to say, "I will not give you any information at all, I will not even tell you the man's address when I know it, so that you can go to him for the information; I will not even tell you the names of the solicitors who acted for the beneficiaries, although it is obviously necessary that some information should be obtained about them"—and this is not the law as it stands at present—then I do not see how in this case the rescission can be otherwise than arbitrary and without reasonable cause.

Judgment for the plaintiff.

Solicitors, *Wickes & Knight*, for *Garner & Sons*, Hounslow; *H. R. Peake.*

Chan. Div. Buckley, J. — Jan. 29, 30, 31; Feb. 7.

DENMAN v. WESTMINSTER CORPORATION.
CORDING v. WESTMINSTER CORPORATION. (a.)

*Metropolis—Streets—Widening—Compulsory powers—House—Adjudication to take whole—Part to be thrown into street—Prior agreement to re-sell surplus portion subject to right of pre-emption—*Bona fides*—Michael Angelo Taylor's Act,* 1817 (57 *Geo.* 3, *c. xxix.*), *ss.* 80, 96.

An adjudication under Michael Angelo Taylor's Act is only binding if, after considering the facts, the local authority giving the notice bonâ fide *believes that the property adjudicated to be necessary is necessary for the purpose of carrying out the proposed widening:* Gard *v.* Commissioners of Sewers, 28 *Ch. D.* 486, 33 *W. R. Dig.* 106, *and* Lynch *v.* Commissioners of Sewers, 34 *W. R.* 226, 32 *Ch. D.* 72, *followed.*

When the local authority wishes to take the whole of a house, but the owner only desires them to take part, the question to be determined is whether what will be left will be a house, regard being had to the work by way of shoring and reconstruction which the owner is willing to do.

Quære, *can a local authority under Michael Angelo Taylor's Act acquire some only of the several interests in the premises which go to make up the freehold?*

Action.

The plaintiffs in the first action were wine merchants carrying on business at Denman House, Piccadilly, and the plaintiffs in the second action were makers of waterproofs, and underlessees of part of Denman House.

The facts were of a most complicated nature, but may be thus summarized:

Denman & Co. were lessees from the Crown for a term expiring in 1982.

At the point in Piccadilly where Denman House stood a widening of about 27 feet was contemplated.

An hotel company or syndicate was also anxious to acquire an extensive site in Piccadilly, including that part of Denman House which it was not proposed to throw into the street.

For the purpose of carrying out these objects four agreements were entered into between the Crown, the London County Council, the Westminster City Council, and the hotel company, or some of them.

In April, 1905, the Westminster City Council adjudicated that the whole of Denman House was

(a.) Reported by T. PAKENHAM LAW, Esq., Barrister-at-Law.

required for the widening, and in June notices to treat were accordingly served on the plaintiffs.

The question in these actions was whether those notices were valid. In addition to Cording & Co. there were also several other underlessees of parts of Denman House for short terms.

Sir Robert Finlay, K.C., and *R. J. Parker*, for Messrs. Denman, the plaintiffs in the first action.—The adjudication of the Westminster City Council was not arrived at *bonâ fide;* they passed it because they had contracted to do so, and it is therefore invalid: *Thomas* v. *Daw*, 15 W. R. 113, 2 Ch. 1; *Gard* v. *Commissioners of Sewers*, 28 Ch. D. 486; *Lynch* v. *Commissioners of Sewers*, 34 W. R. 226, 32 Ch. D. 72. Further, in the circumstances of this case, the whole of Denman House is not necessary for the purpose of the widening, therefore only the necessary part can be taken, if the house as a house is not destroyed: *Teuliere* v. *St. Mary Abbotts*, 30 Ch. D. 642, 34 W. R. Dig. 102; *Gordon* v. *St. Mary Abbotts*, [1894] 2 Q. B. 742; *Aldis* v. *London Corporation*, 47 W. R. 514, [1899] 2 Ch. 169; *Gibbon* v. *Paddington Vestry*, 49 W. R. 8, [1900] 2 Ch. 794; *Pescod* v. *Westminster Corporation*, *ante*, p. 89, [1905] 2 Ch. 475; *Thompson* v. *Hammersmith Corporation*, *ante*, p. 279; and *Parry* v. *Hammersmith Corporation*, 92 L. T. 161, 53 W. R. Dig. 108, 21 T. L. R. 86.

Buckmaster, K.C., and *T. T. Methold*, for the defendants in both actions.—On the construction of the agreements we do not agree to exercise our compulsory powers for the purpose of acquiring lands not required for the widening. These very agreements were before Swinfen Eady, J., in *Pescod* v. *Westminster Corporation*, *ante*, p. 89, [1905] 2 Ch., at p. 489. The only question is, is the whole house properly takeable. There is no distinction between the cases where the owner wants only to give up part and the authority wants the whole, and where the owner wants to make the authority take the whole and the authority only wants to take part. In each case it is a question whether the identity of the house is destroyed: *Teuliere* v. *St. Mary Abbotts Vestry*, at pp. 642-647; *Aldis* v. *London Corporation*. Further, the statutory power of the local authority does not depend upon the owner's idiosyncracy; it is a question of fact to be decided by the court whether the whole is properly takeable or not. There is no certainty that Messrs. Denman's other sub-lessees take the same view as they do.

Gore-Browne, K.C., and *Ashton Cross*, for Messrs. Cording, the plaintiffs in the second action.—No difficulty is caused if the other sub-lessees desire the whole of their premises to be taken, for in that case the authority would take the whole of their premises to the extent of the sub-lessee's interest and part of our premises to the extent of our interest. The Act does not authorize the local authority to acquire some only of the several interests in any premises which go to make up the fee simple.

BUCKLEY, J., after stating the facts, continued: I ask myself, after reading the agreements, what was the purpose of providing that the powers of Michael Angelo Taylor's Act should be put in force at the request of the syndicate. For the public purpose of widening the thoroughfare, the defendants owed the public duty of doing what was necessary to acquire all such land as was necessary for this purpose. There was no room for any request to be made by the syndicate or the hotel company as a preliminary to the local authority acquiring what was necessary for that purpose. But if the provisions as to request were addressed to the case of land which was not wanted for the purpose of the widening, they become intelligible. In any other case they are surplusage. Land necessary to be acquired for the purpose of the widening would include not only that which was actually to be thrown into the street, but that which, having regard to the circumstances of the case, it was necessary to acquire in addition, and which would be surplus land to be dealt with as provided by the Act. No request by the syndicate could be wanted or admissible to move the local authority to acquire all such land. These agreements, I think, intend a contract by the local authority that they will, at the request of the syndicate, use their statutory authority for the purpose of acquiring other and additional land for the purpose of throwing it into that which, under the bargain with the syndicate, was to be the subject of a new Crown lease in their favour for the purposes of the hotel.

In my opinion the Westminster City Council passed the resolution submitted by the London County Council because they had contracted to pass it. I find no evidence that they exercised any independent judgment of their own in the matter. There has been called for the defendants no one who represented either the defendants or the London County Council in the matter to say that the defendants exercised any such judgment. Mr. Andrew Young, who was called, actually said that he did not think it singular that the local authority should agree by the exercise of the powers of Michael Angelo Taylor's Act to get this land for the syndicate; it is, he said, a common thing to do. I am startled and shocked at this statement. The local authority are entrusted with statutory powers, to be used *bonâ fide* for the statutory purpose, and for none other. They have no right to seek to reduce the expense to the ratepayers by straining their powers in the interest of persons who desire to acquire the adjacent land from those who are the owners of it. The language of section 80 of the Act is that, if any houses, walls, buildings, &c., or any part thereof shall be "adjudged," and so on. The defendants were in this matter exercising a power in its nature judicial. They were bound to form an honest judgment, after consideration of all the facts of the case, whether the whole of Denman House or any part thereof was, or was not, necessary to be acquired *bonâ fide* for the purpose of widening Piccadilly. Their duty was to arrive at an honest decision in the matter, in the sense that, after considering the facts, they ought to have said whether they *bonâ fide* believed that the entirety or any and what part of the property was wanted —not necessarily for the purpose of throwing it into the thoroughfare, but *bonâ fide* for the purposes of carrying out the widening of the thoroughfare. If they have not accepted the responsibility of such a decision, and in that sense arrived at an honest adjudication, their decision is not binding. That was decided in *Gard* v. *Commissioners of Sewers* and *Lynch* v. *Commissioners of Sewers*. In my opinion the defendants did not so consider and adjudicate upon the matter, and their adjudication is not binding.

I go on to see whether, upon the facts of the case, this house was such as that the defendants, who unquestionably were entitled to take part of it, were entitled to take the whole. The building was of a depth of fifty-seven feet. The strip will take off something less than an average of twenty-seven feet in the front, leaving a depth of thirty feet. The plaintiffs say that this reduced depth will allow of premises suitable for their businesses, and that they desire to retain that thirty feet and the building upon it, and not to be dispossessed of the site which is to them of so great value. As matter of construction, the building may

be said to consist of two moieties, the line of division between which is, strangely enough, almost coincident with the line of the proposed new frontage in Piccadilly. The building and its floors are carried upon steel girders and steel joists. In the centre of the back moiety of the building is what is practically a tower of brickwork, composed of four walls enclosing the staircase and lift. The southern wall of this tower falls just north of the proposed new line of frontage. From the central tower there run steel joists, east and west from the tower to the external walls, and on the eastern part of the back moiety some steel joists run north and south from the first-mentioned steel joists to the north wall. This system of joists is self-contained in the back moiety of the house. The front moiety, which would be the part to be demolished, has a central pillar near the front wall which supports a long girder running east and west right across the building. The system of joists in this front moiety of the house runs north and south from the south wall to this girder and from this girder to the girders first above described, which run east and west from the central tower to the outer walls. The existence of the central tower in the back moiety of the house gives that moiety such a stability as that there is no practical difficulty in demolishing the front part of the house, leaving the back half standing. The building is built in cement, which gives it large additional strength. The defendants' plans for widening the street include a canting off of the south-east angle of the building. This will create some difficulty. Further, the construction of the building, as regards some of the short joists at this point, and as regards an arch which is turned over the windows above the mezzanine floor, will require some readjustment, and it will, of course, be necessary to put a new front or south wall to the reduced building. The line of that wall would be substantially the line of the southern wall of the staircase tower, but really a little south of it.

The short result of the facts is that upon the thirty feet of depth which are not wanted for the widening there is no difficulty in preserving, with a certain amount of reconstruction, so much of the building as stands on that thirty feet. I may add that there is an existing entrance in Air-street, at the north-east corner, which would be available to give access during the alterations. In *Tuliere* v. *St. Mary Abbotts* and *Aldis* v. *London Corporation* there is authority for saying that, where the landowner desires to retain part, the local authority cannot insist on taking the whole unless the remainder will be useless. There is, however, great difficulty in saying that the power of the local authority is to be determined by ascertaining *ex post facto* what the landowner desires, and the more so if the owner who expresses the wish is a limited owner. One limited owner might take one view and another another view. The freeholder might wish the whole to be taken; the leaseholder might wish to keep part. Upon this part of the case I do not rest my decision upon any principle to be deduced from those cases, to the effect that the power of the local authority is measured by the wish of the owner. But I think that the attitude which the owner takes up is not to be disregarded. The question to be decided is whether that which will be left will be a house. If the owner whose estate is in possession is desirous of doing upon his own land such work, by way of shoring and reconstruction, as that that which will be left will be a house, I think regard ought to be had to that fact. Under such circumstances the local authority in demolishing part will be leaving that which, having regard to the acts which the owner desires to do, will be a house available for him as a house. In every case where part of a house is demolished (say a porch or a cellar) some reconstruction will be required. The question cannot, therefore, I think, be answered by saying that the thing left will require some reconstruction before it will be complete as a house. The question is one of degree. Will there be so much left as that a house will be left? In answering that question regard is, I think, to be given to the fact that the owner is willing to do what is necessary to make that which remains an effectual house. To my mind the question in these cases is one of fact, and largely one of degree. If the projected widening were such as to take eighteen inches off the frontage of a house sixty feet deep, it would, I think, be fallacious to argue that, inasmuch as it would be necessary to pull down the front wall, that which was left would not be a house, even when the owner whose estate is in possession is minded to erect a new front wall. I arrive at the conclusion that the local authority are not here entitled to take more than is wanted for the widening of the street, and that the thirty feet depth which will remain after the widening is not wanted, but is a building which can be and ought to be left as a house which the plaintiffs, who are its owners, desire to retain, and from which the defendants have no right to dispossess them for the purpose of putting the hotel company into possession. As regards *Pescod* v. *Westminster Corporation*, the relevant facts were different, and consequently the decision was different. I find it unnecessary to express an opinion upon the argument which Mr. Gore-Browne addressed to me upon the question whether the local authority can, under this Act, acquire some only of the several interests in the premises which go to make up the fee simple. It is, I think, a question of difficulty, and I keep my mind open upon it until it shall be necessary to decide it. I think the plantiffs are entitled to injunctions to restrain the defendants from proceeding upon the notices to treat. I grant those injunctions and order the defendants to pay the costs of the actions. There will, of course, be a separate judgment in each action.

Judgment for the plaintiffs in each case.

Solicitors, *Hollams, Son, Coward, & Hawkesley; Vallance & Vallance; W. A. Blaxland; Ashurst, Morris, Crisp, & Co.*

K. B. Div.
(Lord Alverstone, L.C.J., and Ridley and Darling, JJ.) — Jan. 13.

REX v. JOHNSTONE.
Ex parte COBBOLD. (a.)

Licensing law—Provisional licence—Period of seven years—Confirming authority—Licensing Acts, 1828 (9 *Geo.* 4, *c.* 61), *s.* 13; 1874 (37 *&* 38 *Vict. c.* 49), *s.* 22; 1904 (4 *Ed.* 7, *c.* 23), *s.* 4, *sub-section* 3.

Licensing Act, 1874, *s.* 22: "*Any person interested in any premises about to be constructed . . . for the purpose of being used as a house for the sale of intoxicating liquors . . . may apply to the licensing justices and the confirming authority for the provisional grant and confirmation of a licence in respect of such premises. . . . A provisional grant and order of confirmation shall not be of any validity until it has been declared to be final by an order of the licensing justices. . . .*"

Licensing Act, 1904, *s.* 4, *sub-section* 3: "*The justices may, if they think fit, instead of granting a new*

(a.) Reported by MAURICE N. DRUCQUER, Esq., Barrister-at-Law.

on-licence as an annual licence, grant the licence for a term not exceeding seven years."

Held, that the powers of granting a provisional licence under section 22 of the Licensing Act, 1874, *are applicable to the grant of a licence for a period of seven years under section 4, sub-section 3, of the Licensing Act,* 1904; *it is no objection to such a grant that the licence will not commence to run from or determine on the 5th of April of any year in accordance with section 13 of the Alehouses Act,* 1828, *as amended by section 33 of the Licensing Act,* 1902.

Rule *nisi* for a *mandamus* calling upon the licensing confirming authority of the Essex Sessions to hear and determine the application for the confirmation of a licence which they had refused to confirm on the ground that it had been granted for more than seven years allowed by section 4, sub-section 3, of the Licensing Act, 1904.

The provisional licence had been granted by the justices to Mr. Cobbold under section 22 of the Licensing Act, 1874, in respect to a proposed hotel and restaurant at Parkeston. The licence contained the following clause: "This licence shall be in force for seven years from the date of the declaration by the justices under the Licensing Act, 1874, s. 22, that the proposed house has been completed in accordance with the deposited plans." One of the conditions indorsed was that the monopoly value to be paid by the licensee to be £180 per annum. The confirming authority refused to confirm this provisional licence on the ground that it was a licence for a longer period than the maximum of seven years specified under section 4 of the Licensing Act, 1904.

Rowsell showed cause.—The provisional licence was operative during the time that it was provisional, and therefore the seven years provided by the section has been exceeded. The licensing authority would have no control over the monopoly value for a period which might considerably exceed seven years, if, for example, it were three years before the hotel was built. Secondly, the grant must be for a period provided for by statute—viz., it must begin and terminate on some 5th of April: section 13 of Alehouse Act, 1828, as amended by section 33 of the Licensing Act, 1902. If the confirming order was made on the 1st of August the seven years would expire on the 1st of August, and there would be a hiatus till the following February sessions.

He referred to *Reg.* v. *London Justices*, 38 W. R. 369, 24 Q. B. D. 341.

Pickford, K.C. (*Poyser* with him).—Section 13 of the Act of 1828 applied only to annual licences from the 5th of April to 5th of April, as the section clearly states, and therefore cannot apply to a licence granted for a term of seven years. As regards the monopoly value, there is no monopoly value until there be an effective licence. There is no effective licence until the order of confirmation is made: see the words of section 22 of the Act of 1874, viz.: "A provisional grant shall not be of any validity until it has been declared to be final by an order of the licensing justices."

Lord ALVERSTONE, L.C.J.—The point raised is clearly one which requires careful consideration. But in my opinion the justices have struck too soon in saying that they would not entertain this application for the confirmation of a provisional licence granted under section 22 of the Act of 1874. The main contention is that the grant of a licence under section 22 to run for seven years to commence from a future period—namely, the time that the licence is confirmed, contravenes section 4, sub-section 3, of the 1904 Act. [His lordship read the sub-section.] The argument, which was based upon the decision in *Reg.* v. *Justices of London*, was that section 22 deals with a licence which is subject to many of the incidents of an ordinary licence. There is provision for the application of renewal, and for an appeal, and other incidents. Therefore, if the true view of section 22 were that it was an operative licence from the time the grant was made, I think there would be a great deal to be said for Mr. Rowsell's argument. But I think, looking at the good sense of the thing, that is not the substance of a grant under section 22, because the section provides: [His lordship read the section.] Therefore although for some purposes the grant of a licence under section 22 may be equivalent to the grant of an ordinary licence, yet it does not dispose of the question whether or not the powers under section 4, sub-section 3, of the 1904 Act can be applied to the grant of a licence under section 22 of the 1874 Act and whether or not it is correct in law to say that the licence shall be for seven years commencing from the time stated. On the common sense of the thing one cannot see why the Legislature could not intend to have applied to a licence under section 22 the provisions of section 4, sub-section 3, of the 1904 Act, as well as to an ordinary licence. When one loooks at the substance of the thing, it is a right to have a licence upon the fulfilment of certain conditions. When the hotel is built it was considered that there ought to be a licence for the premises if it be built according to the plans. Clearly it was permissible for the justices to say that it should not be a licence from year to year but for a certain time, in cases in which the justices are of opinion that a man should be allowed to build a house with the promise it should be a licensed house. I see no reason why this should not apply to a licence under section 22. Mr. Rowsell says, even admitting that to be so, yet it must be for such a period as will not exceed seven years from the day the order was made. That overlooks the true construction of section 22. It is not an effective licence from the date of the order, it has only some of the incidents of one, but it is an effective licence from the date of confirmation. The confirming authority ought to consider it on its merits. I express no opinion as to what they should do in this case. It may be they will consider that it ought not to be confirmed, or not for such a term. It is for them to deal with. The only point which causes difficulty is that which arises from the fact it contravenes the time from which ordinary licences run—viz., from the 5th of April of one year to the 5th of April of the next, and it may be that our decision does create some difficulty not expressly dealt with by the Legislature. That does not seem to me a reason for allowing a different construction of section 4 if that section appears to us clear. It might be met by an application made to the licensing authority at the first court meeting before the seven years' period expires or it may be possible to apply under some other provision. It may be a point for the confirming authority to deal with by altering the term so that it may expire on the 5th of April of some year. It was not *ultra vires* to apply to a licence granted under section 22 the provision giving the justices power to grant a licence for a period of seven years. I think the confirming authority ought to have heard the application.

RIDLEY and DARLING, JJ., concurred.

Rule made absolute.

Solicitors for the rule, *Goddard, Sons, & Holme*, for *Ward & Jones*, Harrow.

Solicitors for the defendant, *Patersons, Sace, Bloxam, & Kinder*, for *W. H. Gibson*, Chelmsford.

House of Lords.

From C. A. (England). Nov. 21.

ELLIOTT v. CRUTCHLEY AND ANOTHER. (a.)

Contract—Performance impossible—Cheque given as part payment—Express provision if caterer incurred no expense.

The appellant agreed with respondents to supply refreshments at a fixed tariff on board a pleasure steamer on the occasion of a Naval Review to be held on the 28th of June, £300 to be paid on account on the Monday before the review. In accepting the contract the respondents wrote, on the 23rd of June, "It is, of course, understood that in the event of the cancellation of the review before any expense is incurred by the caterer there shall be no liability on our side," and a cheque for £300 was duly sent in part payment of the contract. The appellant spent nothing on refreshments, and there was no dispute as to any initial outlay by the caterer. The next day the review was cancelled, and the respondents stopped payment of the cheque.

Held, that the respondents were not liable, and could not be sued on the cheque.

Decision of the Court of Appeal (52 *W. R.* 499, [1904] 1 *K. B.* 565) *affirmed.*

This was an appeal from an order of the Court of Appeal (Collins, M.R., and Romer and Mathew, L.JJ.) (52 W. R. 499, [1904] 1 K. B. 565), affirming a decision of Ridley, J.

The facts are given at length in the court below, and shortly in the headnote.

The case turned entirely upon the construction of the contract.

Witt, K.C., and *A. P. Poley*, for the appellant.

Shearman, K.C., and *Eustace Hills*, for the respondents, were not heard.

Earl of HALSBURY, L.C.—We are all of opinion that this appeal must be dismissed. It is said that the construction which we adopt is not at all applicable to the language used, but we may comfort ourselves with the reflection that four persons who are not unfamiliar with the business have construed these words in the way in which we construe them.

I entirely agree with Mr. Witt's protest, a very solemn protest, against making a contract for the parties. I agree with him that it would be most improper to depart from the contract they have made and to make what we consider a fairer contract.

The only observation I have to make in reply to that is, that neither the court below nor ourselves had or have the least idea of doing anything of the kind. The question we have to determine is what is the real business meaning of the contract which has been made by these parties? It is a contract made, not in the formal method of a contract reduced to writing by a lawyer, but made in the businesslike communication of parties with each other in letters. When I look at the letters I cannot entertain the least doubt that what they really meant was what they said—namely, that if the review went off there was to be no liability; and then, of course, the one thing is correlative to the other—if there is no liability on the one side there is to be none on the other. That is indeed, what they did say in one of the earlier letters, and in fact it follows from the contract itself.

If one looks at the situation of the parties—at what they were dealing with and the contingency which they both contemplated—namely, the possibility of the review going off—there is no room for doubt as to what they meant. I entirely agree with the whole of the Court of Appeal, and with Ridley, J., that as a fact what they meant was that in the event which happened there should be no other liability than that which had been already incurred by the contractor. I understand there has never been any dispute that he ought to be paid back the expense which he had already incurred, and which amounted to £20. But in regard to the cheque for £300, which was to be given in respect of refreshments, it seems to me to be perfectly clear that there is no liability in respect of that matter.

Therefore I am of opinion that this appeal ought to be dismissed with costs, and I move your lordships accordingly.

Lord ROBERTSON.—I agree. I cannot profess to think the matter either doubtful or difficult.

Lord LINDLEY.—I am entirely of the same opinion. This is simply an action on a cheque to recover the amount of the cheque—viz., £300, neither more nor less. It is impossible, to my mind, to read the two letters of the 4th and 5th of March and come to the conclusion that this action for £300 can lie. The appellant's construction of these letters is not the meaning of the parties. I entirely adopt the true and fair construction put upon those letters by the Court of Appeal.

Order of the Court of Appeal affirmed, and appeal dismissed with costs.

Solicitors, *Samuel Price & Sons; Dowson, Ainslie, & Martineau.*

(a.) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

Court of Appeal.

(Collins, M.R., and Romer and Cozens-Hardy, L.JJ.) Feb. 26.

In re WHALLEY. (a.)

Lunacy—Person "lawfully detained" under the Idiots Act, 1886—*Appointment of committee—Jurisdiction—Idiots Act,* 1886 (49 *Vict. c.* 25)—*Lunacy Act,* 1890 (53 *Vict. c.* 5), *s.* 116, *sub-section* 1 (c).

The court has jurisdiction under section 116, *sub-section* 1 (c), *of the Lunacy Act,* 1890, *to make an order appointing a committee of the estate of a person of unsound mind lawfully detained in an asylum under the provisions of the Idiots Act,* 1886.

In re Watkins, 44 *W. R.* 609, [1896] 2 *Ch.* 336, *distinguished.*

Adjourned summons.

The question raised on this summons was whether the court had jurisdiction under section 116, sub-section 1 (c) of the Lunacy Act, 1890, to make an order appointing a committee of a lunatic not so found by inquisition, but lawfully detained in a lunatic asylum under the provisions of the Idiots Act, 1886.

Prior to the year 1886 two brothers, Mark and William Whalley, being persons of unsound mind, were received into the Earlswood Asylum for Idiots, and were there "lawfully detained" since 1886 under the provisions of the Idiots Act, 1886.

On the 12th of January, 1906, the trustees of the brothers Whalley, being anxious that committees of

(a.) Reported by E. WAVELL RIDGES, Esq., Barrister-at-Law.

their estates should be legally appointed so as to enable them (the trustees) to obtain a valid discharge for moneys paid on the idiots' behalf, summonses were issued by Frederick Henry Whalley, a second cousin of the brothers Whalley, asking for the appointment of himself as committee of their estates.

By section 116, sub-section 1 (c) of the Lunacy Act, 1890, it is provided that the powers and provisions of that part of the Act relating to management and administration are to apply to "every person lawfully detained as a lunatic, though not so found by inquisition."

Section 341 of the same Act provides that in that Act, if not inconsistent with the context, "lunatic" means an idiot or person of unsound mind.

Eve, K.C., and *Methold*, for the applicant.—Under section 116, sub-section 1 (c), the court has power to make the order asked for. It is true that under section 17 of the Idiots Act, 1886, the term "idiots" or "imbeciles" does not include lunatics, and that the term "lunatic" does not mean or include idiot or imbecile. In fact, the two expressions are mutually exclusive. But section 341 of the Lunacy Act, 1890, provides that the term "lunatic" in that Act means an idiot or person of unsound mind, and that definition would include a person lawfully detained as an idiot under the Act of 1886. *In re Watkins*, 44 W. R. 609, [1896] 2 Ch. 336, is clearly distinguishable from the present case, because there the lunatic was detained in a foreign country, under the laws of that country; here the brothers Whalley are detained in England under an English Act. In *in re Watkins* there is a *dictum* of Lopes, L.J., to the effect that "lawfully detained" in section 116, sub-section 1 (c), means lawfully detained under the Act of 1890. But the decision should not be extended further than the particular case.

COLLINS, M.R.—I think this case is free from difficulty, and only one case has been cited which throws any doubt upon it. Section 116, sub-section 1 (c), provides that the provisions of the Act as to management and administration are to apply to "every person lawfully detained as a lunatic, though not so found by inquisition." The Idiots Act, 1886, contains provisions for receiving idiots or imbeciles under age into any hospital, institution, or licensed house, and for retaining them there after they are of full age. There is no question that the persons to whom this case relates are lawfully detained in Earlswood Asylum under the Act of 1886. Now the expression "lawfully detained" in section 116 of the Act of 1890 does not exclude persons detained under earlier enactments unless there are express words to that effect, and there are none. Therefore *primâ facie* the narrower construction could not be placed upon the Act of 1890 without ignoring the earlier enactment. The objection to the jurisdiction is based on the case of *In re Watkins*, and it has been suggested that that case is an authority for narrowing the jurisdiction of the court. But there the question was whether the court had jurisdiction over a person lawfully detained under the laws of Belgium, and the only point decided was that the court had no jurisdiction in such a case. The decision was that there was no other source of jurisdiction than the Act of 1890, and that the lady in question, not coming under the Act of 1890, was outside the jurisdiction. No question was raised about any earlier enactment, and the Act of 1886 was not present to the minds of the Lords Justices. That decision only applied to a person lawfully detained by foreign law, and the case is clearly distinguishable from the one we are now considering. No doubt the point was worth discussing, but there can be no doubt that this court has jurisdiction in a case like this, and I think the orders should be made.

ROMER, L.J.—I agree.

COZENS-HARDY, L.J.—It would be unfair to treat *In re Watkins* as having any bearing upon the present case. In fact the decision there has nothing whatever to do with the case of a person lawfully detained under the Act of 1886. It is especially provided by section 340 of the Act of 1890 that that Act "shall not affect the provisions of the Idiots Act, 1886." Section 116, sub-section 1 (c), limits the jurisdiction to persons "lawfully detained," and there is no doubt that these persons are lawfully detained. I think the orders should be made.

Solicitors for the applicant, *Bolton & Co.*

From Chan. Div. (Collins, M.R., and Romer and Cozens-Hardy, L.JJ.) — Feb. 13, 14.

HOOPER v. HERTS. (a.)

Company—Shares—Transferor and transferee—Blank transfer—Implied contract by transferor.

There is an implied obligation on the part of a transferor of shares to do nothing to prevent his transferee getting the benefit of the transfer. W., a shareholder in a company, handed the certificate of the shares and a blank transfer to H. to enable him to raise a loan. H. endeavoured to raise the loan from the plaintiff. The plaintiff declined to advance the money personally, but he found a bank who were willing to advance it to him on his personal security. H. thereupon authorized the plaintiff to raise a loan on the security of the shares, and undertook to indemnify him against loss. In pursuance of this authority the plaintiff handed the share certificate and transfer to the bank, and received from them the amount of the loan, which he paid to H. The bank filled in the name of the plaintiff as transferee, and lodged the certificate and transfer for registration with the company. The company informed W., who notified them that the transfer was irregular. By reason of such notification the company declined to proceed with the transfer, and it was not completed till the shares had fallen very considerably in value. H. became bankrupt and never repaid the plaintiff any portion of the loan, all of which had eventually to be repaid by the plaintiff to the bank.

Held, that the plaintiff was entitled to damages as against W. for breach of the implied obligation on W.'s part to do nothing to prevent or delay the registration of the shares, the measure of such damages being the difference between the amount the plaintiff might reasonably have obtained by realizing the shares at the time of the breach and their actual value at the date when he obtained registration.

This was an appeal by the plaintiff from so much of the judgment of Kekewich, J., as dismissed the plaintiff's claim for damages for breach of an implied contract or obligation on the part of the defendant Whatton not to prevent or delay the registration of a *bonâ fide* transferee of certain shares in the Smelting and Refining Co. of Australia (1901) (Limited).

The facts were as follows:

In the year 1904 the defendant Whatton was the registered holder of 1,467 7 per cent. preference shares in the said smelting company.

About the 8th of January, 1906, he delivered to the defendant Herts the certificate for these shares

(a.) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

and a blank transfer of such shares duly executed, and he instructed the defendant Herts to borrow money on these shares.

On the 13th of January, 1904, the defendant Whatton wrote to the defendant Herts as follows: "With regard to the smelting shares, I am anxious to know what you have done or can do. Please don't postpone the matter if you have not already seen about it. One ought to be able to borrow on those shares up to a good value at 4 per cent."

On the 14th of January the defendant Herts saw the plaintiff and requested the plaintiff to advance him £700 on the security of the deposit of the said shares and signed transfer.

The defendant Herts produced to the plaintiff the said certificate and signed transfer, and also showed him the defendant Whatton's letter of the 13th of January.

The plaintiff informed the defendant Herts that he was unable himself to find the money required, but that he would endeavour to borrow it from the Mines and Banking Corporation (Limited).

The corporation declined to lend to either of the defendants, but agreed to lend the plaintiff the sum of £700 on the security of the shares, and also the plaintiff's personal liability, at 10 per cent. interest, the loan to be repaid with such interest within fifteen days from being made.

The plaintiff informed the defendant Herts of the decision of the corporation.

The defendant Herts thereupon wrote to the plaintiff authorizing him to raise a loan of £700 on the security of the shares and undertaking to indemnify him against any loss.

In pursuance of this authority the plaintiff handed the share certificate and transfer to the corporation and received from the corporation the sum of £700, which he paid to the defendant Herts.

The name of the plaintiff was filled in the transfer as transferee, and the corporation lodged the certificate and transfer for registration with the smelting company in March, 1904. The smelting company, in accordance with the usual custom, notified the defendant Whatton of the lodging of the transfer.

The defendant Whatton wrote that the transfer was not in order and should not be completed. In consequence of this notification the transfer of the shares was not completed until after the commencement of the present action.

Evidence was given to show that in March, 1904, the shares were of considerable value, but that there had been a great fall since, and by the time the transfer was completed they had become practically worthless.

Herts never repaid the plaintiff any part of the £700, and the corporation pressed the plaintiff for repayment.

In these circumstances the plaintiff on the 30th of April, 1904, commenced the present action claiming as against Herts repayment of the £700 and interest, and as against Whatton a declaration that he was entitled to a charge on the shares for £700 and interest, and foreclosure or sale, and also for damages for breach of the implied obligation or contract on the part of the defendant Whatton not to do anything to prevent or delay the registration of a *bonâ fide* transfer for value of the shares.

At the date of the commencement of the action the corporation had not been paid, but they were paid off by the plaintiff before the trial.

The defendant Herts, who had become a bankrupt, did not appear.

The defendant Whatton put in a defence denying the authority of Herts to borrow money on the shares.

Kekewich, J., found that Herts had authority to borrow money on the shares and that the plaintiff was entitled to a charge on them. But as regards the claim for damages the learned judge held that the plaintiff was only a nominee for the corporation and that the corporation had sustained no damage. He was therefore of opinion that the plaintiff was not in a position to sustain the claim for damages, and that he could not be said to have suffered damage. He accordingly dismissed the claim for damages.

The plaintiff appealed against so much of the judgment as dismissed the claim for damages.

P. O. Lawrence, K.C., and *Napier*, for the appellant.—There is an implied obligation upon the person signing a blank transfer to do nothing to prevent the completion of the transfer: *London Founders' Association* v. *Clark*, 36 W. R. 489, 20 Q. B. D. 576; *Skinner* v. *City of London Marine Insurance Co.*, 33 W. R. 628, 14 Q. B. D. 882. If a blank transfer is handed over to a person, it is handed over by the transferor with the intention of entering into this implied obligation with anyone whose name is properly entered on the blank transfer. Kekewich, J., was of opinion that the plaintiff in this case was a mere nominee and that his principal, having sustained no damage, he could recover nothing: but on the facts that is not so: *France* v. *Clark*, 32 W. R. 466, 26 Ch. D. 257; *Ex parte Sargent, In re Tahiti Cotton Co.*, 22 W. R. 815, 17 Eq. 273; *Gurney* v. *Seppings*, 2 Ph. 40; *Moore* v. *North-Western Bank*. [1891], 2 Ch. 599, 39 W. R Dig. 48. [ROMER, L J., referred to *In re East Wheal Martha Mining Co.*, 33 B. 119, 11 W. R. Dig. 46.]

Stewart Smith, K.C., and *Cozens-Hardy*, for the respondent.—The plaintiff Hooper's rights against Whatton only arise by estoppel. There is no contract between Hooper and Whatton at all. The rights between a vendor of shares and his transferee arise not from the transfer but from the contract of sale which precedes the transfer: *Skinner* v. *City of London Marine Insurance Co.* Hooper was not a transferee in his own right or beneficially. He was the nominee of the Mines Corporation. The Mines Corporation have suffered no damage and their nominee cannot recover damages if his principal would fail.

No reply was called for.

COLLINS, M.R.—This is an appeal from the decision of Kekewich, J. The plaintiff in this case claims a declaration that by virtue of the deposit with the plaintiff of a transfer in blank signed by the defendant Whatton of 1,467 shares of a certain company and of the certificate of such shares, made by the defendant Herts, under the authority of the defendant Whatton, the plaintiff is entitled to a mortgage or charge on such shares for the said sum of £700, and interest. Herts did not appear. The learned judge made the declaration in the terms asked for by the plaintiffs. The shares in question are now of little or no value, and therefore the declaration was not of any great pecuniary advantage to the plaintiff.

But the plaintiff had also introduced by amending his writ and his claim: "Damages for breach of the implied contract or obligation by the defendant Whatton not to do anything to prevent or delay the registration of a *bonâ fide* purchaser for value of the shares referred to"; and it is upon that amendment that the question now in discussion arises. The learned judge having found, as I have said, in favour of the plaintiff upon the question of the declaration, felt himself in a difficulty in ordering damages to be paid under the amendment. In point of fact he held that there was an obligation between the plaintiff and the defendant and a breach of that

obligation, but that in the circumstances the plaintiff was in such a position that he could not prove that he had sustained any damages by virtue of the breach; and it is upon that point that the appeal comes before us. The decision of the learned judge has narrowed the points in controversy before us very much indeed; it has cut away (because the defendants are not appealing here) a point that might be raised as to the invalidity of the actual ultimate transfer by the defendant Whatton in favour of the plaintiff Hooper.

Shortly stated the circumstances were these, and it is not necessary to go into them in detail, because, as I have said, the point arising for discussion upon that has been concluded by the finding of the learned judge: Herts was a person engaged in financial operations; Whatton, the defendant, was a clergyman, who appears also to have embarked in some speculative transactions—at all events the relations between him and Herts appear to have been intimate—and the learned judge found that Whatton appears to have been very much in the hands of Herts. Whatton was possessed of the shares mentioned in the writ, and he was desirous of raising money upon them. Herts also was in need of money, and there seems to be no doubt upon the evidence that Whatten was willing that Herts should use the shares belonging to Whatton as a security for a temporary loan to be raised by Herts for his own purposes. I think he was also desirous, but at a later date, of raising money himself upon them. Now, the machinery which he adopted to bring about this result was that he put into the hands of Herts a transfer of 1,467 preference shares in the company named, and he also handed him his certificates of those shares for the purpose of enabling him to raise a temporary loan, as I have said, for Herts's own purposes. Whether he also authorized him to raise a loan for himself, Whatton, or not, is immaterial in the case; he handed those documents for the purpose of using them for the purpose of raising the loan. The result was Herts went to Hooper, the plaintiff here, with whom he had had some relations before, and he got from Hooper on the security of this transfer and the certificate one or two loans of comparatively small amount at first—£150, or, probably, £200. But more money was wanted, and Herts took steps to induce Hooper to raise it from a certain company—I think it was a mining and banking company, at all events they were persons from whom Herts thought Hooper would be able, with the aid of these certificates, to raise the sum wanted. Accordingly Hooper, armed with the transfer and the certificates, put himself into communication with the mining bank, and the result was that they found him £700 upon the deposit of those securities with them.

The result of that transaction as between Herts and Whatton appears to have been that Whatton had put himself in such a position that he could not impugn the right of Hooper, or of the bank from whom Hooper had got the advance to deal with the transfer in the way they did deal with it, and the way it was dealt with between them and Hooper was, that Herts not returning the money, as he of course undertook to do, in a very short time, the bank naturally began to press for their money. The bank and Hooper were acting together in the matter, Hooper was responsible to them for the money that they had advanced, and they had the security of the transfer and the certificates which he had handed to them, and on which he had a charge to the extent of his own liability. They were acting together, and what the bank did was to put Hooper's name in the transfer so as to make it a transfer from the defendant Whatton to Hooper, and that being done, it was done for the common purpose, it seems to me, of realizing all that could be got out of the securities. That having been done, Hooper applies in the ordinary course to the company to register, and then comes the act on the part of the defendant Whatton which gives rise to the suggested cause of action which is the matter in controversy on this appeal. Whatton, instead of assisting in carrying out the transfer which he was estopped from denying, wrote to the company on the 26th of March putting a stop to the transfer, with the result that the shares could not by registered and any dealing with them on the part of Hooper, or of the bank, to realize the security was suspended, and it was not until the date of the writ, or, I think, February of the following year, that the shares were taken up. In the meantime those shares had depreciated in value so much that it is very doubtful whether they have any value at all at the present moment.

It is said that these shares had some considerable value at the time that the stoppage was put on them, and the question is whether in those circumstances there is any right of action for Hooper against Whatton. The learned judge had no doubt upon that part of the matter, whether a transferor who has transferred, I will assume for value, is under an obligation not to hinder the purchaser or the transferee from getting the benefit of that transfer—not to do anything himself to hinder his transferee from getting the full benefit involved in the fact that he has transferred. I will read the passages in which Lord Esher, then Master of the Rolls, expressed himself in the case of *The London Founders' Association* v. *Clarke*, but before reading them, perhaps I ought to state the facts of the case from the head-note: "A contract for the sale of shares in a registered company was made through brokers upon and subject to the rules of the Stock Exchange. In accordance with the practice of the Stock Exchange the transferee of the shares paid the price of them to the vendor upon the delivery to him of a duly executed transfer. An application for registration of the transfer being subsequently made to the directors of the company, who were empowered by the articles of association in their discretion to decline to register a person claiming by transfer of shares, they refused to register the transferee as a member of the company. The transferee thereupon brought an action to recover back the price of the shares from the vendor as money had and received to his use. Held, following *Stray* v. *Russell*, 1 E. & E. 888, 917, that the contract for the sale of shares on Stock Exchange did not import an undertaking by the vendor that the company would register the transferee, and that the action was not maintainable." Now the Master of the Rolls says this: "It seems to me that to hold the plaintiffs' contention to be correct would be in direct contravention of what was said" (that is, the contention that there was a total failure of the consideration, giving the plaintiff the right to recover back his money). "I have no doubt that the seller must not prevent or do anything to prevent the company from accepting the purchaser or his nominee. What the remedy would be if he did it is unnecessary now to consider. There is nothing here to show that the seller in this case did anything of the kind." Again, lower down he says: "The purchaser takes that risk on himself" (that is the risk of the company not approving the transfer) and the seller's liability is satisfied by handing to the purchaser the transfer and certificates of the shares, in proper form and doing nothing either before or subsequently to prevent the registration of the purchaser."

Now the learned judge had no doubt whatever upon that part of the case. He thought that an

obligation had arisen upon Whatton not to interfere with the lawful results of anything done under the authority of the transfer, and therefore the only question in his mind was whether, there being a breach of that obligation on the part of Whatton by intervening and stopping the registration of these shares, the plaintiff was in a condition to claim damages. Before us the point has been raised, and insisted upon, that there is no such obligation as that acted upon by Kekewich, J., to the extent I have named, and asserted as existing by Lord Esher. That point has been argued before us by counsel for the respondents, and they also rely strongly on the other point upon which Kekewich, J., decided—that the plaintiff is not in a position to claim damages.

Now, to take the first point first, it seems to me quite clear, and for the reason given by Lord Esher, that there does arise out of the relation constituted between the parties by the transfer, an obligation, or a duty (whether arising out of the contract or out of the relation between the parties), that the grantor shall do nothing to interfere with the grantee getting the benefit of his grant. That, it seems to me, is the principle asserted—that there is a duty arising out of the relations of the parties. It is not one which is in express terms contracted for between the parties, and it is not to be found in express terms in the transfer itself. The transfer itself contains the grant by which the relation between the parties of grantor and grantee is created, and that carries with it an obligation, as it seems to me, on the part of the grantor not to interfere with the full fruition by the grantee of what the grantor has purported to give him under the grant.

That seems to me enough to establish the obligation. The breach of it is not denied, and now we come to the question of damages: Aye or no is the plaintiff in this case entitled to claim damages? My first answer to that is, Why not? Here is a legal transferee suing a legal transferor for an admitted breach of a proved obligation. Why is he not to have his damage? If we were in a court of common law I do not think there could be much doubt about it. Here you have what appears to me to be *primâ facie* a clear right in a legal transferee who is entitled to the performance of a particular obligation to have damages paid to him measured by the loss which he in his legal position as owner can be fairly said to have suffered by reason of the breach of that obligation. Now, why is he not entitled to have damages? The suggestion made is that his right in this case case was not a beneficial right in himself; but that contention must go this far to be of any use at all; that he was a mere nominee for the bank who had lent the money on the security of the transfer, and being a mere nominee he has no right of action really in himself at all— he is merely their *pret nom*, and in order to see whether there are damages it must be assumed that the real parties to the action are those for whom he is a *pret nom*; and inasmuch as the bank who have lent this money have got the security of a solvent person—namely, Hooper, they cannot complain that they have suffered anything by the interference by the defendant with the obtaining the full benefit of the shares embraced in the transfer—that is to say, since Hooper can and will pay them they cannot sue, and though Hooper must and will pay them he cannot sue either. It seems to me that is to shut one's eyes to the common sense of the matter in endeavouring to appreciate a very subtle equitable distinction.

I think we are entitled here to look broadly at the facts; it is not the case of Hooper putting in suit his right against the rights of the lending company; on the contrary he and the lending company are acting together in this matter for the common purpose of realizing to the best advantage, having regard to their relations, the value of the security. Undoubtedly as between the lenders, the company, and Hooper, the value of that security would come in in reduction of the obligation of Hooper to the company; and the person primarily interested (since he was the person who would have to pay under any hypothesis) in introducing the value of that security into the discussion was Hooper. If the value of those shares could be realized it would enure ultimately for the benefit of Hooper, because it would reduce his obligation to the company if the company took it at the time. If, on the other hand, he paid off the company, then he would apply the security in mitigation, so far as it would go, of his own damages. So that in measuring this case by the ordinary standards which would be applied in measuring this matter at common law we are entitled to look at it, or, if it were a jury who were assessing it, to tell them that they must look at it reasonably, and say what, as reasonable men, they would expect to be the damages that would be suffered by a person in Hooper's position in those circumstances. A jury are not bound to ascertain—they cannot ascertain absolutely, and with mathematical nicety, the precise damage that a person must suffer. They have to look at the reasonable probabilities of the case, and they have got to compensate a person so far as they can for the loss which in their view, having regard to all the circumstances of the transaction, he has suffered as a natural consequence of the breach for which the defendant is responsible. In this case the act of the defendant has prevented the benefit accruing to the persons entitled from the right to deal with those shares at the time when he entered into his obligation. If that right had existed, Hooper was the person in law, as between him and the defendant, who was entitled to the benefit of it. That might be enough as against Whatton in this action to say: You are the transferor in this matter, and you cannot as against your transferee set up these nice considerations, or go behind the real transaction. But if we do go behind the transaction we must not take leave of our common sense; and we find that, taking all these equities into consideration, the net result of the matter is that the lending company are only not sufferers, because they get paid by Hooper, and if they get paid by Hooper why should not Hooper get the benefit which he was entitled to from the transferor; therefore it seems to me that the person who really suffers in this matter by the action of Whatton—namely, Hooper, is the person who is entitled to receive the damages from him.

Therefore it seems to me that on the ground on which the learned judge decided this case, although I agree with him as a whole, I am unable to take the view he has taken here, and I think that really his mistake was in treating Hooper as a person who was merely, as Mr. Cozens-Hardy in his short and perfectly logical argument suggested, a person with no beneficial interest. But the real point in this case is, when we see the facts of this case, that Hooper was not a mere nominee; he was really, when you sift it, and get at the actual facts, the person beneficially interested in the realization of the value of that security. If he had been, as Mr. Cozens-Hardy very ingeniously argued, he ought to be treated as X, as a person with no beneficial interest—an abstraction, merely lending his name for the purposes of the writ, then I should accept Mr. Cozens-Hardy's position; but Romer, L.J., has declined to take the first step, and I do not feel any more inclined to take it than he did—I decline to measure it by the abstraction "X"; I prefer to treat Hooper as a person beneficially inter-

ested in the security. Now what is the result of that? There is a right to damages measured by the loss to Hooper, and the loss to Hooper was what, as a reasonable person, he might have got by realizing that security at the time of the breach.

That does not seem to me to involve that he must be taken as bound to go on the market, and force the whole of those shares on the market at one and the same time. I think if the matter were before a jury they would be asked to treat it as reasonable men, and consider what a person anxious to realize the security to the best advantage, acting reasonably—not taking an undue time about it, but dealing with it prudently—what in their view would be the value of shares so realized—realized to the best advantage, having regard to the nature of the shares, the state of the market, and the possible depreciation of the shares by waiting an undue time. Of course a man would have to act reasonably, and they would have to make the best estimate they could of how much he would have got by realizing the shares acting as a reasonable man; and to that extent, and to that extent only, the loss is measured by the difference between the ultimate value at the time when he got the dominion of the shares, and their value had he had the opportunity of so realizing them as I have suggested. That will be the standard, and that will have to be ascertained by the master. I do not think there will be any very great difficulty about it, because there was evidence before the learned judge of the state of the market during the material period in question. It is not a case of a given sale on a particular day. The master will have to consider all the circumstances—the amount that had to be disposed of, and the prices, so far as he can learn them, ruling during that time.

Therefore it seems to me the appeal must be allowed to the extent I have named, and there must be the inquiry I have suggested.

ROMER, L.J.—I am of the same opinion. The learned judge in the court below has found—and there is no appeal from that part of the judgment—that the transferor of the shares, the defendant Whatton, must be held to have authorized what was in fact done in this case with regard to the shares—namely, the filling in the blank transfer executed by Whatton with the name of Mr. Hooper as transferee and the charges in Hooper's favour and a subsequent mortgage by Hooper of the shares to the Mines Corporation. That being so as between Whatton and Hooper, Whatton is in the position of a transferor to Hooper, and it is to be noticed that Hooper has a direct interest in the shares not only in respect of the Mines Corporation, but in his own right as equitable mortgagee before the mortgage to the Mines Corporation, and because of his position as mortgagor to the Mines Corporation. And with reference to the argument of the respondents in this case before us, when for the purposes of the Mines Corporation, or the Mines Corporation and Mr. Hooper, Mr. Hooper's name was put as transferee of these shares, it appears to me impossible to say that Mr. Hooper is to be considered as having no other interest whatever in the shares except as a mere nominee for the Mines Corporation. I think on the facts he must be taken to have been put in as nominee, because he also occupied the position of mortgagor, and had otherwise an interest in these shares. That being so, it appears to me that the defendant Whatton cannot say as against Hooper that the latter, as transferee, has no interest in these shares except as representing the Mines Corporation.

It is not necessary for me to decide the point, but I should like to point out that I am not sure that any difference would arise in this case if Hooper's name had not been put in as transferee and a third name had been put in. I am not at all sure that even in that case it could not be said on behalf of Hooper and of the Mines Corporation that the name of that third person had been used for the purpose of both; but I need not consider that in this case. It is sufficient to say here that in my mind it is established that Whatton is the transferor of these shares to Hooper, and that Hooper stands in the position of a transferee for valuable consideration.

In these circumstances I have, speaking for myself, no doubt that there is an implied duty and obligation as between Whatton and Hooper that Whatton will do nothing to prevent Hooper being put on the register of shares so as to acquire the full benefit to be derived from the transfer.

What happened was this. An application was made to the company to put on Hooper's name as transferee. That was an application made at the time; there was no dispute of any kind as between the Mines Corporation and Hooper—in fact there never has been any dispute between these two. In this matter they appear always to have acted amicably, their interests being practically identical.

An application being so sent in, registration, but for the conduct of the defendant Whatton, which I am about to refer to, would have followed in due course, and that registration, as I need scarcely point out, would have inured for the benefit of Hooper, and of his mortgagees, the Mines Corporation. What happened then was this: in breach of his duty, or obligation, Whatton gives notice to the company, the shares of which were the subject of the transfer, not to recognize the transfer—representing, in fact, that the transfer was not valid as against him.

To my mind that was a clear breach of the duty, or obligation, he owed to Hooper. The result of that breach of his duty was that the shares were not registered. Who suffered from that? Hooper certainly suffered from it; he, the transferee, whose name ought to have been put on the register, by the breach of duty to him on Whatton's part failed to get on the register; he, as representing himself and his mortgagees, lost the benefit at that time of the transfer through the defendant Whatton's breach of duty or obligation. It was by reason of that breach of duty that Hooper as representing both himself and Whatton failed to get the full benefit of the transfer, or indeed any benefit from the transfer till the judgment in this action, when their right to have the transfer perfected by registration was decided against Whatton.

To my mind there has clearly been damage caused by the delay which has arisen by reason of the defendant Whatton's breach of duty to Hooper; for it is admitted that between the date when this transfer ought to have been registered and when Hooper, as representing himself and his mortgagees, could have obtained, and would have obtained if the registration had been proceeded with, the full benefit of these shares, and the time when ultimately he was enabled to get a decision in his favour as against Whatton there was a falling off in the value of the shares.

To my mind the measure of damages caused by the breach of duty and the delay is the difference between those two values. I really could not add to what the Master of the Rolls has said as to how that damage ought to be estimated. In estimating the value of those shares at the time when registration ought to have been effected the master who has to estimate the value must try to ascertain the value in a reasonable way. Of course, amongst other considerations, he would bear in mind that so large a number of shares was involved in this transfer that they

could not have been sold on the market probably in one block, but they would have to be dealt with by degrees. That and all other material considerations bearing upon the question, of course, without special direction, I should hope, from us, will be taken into consideration by the master. With regard to the proceedings by Hooper, Hooper, to my mind, when he started this action must be held to have made his claim for damages for delay on behalf of those who claimed through him—that is to say, if any damages have been suffered by his mortgagees he would have been held, I should have thought, to sue as representing them as well as representing himself, but in the events that have happened, seeing that pending the trial he has paid those mortgages off, it follows that the full amount of damage which will be found as the result of inquiry before the master will have to be paid to him entirely, so that he alone will be entitled to receive the amount of damage.

The result is there will have to be the inquiry directed before the master; the costs of that inquiry will be reserved in the usual way with liberty to apply as to those costs in the usual way when the amount of damage is ascertained. I apprehend that the appellant will get his costs of this appeal; and I should think that such a modification ought to be made in the costs of the court below us, at any rate to give the plaintiff his right to so much of the costs of the action in the court below as he would have been awarded if the learned judge had held that he was entitled to his claim for damage.

COZENS-HARDY, L.J.—I am of the same opinion and I have nothing to add.

Solicitors, *G. L. Matthews & Co.; Thorp & Saunders.*

High Court of Justice.

Chan. Div. } Kekewich, J. } Jan. 31.

HOLLIWELL *v.* SEACOMBE. (*a.*)

Vendor and purchaser—Sale by order of the court—Conditions of sale—Power to rescind—Particulars—Misrepresentation—Costs of bidding at sale and investigating title—Rescission.

A sale was made by order of the court of certain land which was described as valuable freehold land . . . immediately ripe for development as a building estate . . . which can be utilised for the erection of numerous small class residences. It was sold subject to a condition that "if any purchaser shall take any objection or make any requisition which the vendors are advised not to remove or comply with . . . the vendors . . . shall be at liberty . . . to rescind the contract for sale upon such terms as the judge shall approve, and the purchaser . . . shall thereupon be entitled to receive back his deposit, and shall receive the same in discharge of all claims for costs or otherwise." The abstract when delivered disclosed a deed under which the vendors' predecessor in title had covenanted to erect almshouses, and also had covenanted that the land and the buildings to be erected thereon should not be used for any purpose whatsoever other than as almshouses.

Held, that the purchaser was entitled to be discharged from his contract and to a return of his deposit by reason of misrepresentation, and that he was entitled to be paid his costs, charges, and expenses, including the costs occasioned by his bidding at the sale, notwithstanding the provisions of the condition.

Powell *v.* Powell, 23 *W. R.* 482, 19 *Eq.* 422, *and* Perkins *v.* Ede, 16 *Beav.* 268, *followed.*

Adjourned summons.

This was an application by a purchaser of a certain property which had been sold by order of the court to be discharged from his purchase on the ground of misrepresentation and to be paid all his costs incurred in connection therewith.

The sale took place by public auction on the 7th of July, 1905, when the property in question, which was Lot 6, was described in the particulars of sale as "all that enclosure of valuable freehold land situate at Culverdon Down, Tunbridge Wells, and known as Down-lane Football Ground, containing in all about 2 acres 1 rood, and immediately ripe for development as a building estate. It contains a frontage of 100 feet to the road known as Culverdon Down-road, and offers an exceptional opportunity of acquiring freehold building land in a very pretty and popular part of the Down, and affording a large area which can be utilized for the erection of numerous small class residences, for which there is an ever-increasing demand in this particular locality."

One of the conditions of sale, which had been settled by conveyancing counsel to the court, was as follows:

Condition 7. ". . . If any purchaser shall take any objection or make any requisition which the vendors are advised not to remove or comply with, or if any question should arise as to the conveyance, the vendors, with the sanction of the judge, shall be at liberty by notice in writing to be delivered to such purchaser or his solicitor and notwithstanding any intermediate negotiation to rescind his contract for sale upon such terms as the judge shall approve, and the purchaser whose contract is so rescinded shall thereupon be entitled to receive back his deposit and shall accept the same in discharge of all claims for costs or otherwise and shall forthwith return all abstracts and papers in his possession belonging to the vendors."

The lot was purchased by the applicant for £2,250, and the vendors, who were entitled to the estate of one E. M. Hunter, who had died intestate, delivered an abstract of their title in due course, which disclosed a conveyance of the 28th of July, 1887, by which Hunter bought the property from certain vendors who were therein called "the Hopwood Trustees" and thereby covenanted that his executors, administrators, and assigns would forthwith erect almshouses on the said piece of land with suitable gardens and appurtenances thereto, and would not at any time use the said land or the buildings to be erected thereon as aforesaid or permit or suffer the same to be used for any purpose whatever other than as almshouses for the poor with the gardens or yards thereto and any necessary roads or paths.

The purchaser in his requisitions referred to this restrictive covenant, of which he had no previous notice, and claimed that as the restrictions therein contained, which would prevent the property from being developed as a building estate, were not mentioned in the particulars, he was entitled to rescind the contract and to have his deposit returned and to be paid all his costs.

The vendors contended that the restrictions did not affect the purchaser, as they were personal to Hunter and did not run with the land, and that in any event they could not be enforced as they were too vague.

The purchaser, however, ascertained that the covenant would be enforced by the Hopwood Trustees, and that the vendors knew of this before

(*a.*) Reported by R. FRANKLIN STUBBING, Esq., Barrister-at-Law.

the sale. He therefore issued this summons on the 20th of October, 1905, to be discharged from his purchase and to be paid all his costs, charges, and expenses.

The vendors thereupon applied for leave to give notice to rescind under condition 7, which leave was granted, and the notice to rescind was accordingly served on the purchaser on the 13th of November, 1905.

Upon the purchaser's summons coming before the master, he decided that he had a discretion to deal with it having regard to condition 7, and that the purchaser was entitled to all the costs, charges and expenses consequent upon his bidding for and being allowed to become the purchaser of the lot in question.

P. O. Lawrence, K.C., and *Ribton*, for the purchaser.—The purchaser is entitled to rescind and to be discharged from his contract on the ground of the misrepresentation that the land was available for building. That was the right course for the purchaser to pursue when the sale was by order of the court. The misrepresentation is such as to avoid the contract altogether, and the vendors cannot take advantage of condition 7. In *Flight* v. *Booth*, 1 Bing. N. C. 370, it was held that where the misdescription was in a material and substantial point so far affecting the subject-matter of the contract that but for such misdescription the purchaser might never have entered into the contract at all, the contract was avoided altogether. *In re Terry and White's Contract*, 34 W. R. 379, 32 Ch. D. 14, is also an authority for the same proposition. In *In re Puckett and Smith's Contract*, 50 W. R. 532, [1902] 2 Ch. 258, the principle of *Flight* v. *Booth* was applied to the case of a latent defect. *Isaacs* v. *Towell* [1898], 2 Ch. 285, 46 W. R., Dig. 170, can be distinguished from the present case as it was expressly found in that case that there had been no misrepresentation, and therefore the question was whether the purchaser could give notice to rescind under his contract. In *Bain* v. *Fothergill*, 23 W. R. 261, L. R. 7 H. L. 158, the purchaser was held to be only entitled to the costs of investigating the title, but that was simply a case of want of title and not of misrepresentation, and the sale was not a sale by the court. The order asked for in the present case was based on the order made by Bacon, V.C., in *Powell* v. *Powell*, 23 W. R. 482, 19 Eq. 422, which is cited in Seton on Decrees (6th ed.), vol. 1, p. 356, as being the proper form. The reason for the order was to place a purchaser who was entitled to be discharged in the same position as he would have been if he had not bid at the sale or had not entered into the contract. [KEKEWICH, J.—In *Perkins* v. *Ede*, 16 Beav. 268, where the title was defective Romilly, M.R., put it quite shortly, he simply said "Take the usual order."] Lord Herschell in *Derry* v. *Peck*, 38 W. R. 33, 14 App. Cas. 337, pointed out the distinction between an action for deceit and an action to obtain rescission of a contract on the ground of misrepresentation. In *Else* v. *Else*, 20 W. R. 286, 13 Eq. 196, Romilly, M.R., held that the court would not allow a vendor to take advantage of his own conditions so as to defeat a purchaser who had been deceived thereby. The court will put the purchaser back into the same position as he would have been in if he had never seen the conditions of sale sent out under the sanction of the court, and will give him the costs of sending an agent to bid and the expenses of investigating the title.

Stewart Smith, K.C., and *Schwann*, for the vendors.—The vendors were given leave to serve notice of rescission under the contract, because it was found that the title was not such as could be forced on a purchaser. There was no misrepresentation in fact; whether the representation that the land was ripe for development as a building estate was true or not depended on whether the covenant in the deed of the 28th of July, 1887, was enforceable or not. In the first place that covenant was only binding on Hunter personally, it did not run with the land; secondly, the covenant was void as being a charitable trust within 9 Geo. 2, c. 36, the Act for the Restraint of the Disposition of Lands; and, thirdly, the covenant was forthwith to erect almshouses, and as nothing had been done under it, therefore the Statute of Limitations applied: *Governors of Magdalen Hospital* v. *Knotts*, 27 W. R. 602, 4 App. Cas. 324. It was said that condition 7 did not apply because there was misrepresentation; but, assuming there was no misrepresentation, condition 7 did apply, and the question was, what did it mean? "Upon such terms as the judge shall approve" meant such terms as the judge, having regard to the interests of all parties over whose interests he is watching, *inter se*, thinks ought to be the proper terms; it was not intended that the purchaser should have any voice in the matter as to the terms upon which the contract should be rescinded. But such terms, when approved by the judge, could not alter the contract. Under the conditions the purchaser was to receive back his deposit in discharge of all claims for costs or otherwise. It was admitted that the purchaser is entitled to his costs up to the time when he received the notice to rescind, but not after. This was in accordance with the decision in *Isaacs* v. *Towell*. In *In re Spindler and Mear's Contract*, 49 W. R. 410, [1901] 1 Ch. 908, it was held that a condition entitling the vendor to rescind the contract, if he was unwilling to comply with purchaser's requisition and to retain the deposit, but without interest or costs, did not prevent the court from ordering the vendors to pay the costs of litigation pending at the date of rescission. In this respect, following *Duddell* v. *Simpson*, 15 W. R. 115, L. R. 2 Ch. 102, and *In re Deighton and Harris' Contract*, 46 W. R. 341, [1898] 1 Ch. 458, the purchaser's costs ought to be confined to the costs of investigating title, as in *Bain* v. *Fothergill*. Any other damage is too remote. In seeking to recover the costs of bidding the purchaser is trying to extend the doctrine much further than it has been extended before. In *Powell* v. *Powell* there was no title at all, and the vendor never took any steps to remove the objections, and that was why Bacon, V.C., held that the condition did not apply. In *Else* v. *Else* also there was no title.

Lawrence, K.C., in reply.—The covenant was an ordinary restrictive covenant, and a purchaser with notice could be restrained from using the land for a different purpose. It was not merely personal to Hunter. If this was a devotion to charity the whole deed was made void, not merely this particular covenant. The covenant runs with the land, as it clearly "affects or relates to" the same, within the meaning of the Conveyancing Act, 1881.

KEKEWICH, J.—The application before me is one by a purchaser under a sale by the court to be discharged from his purchase, and to be paid the costs not only of this application, but also the costs, charges, and expenses occasioned by his bidding for and being allowed to be the purchaser of the property in question, as well as the costs of investigation of title.

It is admitted that he is entitled to be discharged unless that right has already been anticipated by rescission, and it is also admitted that if he is entitled to be discharged he is entitled to his costs of investi-

gating the title and those occasioned by this application. But the question arises as to those special costs occasioned by his bidding at the auction. It is suggested that he is precluded from that by *Bain* v. *Fothergill*, but it seems to me that that case, although it lays down a rule of almost universal application, has nothing to do with sales by the court. The practice of the court seems to be perfectly well settled, though it is not laid down in any text-books. The matter was discussed in *Powell* v. *Powell*, before Bacon, V.C. There the purchaser was held to be entitled to be discharged, and the Vice-Chancellor said in his judgment, at p. 425: "This brings it to the ordinary case of a purchaser also who, finding that he is entitled by law, on account of the invalidity of proceedings in chambers, to be discharged from his contract, is entitled on coming here to be reinstated in exactly the same position that he stood in when he attended the sale, and to be indemnified against all the expenses he has been put to." That is a rule laid down with reference only to sales by the court and the discharge of purchasers under such sales. Without citing authorities it is always recognized by the court that it is the bounden duty of the court to uphold a very high standard of conduct more strictly in the case of a sale by the court than in cases between strangers. The minute of the order made in *Powell* v. *Powell* is given in the report of that case, and it is set out in the last edition of Seton, vol. 1, p. 356, where the principle is worked out so as to be applicable to a sale by private contract under the direction of the court. Nothing else is referred to there except *Powell* v. *Powell*, but during the argument we came upon another case, *Perkins* v. *Ede*, 16 Beav. 268, where Romilly, M.R., contented himself by saying "Take the usual order," but the reporter set out the order, giving the reference to the registrar's book in a footnote as follows: "Abstract of order. Discharge the purchaser and tax his costs, charges, and expenses properly incurred, occasioned by his bidding for and becoming the purchaser of Lot 3, and also his costs of the reference as to title, and of all proceedings consequent thereon, including his costs of and occasioned by the plaintiff's exceptions to the master's report and the order thereon, and of this application and consequent thereon, and direct payment out of the fund in court." That was in 1852, and Bacon, V.C., made the same order in 1875 in *Powell* v. *Powell*. I must therefore take it that that is the usual order following the settled practice of the court, and that the purchaser here is entitled to it now. Is there anything under the contract which precludes him from obtaining an order of this kind? He purchased under a condition [which his lordship read]. There was a very similar clause in *Powell* v. *Powell*, but it did not there prevail to prevent the purchaser from obtaining the costs which he sought, but in that case there was no notice to rescind, and it is said that the purchaser can ask for no more than what the clause entitles him to and a small sum for costs up to when the notice was given. I am therefore brought back to this: Does the seventh condition apply to such a case as this? The purchaser says No, because there was such a misrepresentation as entitled him to be discharged from the whole contract. It does not matter much for this purpose whether the purchaser issued his summons first or whether the vendor gave his notice to rescind first. It seems to me that if the purchaser is entitled to be discharged on the ground of misrepresentation, that right would not be affected by a notice to rescind under condition 7. But if, on the other hand, he is not entitled to be discharged on the ground of misrepresentation, then the notice to rescind would, although later than the summons, prevent him from getting more. As a matter of fact the notice to rescind was given some time later. Therefore the question is whether the purchaser is entitled to be discharged on the ground of misrepresentation, and if so whether he is entitled to costs as in *Powell* v. *Powell*.

His point is this, the lot in question was advertised as "valuable freehold land, immediately ripe for development as a building estate." There was also a representation that it could "be utilized for the erection of numerous small class houses, for which there is an increasing demand." Whatever else that means, it means that the property is offered as available as building land upon which the purchaser can build houses. That seems perfectly clear. Now, can that be done? In the abstract there was disclosed a certain deed of the 27th of July, 1887, under which Hunter purchased the property from Hudson, which contained certain covenants by Hunter. In the first place there was a covenant that he, his executors, administrators and assigns, would forthwith erect almshouses. That I pass by, because it is clearly only binding upon Hunter and is not enforceable against the purchaser; then the covenant goes on in a negative fashion that he would not allow the land or the buildings to be erected thereon to be used for any purposes whatsoever other than as almshouses. In other words he cannot and will not put up any residences other than almshouses. So far it is a clear contradiction of the statement that this is building land on which the residences mentioned in the description can be erected. Then it is said that this is only a personal covenant; in one sense it is only a personal covenant, but according to well-known principles there is no doubt that it can be so enforced against any assignee of the land, with notice of such a covenant, as that an injunction would be granted to restrain a breach of it. That is clear upon the authorities. To the knowledge of the vendors the land cannot be used for building purposes, contrary to their representation.

Then it is said that there is an objection to this covenant inasmuch as almshouses are a charity, and that therefore the restriction is invalid, but I cannot myself see how a covenant not to build other than almshouses can be treated as offending the rule against perpetuities. It seems to me that the misrepresentation is made worse than ever if the restriction proves to be one that makes the contract useless for every purpose so far as building is concerned.

The vendors have represented that they have a good title, and that the land could be used for a particular purpose—viz., for building, when it could not be, therefore there is a misrepresentation. In such a case does the notice to rescind apply? I think it is out of the question. Lindley, L.J., in *In re Terry and White's Contract*, 34 W. R., at p. 382, said: "However clear a contract may be in its language, it may be rescinded for fraud or material misrepresentation; and cases are reported in which contracts for the sale of land have been rescinded on this ground, although one of the conditions was that no error or misstatement should annul the sales, but should be the subject of compensation. In such cases the fraud or misrepresentation, if sufficiently serious, vitiates the whole contract, including the condition." That is quite consistent with other authorities, and a purchaser is not bound to come and say, "I will rescind the contract and will take what the condition gives me"; he may say "I will have what the law gives me apart from the condition." That really disposes of the case.

But condition 7 further provides that "the vendors . . . shall be at liberty . . . to rescind the contract for sale upon such terms as the judge shall

approve," and then goes on to provide that "the purchaser whose contract is so rescinded shall thereupon be entitled to receive back his deposit, and shall accept the same in discharge of all claims for costs or otherwise, and shall forthwith return all papers in his possession belonging to the vendors." These words seem to me to state clearly and exhaustively what the bargain between the parties is, what the purchaser's position is, what he is entitled to receive, and what he can do; and it seems to leave no room for any discussion as to the terms upon which there is to be rescission by the vendors. I think that the terms have nothing to do with the purchaser, if rescission is not fairly within the contract. The purchaser has nothing to do with approving the terms. I am not sure that the terms are really wanted. What is meant is that sales under the direction of the court often occur in actions between or affecting many parties, such as debenture-holders, and it may well be right that the court should consider on behalf of all parties the terms, if any, on which a contract should be rescinded. I doubt if the words are necessary; the judge must exercise his discretion in each case. I doubt if these words are of any avail; but, if they are, the purchaser has nothing to do with them, and I think the master was right in saying that he could not hear the purchaser. There will, accordingly, be an order as asked: That the purchaser be discharged, and be paid the costs, charges, and expenses incurred by his bidding for and being allowed to be the purchaser of the property as well as the other costs of investigating title and of this application. These costs will come out of the funds in court, without prejudice to the question out of what particular fund they are to be borne.

Solicitors, *E. Elvy Robb; Hare & Co.*, for *Andrew & Cheale*, Tunbridge Wells.

Chan. Div. }
Kekewich, J. } Jan. 18, 25.

In re UNITE, DECEASED.
EDWARDS *v.* SMITH. (*a.*)

Will—Construction—Charity—Gift to be applied under direction of executors—Cy-près.

A testatrix directed her executors to apply a sum to their satisfaction and under their direction towards the enlargement and equipment of a hospital. The enlargements were carried out in the lifetime of the testatrix.

Held, that there was not an immediate gift to the hospital, but that the executors ought to expend so much of the said sum as they thought proper in equipment, and in the event of a balance remaining in their hands, should apply to the court for directions.

Summons.

This was an originating summons taken out by the executors of the will of Anne Maria Unite to determine a question of construction.

By her will, dated the 24th of April, 1902, the testatrix made the following bequest: "I give the sum of £20,000 towards the rebuilding and equipment, to the satisfaction and under the direction of my executors, of the Birmingham and Midland Hospital for Women, the enlargement of which has been recommended, and which charity I have long desired to benfit."

The testatrix died on the 22nd of April, 1905, and her will was duly proved by the executors.

There was no gift of residue in the will.

The enlargements which had been recommended, and which amounted practically to a rebuilding, had virtually been completed in the testatrix's lifetime, but the hospital had neither been furnished or equipped.

Lawrence, K.C., and *Beaumont*, for the next-of-kin.—So far as the sum of £20,000 was to be applied in the enlargement of the hospital this gift fails, and to that extent there is an intestacy. The rebuilding was completed in the testatrix's lifetime and without the approval or direction of the executors. The executors now cannot apply the assets in payment for work done before the testatrix's death.

Ingpen, K.C., and *Sargant*, for the hospital.—This is an immediate gift to the hospital of £20,000 and should be paid by the executors: *Cowper* v. *Mantell*, 4 W. R. 500, 22 Beav. 231; *In re Villiers, Wilkes Bower* v. *Goodman*, 72 L. T. 323, 43 W. R. Dig. 32. Further, it is a charitable bequest, and in case of failure of a part the remainder should be applied *cy-près*. The enlargement of the hospital was merely the motive of the gift: *In re Sanderson's Trust*, 5 W. R. 864, 3 K. & Jo. 497; *Chamberlayne* v. *Brockett*, 20 W. R. 739, 8 Ch. App. 206; *Parnell* v. *Lyon*, 1 V. & B. 479.

Mulligan, K.C., and *Hewitt* appeared for the executors.

Cur. adv. vult.

KEKEWICH, J., in delivering a considered judgment, after reading the portion of the will in question, said: There being considerable difficulty in determining what expenditure, if any, can be sanctioned, it was argued on behalf of the hospital that the words of this bequest really constitute a gift to the charity, so that what cannot be properly expended on rebuilding and equipment belongs to the charity, and may be handed over to it. If that were done the charity would of course not be accountable for the money received, which might be expended on any of the objects of the charity without special regard to rebuilding or equipment. I cannot so construe the gift. There are no doubt authorities, many of which were examined by Wood, V.C., in *In re Sanderson's Trust*, in which it has been held that a specific object may be treated as merely the motive of the gift, and that the gift may be fulfilled notwithstanding that the motive object fails. No one of these authorities deals with a case like the present, which, to my mind, is clearly outside them. Then it was argued that, so far as the specified object fails, the gift might be treated as charitable and applied *cy-pres*. As regards this, suffice it to say that the point cannot be decided in the absence of the Attorney-General, and if in the event, there is money remaining after the application of what can be properly applied in rebuilding and equipment an adjournment must be made in order to bring the Attorney-General before the court. Unfortunately the facts do not render much assistance in construing the will. The testatrix herself tells us that she has long desired to benefit the hospital, and that the enlargement of it had been recommended, and that is about all we know. No definite steps were taken until after her death, and it seems that it was not settled until after that event what should be done. It is said that the executors have been kept aware of the progress of enlargement, and that they have seen what has been done in the way of building and equipment, but they disclaim having hitherto exercised any discretion under the will. It will, I think, be necessary for them to consider carefully how far they have been made acquainted with what was being done, and how

(*a.*) Reported by H. WOLCOTT WARNER, Esq., Barrister-at-Law.

far, if at all, they have assented to it, and in order to enable them to perform this duty, and also to determine how far they may exercise their discretion in the future, I propose to state for their guidance my critical interpretation of the will. If the words "to the satisfaction of my executors" stood alone I think it would be competent for them even now or at any future time to say that what had been done in the matter of rebuilding and equipment, though without their having been consulted or having been acquainted with it, might be paid for to the extent of £20,000, less duty, out of the assets. I do not think that "satisfaction" alone means more than that the executors must honestly consider whether what has been done meets with their approval or not. But the testatrix provides that the rebuilding and equipment towards which the £20,000 is to be devoted must be done "under the direction of the executors," and it is not easy to say what this means. It certainly does not mean that the executors must act as a clerk of the works or a superintending architect. I do not think that it postulates the submission of plans to the executors and their approval of such plans. It does, however, I think, postulate general guidance or control. They cannot be said to have directed acts of the intention to execute which or of the execution of which they were wholly ignorant. In other words, they cannot properly be said to have given directions for works after those works were completed. On the other hand, I think that if they were made aware that certain works of which they had a general knowledge were proposed to be executed, and they gave their assent to the execution thereof as being proper for the rebuilding and equipment of the hospital on being satisfied of their proper execution, they might contribute to the expenditure to the extent of the fixed sum. And in exercising their discretion they would be justified in giving a liberal construction to the word "rebuilding," especially as the testatrix indicates by her own language that enlargement comes within it. "Equipment" scarcely needs definition, but it may be useful to add that, in my opinion, it covers anything and everything required to convert an empty building or part of an empty building into a hospital or part of a hospital with all modern appliances. Further, I cannot see that any limit of time is fixed. I do not think that the executors would be justified in spending all that could reasonably be spent up to a particular date, and then saying that, although apparently nothing remained to be done, yet some further work not yet contemplated might be required at a future time. But until the hospital has been fully rebuilt and fully equipped, an event the date of which it would be extremely hard to fix, I think that the discretion remains exercisable. When the executors have carefully considered all this, it may be that they will find the full amount at their disposal reasonably required for purposes to which they may properly apply it, and, on the other hand, it may be that they will find themselves possessed of a substantial balance. On their report of the result I shall be prepared to give them directions, and, if necessary, to provide for service on the Attorney-General, but in the meantime the summons stands adjourned. It will be convenient to have the report in writing either in an affidavit or (perhaps better) in a statement exhibited to an affidavit.

Solicitors for the executors, *Stow, Preston, & Lyttelton*, for *A. Pointon*, Birmingham.

Solicitors for the next-of-kin, *H. Tyrrell & Son*, for *J. B. Clarke*, Birmingham.

Solicitors for the hospital, *Beale & Son*.

Chan. Div. Swinfen Eady, J. } Nov. 30; Dec. 1, 2, 4, 5, 6, 21.

BOSCHOEK PROPRIETARY CO. (LIMITED) v. FUKE. (a.)

Company— Directors—Qualification—Shares held "as liquidator of H. Co."—Income tax on directors' fees—Meeting convened by acting directors—Valid resolutions—Ratification of ultrà vires *acts—Notice of business.*

Where the qualification of a director was the holding of shares "in his own right," shares held as "liquidator of the H. Co.,"

Held, not to be a good qualification.

Sutton v. English and Colonial Produce Co, 50 *W. R.* 571, [1902] 2 *Ch.* 502.

Unless allowed by the articles, directors may not be paid income tax on their fees.

A general meeting was convened by three de facto *directors irregularly appointed.*

Held, that the resolutions passed thereat were valid.

Browne v. La Trinidad, 36 *W. R.* 289, 37 *Ch. D.* 1; Southern Counties Deposit Bank v. Rider, 73 *L. T.* 374, 44 *W. R. Dig.* 32; *and* British Asbestos Co. v. Boyd, 51 *W. R.* 667, [1903] 2 *Ch.* 439.

Articles fixing the qualification and remuneration of directors must be altered by the company before ratifying acts done in contravention of them.

Imperial Hydropathic Hotel Co., Blackpool v. Hampson, 31 *W. R.* 330, 23 *Ch. D.* 1.

The notice convening a general meeting stated that directors were to be appointed. The report sent with the notice stated that the meeting would be asked to ratify the election of R. as a director.

Held, that this was sufficient notice of this particular business.

Irvine v. Union Bank of Australia, 25 *W. R.* 682, 2 *A. C.* 366.

Action.

This was an action brought by the plaintiff company against the defendants F. G. Fuke and C. O. Rigby, two of the late directors of the company, to recover certain payments alleged to have been improperly made.

The plaintiff company was incorporated in 1895 with a capital of £360,000 in £1 shares to acquire certain South African mines. 300,000 shares were issued as fully paid to the vendors, the Heidelburg Estates and Exploration Co. (Limited). The remaining 60,000, except seven, were unissued, but in 1899 the company borrowed £17,500 from the Heidelburg Co. on debentures.

In 1896 the defendant Fuke was appointed secretary at £100 a year, and continued secretary until the 25th of March, 1903. In 1898 the directors resolved that the £500 remuneration, which was the maximum that by article 77 the directors were entitled to receive, should be allotted £200, to the chairman and £100 to the three other directors, article 64 providing that there should never be less than four directors.

On the 27th of February, 1900, the Heidelburg Co. went into voluntary liquidation, and Fuke was appointed liquidator of that company, which then held 275,000 shares and £17,500 debentures of the plaintiff company; the liquidator subsequently recovering 500 more shares on a claim against certain of the shareholders. These shares were transferred to, and on the 6th of September, 1901, were registered in the name of "F. G. Fuke, liquidator of the Heidelburg, &c., Co. (Limited)."

In 1901 only two directors were left, and on the 4th of December, 1901, these directors purported to hold a

(a.) Reported by C. H. CARDEN NOAD, Esq., Barrister-at-Law.

board meeting and to pass the following resolution: "That Mr. F. G. Fuke be, and is hereby appointed, managing director of the company at a remuneration of £700 per annum for a period of two years, and to be at liberty to retain his position as secretary of the company at a salary of £100 per annum, provided that the said F. G. Fuke draws only at the rate of £200 per annum as managing director until the working capital of the company of £60,000 or part thereof has been subscribed."

No part of the £60,000 was in fact subscribed, but Fuke subsequently obtained the entire £700 per annum. The resolution itself was called in question by the company because there were not then, as required by article 64, four directors; there was no power in the articles to appoint a managing director; Fuke had no share qualification "in his own right" (article 66 providing that a director must hold 250 shares "in his own right"); and there was no power to grant remuneration to the directors in excess of a maximum of £500 (article 77).

On the 19th of August, 1902, one of the remaining directors died, and on the 28th of January, 1903, the other remaining director transferred his shares and ceased to be a director.

On the 2nd of February, 1903, Fuke purported, as sole director, to hold a board meeting, and passed transfers of 250 qualifying shares to himself and to two others, a Mr. Hughes and the defendant Rigby, but Fuke was not subsequently appointed a director.

On the 3rd of February, 1903, Fuke purported to hold another board meeting, and appointed Hughes and Rigby directors.

On the 5th of February, 1903, these three directors held a board meeting and a minute was made: "It being stated that it is usual for the tax on managing directors' fees to be paid by the companies, it was resolved that the sum of £8 4s. 3d., income tax on the managing director's fees, be paid out of the funds of the company." At a subsequent board four days later cheques were drawn for income tax on the fees of the three directors.

Question arising as to the validity of some of the acts of the directors counsel's opinion was taken and a general meeting was convened for the 25th of May, 1903, to pass certain resolutions:

1. To reduce the minimum number of directors to two.

2. To give power to appoint a managing director and fix his remuneration.

3. To make past acts done by persons acting as directors binding on the company.

4. To ratify the board's resolution of the 4th of December, 1901, as to appointing Fuke managing director at £700 a year.

At the general meeting these resolutions were passed and the first two duly confirmed by an extraordinary general meeting on the 11th of June, 1903. It was now said by the plaintiff company that there was no board competent to summon the meeting, and that the third and fourth resolutions could only be passed after the articles infringed had been altered by special resolution.

On the 31st of July, 1903, notice of the ordinary general meeting was given for the 10th of August, among other purposes, for the election of directors. The directors' report which accompanied the notice contained a statement: "Directors.—You will be asked to ratify the election of Mr. C. O. Rigby as a director, also to elect a new director"—Hughes having in the meantime resigned. At the meeting held on the 10th of August, 1903, the election of Rigby as a director was confirmed as from the 3rd of February, 1903. On this resolution Rigby now claimed that he had been director from the 3rd of February, 1903, to March, 1905, when he retired, and was entitled to two years' salary at £100 in consequence. He had received, in fact, £190.

In January, 1905, the Heidelburg Co. was reconstructed in order to carry out a scheme for financing the plaintiff company. Fuke represented that the debts of the plaintiff company up to date could be paid off for about £2,000, without, however, disclosing that the money was chiefly wanted, not to cover liabilities of the company which he had met personally, but in payment of the undrawn balance of his own past remuneration at £700 a year. The money was raised by the new Heidelburg Co. and paid to Fuke, who relied on two general meetings on the 28th of January and the 25th of February, 1905, as ratifying these payments, though upon the evidence it was shown that the object of the payments was never explained to the shareholders. On the 13th of March, 1905, the reconstruction was completed by the appointment of new directors of the plaintiff company and the resignation of Fuke and Rigby.

Eve, K.C., and *Felix Cassel*, for the plaintiff company.

Micklem, K.C., and *F. Russell*, for the defendant Fuke.

Gore-Browne, K.C., and *Austen-Cartmell*, for the defendant Rigby.

Cur. adv. vult.

SWINFEN EADY, J., in a considered judgment, said: The principal defendant is Francis George Fuke, and the main ground of complaint against him is that, being liquidator of a company which held nearly all the share capital of the plaintiff company, he obtained the appointment of himself as managing director of the plaintiff company at an extravagant salary of £700 a year, when there was really no business whatever to manage, and no board duly constituted to appoint him, and when he himself was not even qualified to be a director in accordance with the articles, and that he has obtained payment of this amount although the event upon which £500 a year out of the £700 a year was to become payable has never happened, and that the transaction has never been duly ratified by the company. There are other claims as to a sum drawn for income tax and as to a payment to the defendant Rigby of directors' fees. [His lordship then stated the facts above-mentioned down to the 4th of December, 1901, and the circumstances under which the resolution of that date appointing Fuke managing director at £700 a year was passed, and continued:] This resolution is, in my opinion, invalid. By article 64 the number of directors should not be less than four. By article 77 the directors were to be entitled to receive by way of annual remuneration a maximum sum of £500, with a percentage of profits (if any), such remuneration to be divisible as the board might determine. The articles do not contain any provision enabling the board to appoint any managing director. Under these circumstances it was quite beyond the powers of the two remaining directors to appoint a third person (even if qualified to be a director) to be managing director of the company at a salary of £700 a year. The question, however, has been raised as to whether Fuke was qualified to be appointed a director. By article 75 any occasional vacancy in the office of director may at all times be filled up by the board by the appointment of a qualified member. By article 66 the qualification of a director is the holding in his own right of at least 250 shares, and by article 72 every director shall vacate his office on ceasing to hold his qualifying number of shares. It was contended that article 66 only required a qualifica-

tion in the case of the first directors appointed by the subscribers to the memorandum, but, having regard to articles 72 and 75, this contention is not, in my opinion, well founded. Then was Fuke "a qualified member"? The 250 shares which are claimed as a qualification were entered in the company's register as follows: "Francis George Fuke, liquidator of the Heidelburg Estates and Exploration Co. (Limited), 167, Winchester-house, Old Broad-street, London." Did Fuke hold these shares "in his own right"? In *Bainbridge* v. *Smith*, 37 W. R. 594, 41 Ch. D. 462, 474, Lindley, L.J., pointed out that the phrase "holding shares in his own right" had acquired a conventional meaning, and added, "I think that conventional meaning is this—that a person 'holding shares in his own right' means holding in his own right as distinguished from holding in the right of somebody else. . . . It means that a person shall hold shares in such a way that the company can safely deal with him in respect of his shares, whatever his interest may be in the shares." I therefore ask myself these two questions: (1) Did Fuke hold in his own right, as distinguished from holding in the right of somebody else; and (2) could the plaintiff company have safely dealt with him in respect of these shares, whatever his interest in the shares might be? In my opinion the first question should be answered in the negative. Fuke held the shares in right of the Heidelburg Estates and Exploration Co. (Limited), and not in his own right. Suppose he had been described on the register of the company as "F. G. Fuke, trustee of A. B., a bankrupt," or as "F. G. Fuke, executor of C. D., deceased," in neither case would he have held shares in his own right, but in the former case in right of the bankrupt, and in the latter in right of the testator. So in the present case the description of him on the register as "liquidator of the Heidelburg Estates and Exploration Co. (Limited)" shows that he holds the shares in right of that company, and in his capacity of liquidator of that company. If, on the other hand, he had been registered as "F. G. Fuke, of &c., accountant," he would have held the shares in his own right within the meaning of the decisions, although he might in fact have been trustee of a bankrupt, or executor of a deceased person, or liquidator of a company. In the present case I am not considering whether it is usual or proper for a shareholder to be put upon the register with the description "trustee of A. B., a bankrupt," or "executor of C. D., deceased," or "liquidator of the X Co." I am only considering what is the effect of such a registration. I am also of opinion that the second question, previously mentioned, should be answered in the negative. The plaintiff company could not safely deal with Fuke in respect of the 250 shares, whatever his interest might be in the shares as they had notice that he held them as liquidator of the Heidelburg Co. Suppose the plaintiff company had taken them as security for an overdue debt owing by Fuke personally, could the company have pleaded that they took them in good faith and without notice that they belonged to the Heidelburg Co., of which Fuke was liquidator? Certainly not; the plaintiffs' own register shows that it is as liquidator of the Heidelburg Co. that the shares stand in Fuke's name. In like manner, if the shares had been registered "F. G. Fuke, executor of C. D., deceased," the plaintiff company could not have taken them by way of security from F. G. Fuke for a private debt of his own, and then successfully contended that they had no notice that Fuke was only entitled to the shares as executor of a deceased person. If, on the other hand, the shares had been registered simply "F. G. Fuke, of &c., accountant," then the plaintiff company could have safely dealt with Fuke on the footing that he held the shares in his own right, even though in point of fact he might have held them as executor of a deceased person or liquidator of a company: see also *Sutton* v. *English and Colonial Produce Co.*, 50 W. R. 57, [1902] 2 Ch. 502. I decide, therefore, that the 250 shares were not a qualification for Fuke within the meaning of the articles. [His lordship then detailed the history of the board from the time of Fuke's appointment on the 4th of December, 1901, down to his appointment of Hughes and Rigby to act as directors of the plaintiff company together with himself.] The first act of the board so constituted is thus recorded in the minutes—"5th of February, 1903. Present: F. G. Fuke, managing director, in the chair, T. Hughes, C. O. Rigby. It being stated that it is usual for the tax on managing directors' fees to be paid by the companies, it was resolved that the sum of £8 4s. 3d., income tax on the managing directors' fees, be paid out of the funds of the company." Another board, similarly attended, was held on the 9th of February, 1903, when the only business was drawing a cheque for income tax on the fees of three directors — Fuke received £8 4s. 3d. This transaction is, in my opinion, quite unjustifiable. Even if the board had been duly constituted, they would have had no right whatever to take out of the company's moneys the sums which each director ought to pay out of his own money for any income tax properly payable by him. The defendants are jointly and severally liable for this misapplication of the moneys of the company, and must repay the amount with interest.

I now proceed to consider the alleged confirmations by the company in general meeting of Fuke's position and salary. Questions were raised as to the validity of the past acts of the directors; the opinion of counsel was taken, certain alterations of the articles were recommended, and on the 14th of May, 1903, at a board meeting, the secretary was instructed to convene a general meeting of the company for the 25th of May, 1903. The plaintiffs have objected to the validity of any resolutions passed at this meeting on two grounds. The first ground is that there was no duly constituted board which could validly convene a general meeting of the company. This meeting was called by the only persons acting as directors, and the persons who for upwards of three months had been acting as the board; the resolution for calling it was passed at a board meeting; notice of it was duly sent to every shareholder, and one of the objects of the meeting was to confirm the acts theretofore done by persons purporting to act as directors. Under these circumstances, I must consider any informality in convening the meeting as a mere irregularity, and not sufficient to invalidate any resolution passed at it. The case is governed by *Browne* v. *La Trinidad*, 36 W. R. 289, 37 Ch. D. 1; *Southern Counties Deposit Bank* v. *Rider*, 73 L. T. 374; and *British Asbestos Co. (Limited)* v. *Boyd*, 51 W. R. 667, [1903] 2 Ch. 439.

The second ground on which the plaintiffs have objected to the validity of the third and fourth resolutions passed at this meeting is that they could only have been properly passed after the articles had been altered by special resolution. The company in general meeting could not appoint, and could not ratify, as from December, 1901, the appointment of Fuke as managing director at £700 per annum, as he had not the necessary qualification, and the maximum remuneration of the whole board was fixed by the articles at £500. The articles, until altered, bound the shareholders in general meeting as much as the board. The present case is unlike that of *Irvine* v. *The Union Bank of Australia*, 25 W. R. 682, 2 App. Cas. 366, to which reference was made, as in that case the

limitation of the power of borrowing and mortgaging was merely a limitation of the authority of the directors, and not a limitation of the general powers of the company. It was there argued that the acts of the directors in excess of their authority might be ratified by the company and rendered binding, and that contention succeeded. Articles must first be altered by special resolution before the altered articles can be acted upon: *Imperial Hydropathic Hotel Co., Blackpool*, v. *Hampson*, 31 W. R. 330, 23 Ch. D. 1. It was urged that there was power under article 77, if in the opinion of the board it was desirable that any of their number should perform any special services, to pay him additional remuneration, but there was no duly constituted board to form any such opinion, and that is a condition precedent (see *Caridad Copper Mining Co.* v. *Swallow*, 50 W. R. 565, [1902] 2 K. B. 44); moreover, no special services are referred to either in the board minutes or the minutes of the general meeting, and the company did not purport to exercise this power in any way. It was further urged on behalf of Mr. Rigby that he ought not to be under any liability in this matter as he was acting in good faith under the advice of counsel, and without objection the opinion was put in evidence, but when looked at it is clear that counsel advised that all the resolutions should be passed as special resolutions, and not merely the first and second; and, moreover, the payment really impeached in this action was made long afterwards, during the present year, and after the question as to it has been raised. [His lordship then discussed the circumstances of the reorganization of the new Heidelburg Co. and the alleged ratification by the plaintiff company, under the scheme then on foot, of the payments made by the Heidelburg Co. to Fuke in respect of the undrawn balance of his £700 a year, and decided that there had been no such ratification. The nature of the claim, in which Fuke had such a large personal interest, had never been properly placed before the shareholders of the plaintiff company or of the Heidelburg Co. The payments so made were a misapplication of the funds of the company for which the defendants were jointly and severally liable. His lordship then continued:] The remaining claim is as to Rigby's remuneration. It is alleged that he only served as director one complete year, for which he was only entitled to £100, but nevertheless has been paid £10 and £180 10s. 8d., making together £190 10s. 8d. The argument that Rigby had not served two complete years was based on the contention that his election or appointment by Fuke on the 3rd of February, 1903, had not been duly ratified or confirmed by the company in general meeting on the 10th of August, 1903, because sufficient notice had not been given that the matter would be dealt with at that meeting. The report of the directors is dated the 31st of July, 1903, and was sent out with the notice convening the ordinary general meeting for the 10th of August, 1903. The report contains this paragraph: "Directors,—You will be asked to ratify the election of Mr. C. O. Rigby, as a director; also to elect a new director," and the notice convening the meeting states that the meeting will be held for the purpose of receiving the directors' report, and accounts, to the 30th of June, 1903, and the election of directors and auditors. In my opinion this was sufficient notice to the shareholders of the intention to bring before the meeting the ratification of Mr. Rigby's election: see *Irvine* v. *Union Bank of Australia*, where Sir Barnes Peacock, in delivering the judgment of the court, said that their lordships "are not prepared to say that if a report had been circulated before a half-yearly meeting distinctly giving notice that the directors had done an act in excess of their authority, and that the meeting would be asked by confirming the report to ratify the act, this might not be sufficient notice to bring the ratification within the competency of the majority of the shareholders present at the half-yearly meeting." In my opinion this report and notice given amounted to sufficient notice of the business which was intended to be brought forward at the meeting—namely, to ratify the election of Mr. Rigby. The result, therefore, is that this claim fails. The defendants must pay the costs of the action except so far as increased by the claim for alleged excess of remuneration paid to Rigby; the plaintiffs must pay the costs of the action so far as increased by this claim, with the usual set-off.

Solicitors, *Mayo, Elder, & Co.; Charles Robert Woolley.*

K. B. Div.
(Lord Alverstone, L.C.J., and Lawrance and Ridley, JJ.) — Dec. 19.

BROWN (*Appellant*) v. LEGGETT (*Respondent*). (*a.*)

Pharmacy Acts—Poisons—Alleged illegal sale to a person then unknown to seller—Rankin's Ointment—Vermin killer—Resolution that article be deemed poison—Pharmacy Act, 1868 (31 & 32 *Vict. c.* 121), *ss.* 2, 17.

By resolution passed in pursuance of section 2 *of the Pharmacy Act*, 1868, *the Pharmaceutical Society of Great Britain declared that "vermin killers" should be deemed to be poisons under Part II. of the schedule to the Act. The appellant was convicted of selling a vermin killer, which was a compound article containing a percentage of a poison included in Part I. of the schedule, "to a person then unknown to him, and who was not introduced to him by some person known to him," contrary to section* 17 *of the above Act.*

Held, that the conviction was wrong, because the society had power to declare what articles should be deemed to be poisons under Parts I. and II. respectively of the schedule to the Act.

Case stated by the stipendiary magistrate of the City of Leeds (C. M. Atkinson, Esq.), raising for decision the question whether the sale of a certain poison, named in the first part of Schedule A to the Pharmacy Act, 1868, when compounded with another substance was an offence within section 17 of the same Act.

The following were the material facts stated:

The appellant was charged with unlawfully selling a certain poisonous vegetable alkaloid, being a poison named in the first part of Schedule A to the Pharmacy Act, 1868—to wit, veratrine—to one Margaret McCann, who was then a person unknown to him, the said Margaret McCann not being then introduced to him by some person known to him contrary to the form of the statute. The appellant was a registered chemist and druggist, carrying on business at a shop in Leeds, and was duly qualified. On the 27th of July, 1904, the appellant sold at his shop to Margaret McCann a packet containing 228 grains of a substance known as "Rankin's Ointment," to which was affixed a label distinctly and legibly printed in the words following: "Rankine's ointment for destroying vermin in the head. Trade 15,658 Mark. Tins 6d. and 1s. Poison. Not to be applied where the skin is broken. Price 6d." Rankin's Ointment was a compound composed and sold for the destruction of vermin.

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

Margaret McCann was a person then unknown to the appellant, and was not then introduced to him by any person known to him. The said packet contained 2 2-5 grains (equivalent to 1 per cent.) of certain poisonous vegetable alkaloids. On analysis these were found to consist to a very large extent (about 90 per cent.) of pure alkaloid veratrine, which is a poisonous vegetable alkaloid. This quantity was sufficient, if the ointment in the packet were taken internally by an adult human being, to cause purging and vomiting and possibly a fatal result.

Section 17 of the Pharmacy Act, 1868 (31 & 32 Vict. c. 121) provides as follows: "It shall be unlawful to sell any poison either by wholesale or retail unless the box, bottle, vessel, wrapper, or cover in which such poison is contained be distinctly labelled with the name of the article and the word 'poison,' and with the name and address of the seller of the poison; and it shall be unlawful to sell any poison of those which are in the first part of Schedule A to this Act, or may be hereafter added thereto under section 2 of this Act, to any person unknown to the seller unless introduced by some person known to the seller, and on every sale of any such article the seller shall, before delivery, make, or cause to be made, an entry in a book to be kept for that purpose stating in the form set forth in Schedule F to this Act the date of the sale, the name and address of the purchaser, the name and quantity of the article sold, and the purpose for which it is stated by the purchaser to be required, to which entry the signature of the purchaser and of the person, if any, who introduced him shall be affixed; and any person selling poison otherwise than is herein provided shall, upon a summary conviction before two justices . . . be liable to a penalty not exceeding £5 for the first offence and to a penalty not exceeding £10 for the second or any subsequent offence. . . ."

Part I. of the schedule comprises (*inter alia*) "all poisonous vegetable alkaloids and their salts."

Section 2 of the Pharmacy Act, 1868, provides as follows: "The several articles named or described in the Schedule A shall be deemed to be poisons within the meaning of the Act, and the Council of the Pharmaceutical Society of Great Britain may from time to time, by resolution, declare that any article in such resolution named ought to be deemed a poison within the meaning of this Act; and thereupon the said society shall submit the same for the approval of the Privy Council, and if such approval shall be given, then such resolution and approval shall be advertised in the *London Gazette*, and on the expiration of one month from such advertisement the article named in such resolution shall be deemed to be a poison within the meaning of the Act."

In pursuance of this section the Pharmaceutical Society, on the 1st of December, 1869, declared by resolution that certain articles named therein ought to be deemed poisons within the meaning of the Act, which resolution was duly approved and advertised. The articles were (*inter alia*) preparations of prussic acid, strychnine, atropine, corrosive sublimate, morphine, and every compound containing any poison within the meaning of the Pharmacy Act, 1868, when prepared or sold for the destruction of vermin.

The magistrate was of opinion that vermin killers containing, in dangerous quantities, poisons within Part I. of the schedule fell within that part of the schedule, and he accordingly convicted the appellant.

Sir Edward Clarke, K.C. (*Bonsey* and *Glyn-Jones* with him), for the appellant.—Compounds containing poisonous vegetable alkaloids are not within Part I. of the schedule, and the words "poisonous vegetable alkaloids and their salts" in Part I. do not include compounds merely containing some poisonous vegetable alkaloid. A compound containing such alkaloids has been declared a poison, but it has not been declared a poison within Part I. The magistrate came, therefore, to a wrong conclusion when he accepted the contention of the respondent that a compound containing a poisonous vegetable alkaloid "in dangerous quantities" was to be regarded, for the purpose of section 17 of the Act of 1868, as the alkaloid itself, and therefore as a poison which could only lawfully be sold under the restrictions imposed upon the sale of articles included in Part. I. of the schedule. Moreover, inasmuch as the resolution of 1869 did not place vermin-killer within Part I. of the schedule, it must be taken that "every compound containing any poison within the meaning of the Pharmacy Act, 1868, when prepared or sold for the destruction of vermin" is comprised within Part II. of the schedule. Moreover, certain substances containing poisons within Part I. have been placed by subsequent legislation in Part II. of the original schedule: see note to Part 2 in Chitty's Statutes, where the additions which were made to that part of the schedule in 1869 by the Privy Council are referred to. That was done exactly in terms in the Sale of Poisons (Ireland) Act of 1870 after the resolution of the Pharmacy Society. Admitting this ointment is a poison, and must be so labelled and have the name and address of the seller on it, nevertheless it is not one of those specified in the schedule in Part I., and therefore the conviction for alleged non-compliance with section 17 of the Act of 1868 by the appellant was wrong, and should be quashed.

D. M. Kerly, for the respondent.—The ointment contains a dangerous quantity of "poisonous vegetable alkaloids" which are expressly included in Part I. of the schedule, and as the penal sections of the Pharmacy Act are not confined to the sale of the scheduled poisons in their simple state or of the preparations of such poisons, but extend to the sale of a mixture or compound containing a scheduled poison, the conviction was right: *Pharmaceutical Society* v. *Piper & Co.*, 41 W. R. 447, [1893] 1 Q. B. 686; *Pharmaceutical Society* v. *Armson*, 42 W. R. 662, [1894] 2 Q. B. 720. The defence here is that the appellant sold poison *plus* something else. But the sale of a scheduled poison is none the less a poison within the schedule because it has been mixed with other articles so as to constitute a compound. Vermin-killers containing poisons within Part I. of the schedule were not intended to be withdrawn by resolution from Part I., even if the Act conferred power on the council of the society so to withdraw them. It was argued by the appellant that it was quite consistent with the terms of the resolution to hold that vermin-killers containing poisons in Part I. fell within Part I., while vermin-killers containing poisons in Part II. fell within Part II. At the date of the resolution none of the cases as to the sale of mixtures or compounds had been decided, and that is the probable explanation why vermin-killers were specifically mentioned. If the appellant's contention is upheld strychnine and other deadly poisons in the form of vermin-killers could be obtained by all persons indiscriminately and in any quantity, without record or inquiry of any kind.

Sir Edward Clarke, K.C., in reply.—Unless the court is prepared to hold that the resolution of the society of 1869 was *ultra vires* the conviction cannot stand. Vermin-killers were not placed by that resolution in Part I. of the schedule and therefore must be deemed to be in Part II., to which section 17 does not apply. The words in the order are "Every compound containing any poison within the meaning

of the Pharmacy Act, 1868, when prepared or sold for the destruction of vermin." The Irish Act of 1870 (33 & 34 Vict. c. 26) followed the resolution of 1869 and adopted the additions to the English Act of 1868 made by that resolution The two cases cited do not deal with the point in this case.

Lord ALVERSTONE, L.C.J.—This is an interesting case, but the arguments raised involved weightier considerations than I think were really necessary or material for the purpose of considering this case. For myself I do not question the correctness of the bulk of Mr. Kerly's argument. If he is right in saying that we must regard this stuff as containing an ingredient or poison named in the first part of Schedule A, I think it would be an offence under section 17 to sell that without knowing the vendee or without the vendee being introduced by some person known to the seller. In my judgment the fact that a poison named in the first part of the schedule is mixed with some other ingredient does not the less make it the sale of a poison. As I put it to Sir Edward Clarke in his reply, "You do not contend that if a seller had mixed prussic acid with flour he could sell it as a vermin killer without infringing the Act, and without knowing the person to whom it was vended and without the purchaser being introduced by some person known to the seller." Therefore the major proportion of the argument we have heard from Mr. Kerly in this case seemed to me not to touch the real point. In my opinion the case turns on whether the order of the Pharmaceutical Society was *ultrà vires* or not. Although I would not hesitate to declare an order *ultrà vires* if it appeared to me to contravene the clear meaning of the statute, in my judgment—after considering, with the advantage of the argument we have had — that cannot be contended in this case. The schedule, so far as this case is concerned, cannot be said to enumerate veratine or to name veratine. The part of the schedule it is said to come under, are the words "strychnine &c., or any poisonous vegetable alkaloids or their salts." I think the general idea of this Act was, that being the case, that the Pharmaceutical Society should have power to say which things ought to be deemed to be poisonous within one part of the schedule or the other. I was at first a little troubled by the suggestion that the Pharmaceutical Society had not the power to say that things were poisons, but I think when you observe that the Act has specified the two parts of the schedule, and says that the several articles named or described shall be deemed to be poisons, and that the council may from time to time declare on the resolution of the Pharmaceutical Society that any articles are to be deemed poisons within the meaning of this Act. That involves the power of putting the article which they deem to be poison, in one part of the schedule or the other; otherwise they cannot work the Act. I think, therefore, that there is a necessary implication of the power given to the Pharmaceutical Society to say in which part of the schedule a particular thing which is deemed to be poison is to go. That being so, it is properly conceded by Mr. Kerly that unless he can make out that this particular article is named in the first part of the schedule, the order of the Pharmaceutical Society is invalid. But he contends that, in so far as that it must either be read as including the compound of an article specially named in the first part, or that in so far as it did include the compound of an article named in the first part it would be *ultrà vires*. Now, quite apart from the Irish statute I should come to the conclusion that the society had got the power to make the resolution or order of 1869. The order follows the actual words of section 2, and therefore it cannot be suggested that it does not purport to be made under it. They recommend and declare that certain things ought to be deemed to be, some in the first part and others in the second: and in the second paragraph they have included two classes of articles which touch this very question, thus: "Every compound containing any poison within the meaning of the Pharmacy Act, 1868, when prepared or sold for the destruction of vermin," preparations of prussic acid, preparations of strychnine, and so on; the last two come within the four articles named, and they put them into Part I. As to the others, they put them into Part II. Now, in my judgment, it was not *ultrà vires* to declare that an article or preparation which contained some poisonous matter, but was if I may use the expression, a mere mixture of poisonous matter with something else, was to go into the second part. I think it quite impossible to overlook the legislation of the year 1870. There is no reason why in such a matter as the sale of poisons there should be different restrictions or a different power with regard to one part of the United Kingdom from another part. And when you find that in 1869 the Pharmaceutical Society made this order, in which order they have purported, as I have already pointed out, to put into the second part every compound containing poison prepared or sold for the destruction of vermin; and that Schedule A of the Act of 1870 puts into the second part in terms those very words, I think it is a legislative recognition of the power of the Pharmaceutical Society to make the order, because the Pharmacy Act, 1868, was supplemented by the Pharmaceutical Society's order of 1869; and the later Act in Ireland was a statute which embodied, so far as it had then gone, the wisdom of the Pharmaceutical Society with regard to other matters. All I desire to say is that I do not express any doubt upon the suggestion made by Sir Edward Clarke that it may turn out that in some later orders they have done exactly the same thing. I do not pretend to have, and I do not think any judge of the High Court should assume to have, the knowledge which would enable him to know whether an article does come within the first part of the schedule, unless it be either admitted or the fact is found for him. I am not saying there were other instances, but if there were, they would show that from time to time this power did rest with the Pharmaceutical Society. I desire only to add, as a matter of precaution, this: Of course, we know now from the statements made that this verative is a poisonous vegetable alkaloid, and that there is some portion of it in this vermin-killer. Of course, with the knowledge we have now, that involves the knowledge of the very fact which the Pharmaceutical Society would know about. It would show good sense and wise legislation to make an authority of that kind declare for the benefit of the public what ought to be deemed poisons within the one branch or the other. Of course, it must not be supposed that I suggest that the sale of a named poison mixed with something else would not be a sale under section 17. I repeat that I do not in any way throw the slightest doubt on that part which I think is concluded by the language of the section itself and by the judgment of the Court of Appeal. But I come to the conclusion that the order of 1869 is a perfectly valid order and that, therefore, the sale of the article was quite justified by the Act and order and was not the sale of a poison named in Part I. of Schedule A. It was a poison, and therefore required to be labelled poison and have the name of the seller on the box. But it was not a poison in the first part of Schedule A which required to be

sold only to a person known to the vendor or introduced by a person known to him. I think the appeal, therefore, ought to be allowed, with costs.

LAWRANCE, J.—I concur, and I have nothing to add.

RIDLEY, J.—I agree. I think the Pharmaceutical Society had power to pass the resolution on which the Privy Council made their order.

Appeal allowed with costs.

Solicitors for the appellants, *E. Beck & Kirby.*

Solicitors for the respondent, *Markby, Stewart, & Co.*

House of Lords.

From C. A. (England). Dec. 15.

CALTHORPE *v.* TRECHMANN.
MACLEAY *v.* TAIT. (*a.*)

Company—Prospectus—Directors' liability—Omission to state contract—Proof of damage—Waiver clause—Companies Act, 1867 (30 & 31 *Vict. c.* 131), *s.* 38.

In an action against directors by a shareholder who has taken shares on the faith of a prospectus claiming damages under section 38 *of the Companies Act,* 1867, *it is necessary for the plaintiff to prove that he has sustained damage by reason of the non-disclosure of a material contract required to be disclosed by that section, and also that had he been aware of it he would not have taken the shares. Where there is no actual fraud, but a mistake honestly made by the directors, a waiver clause as to any fuller compliance with section* 38 *of the Companies Act,* 1867, *is a sufficient answer to the action.*

Decision of the Court of Appeal ([1904] 2 *Ch.* 681) *reversed.*

In these two actions the respective plaintiffs sought to recover damages under section 38 of the Companies Act, 1867, against the directors of the Standard Co. under circumstances which are given in some detail in the judgment of Lord Lindley.

The Court of Appeal had held that the prospectus issued was to be considered fraudulent under the statute.

Haldane, K.C., Gore-Browne, K.C., and *Cozens-Hardy,* for the appellants in the first action.

Younger, K.C., and *Ashton Cross,* for the appellants in the second action.

Hughes, K.C., and *W. Higgins,* for the respondents.

Earl of HALSBURY, L.C.—Both these actions are actions for damages brought by the respective plaintiffs, who complain that they have been injured by the fraud of the defendants, and claiming damages for the loss they have sustained by the fraud of which they complain. As the actions are identical in their merit, I will, in what I have to say hereafter, treat the matter as if there were one plaintiff and one defendant. But for the thirty-eighth section of the Companies Act it is certain that neither of these actions could have been brought; and the real question to be debated is whether that section does, or rather did, more than enact where a contract which ought to have been inserted in a prospectus is omitted, that such omission shall be held to be fraudulent. That is what the section in terms enacts, and I think it decides no more. Now, in order to entitle the plaintiff to recover damages where he sues for damage suffered he must prove that he sustained them, and as one step towards that proof he must show that he acted on the faith of that fraudulent statement. It is an old judicial observation that fraud without damage or damage without fraud will found no action. Now, in this class of case, where misstatements are made in a prospectus and people have been led to take shares the taking of which has led to loss, I have often said that it is quite a fair inference to draw—if the prospectus is calculated to induce people to take shares and they do take shares—that the prospectus, tainted with falsehood as it is, be acted on as a whole—that people cannot be expected to analyze their own mental sensation so minutely as to be able to explain what particular statement induced them to become subscribers; but the question under this section is a very different one, and I think to enable a plaintiff to recover damages he must convince the tribunal before whom the question comes that if he had known of the omitted contract he would not have become a shareholder. That is what he must prove. Now in this case I do not believe for a moment, for the reasons to be given by Lord Lindley, that there would have been the smallest difference in the plaintiff's conduct if the contract in question had been disclosed as it ought to have been. I have had the opportunity of reading what Lord Lindley has written on that subject, and I entirely concur with him as to the waiver clause. Where a clause of that sort has been inserted, as part of the machinery for fraud it will, of course, afford no protection to its contrivers, but where, as in this case, there is a perfectly honest slip, why should it not be a protection? I know no reason. I move therefore, that both appeals be allowed, and that both actions be dismissed, with costs, both here and below.

Lord ROBERTSON.—It is, in my opinion, quite clear that the statute, by declaring a prospectus to be fraudulent, does not dispense the person founding on the fraud from proving that damage has resulted from the fraud. This is plain on principle, and if it were needed there is good authority for it.

On the other hand, the vice of the prospectus being an omission, the question whether, if that omission had not taken place, the result would not have been the same—that is to say, the shares would have been taken—is one requiring cautious and delicate handling. I do not think it an insoluble question, as has been suggested. But even for the person whose election to take or not to take is in debate, and even supposing him to speak with absolute candour, it requires a mind of singular clearness to decide how he would have acted if the omitted contract had been named; and it has to be borne in mind that it is not how he ought in reason to have decided, but how he (the particular individual) would have decided, that has got to be ascertained. Accordingly, one has to make full allowance for all sorts of considerations and prejudices—that the contracts made are too many and the thing too complicated—or that he did not like the names of the people, and so on.

Now, applying this view to the present case, I cannot join in any emphatic assertions about the conclusiveness of the evidence. But I take into account the nature of the omitted contract and the account given by this gentleman of his views of the enterprise, and I think it safe to infer that the omission of this contract did not affect his decision to apply for shares, and that he would not have acted otherwise if it had been mentioned. On this ground I agree in the reversal proposed.

(*a.*) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

Lord LINDLEY.—Both of these appeals turn on the true construction of section 38 of the Companies Act, 1867, and of the application of that section to the facts of the cases which have to be considered. Before attempting to apply the section to those facts it will be convenient to examine the section itself and the construction which has been judicially put upon it. The section consists of two parts. The first states that a company's prospectus must contain certain particulars, the second declares that a prospectus which does not contain those particulars "shall be deemed fraudulent on the part of the promoters, directors, and officers of the company knowingly issuing the same as regards any person taking shares on the faith of such prospectus, unless he shall have had notice of such contracts." The particulars which are required to be stated "are the dates and names of the parties to any contract entered into by the company or the promoters, directors, or trustees thereof before the issue of such prospectus." The section says no more. When the section has to be applied to any particular case—*i.e.*, when a plaintiff sues a defendant for damages for a breach of duty imposed by this section, the following questions necessarily arise—viz.: (1) Is the document to which the plaintiff says no reference is made in the prospectus such a contract as is described in the first part of the section? If it is not such a conractt, there is an end of the case. If it is, and if it is not disclosed, then it is necessary to inquire (2) whether the defendant was a promoter, director, or officer of the company; (3) whether he knowingly issued the prospectus; (4) whether the plaintiff took shares on the faith of the prospectus; (5) whether he had notice of the undisclosed contract before he applied for his shares? Assuming that all these questions are answered in the plaintiff's favour, there are still other questions as to which the section is wholly silent—viz., what is the plaintiff's remedy, and what more must he prove to entitle himself to damages? These matters are left to be dealt with by the judicial tribunals of the country, and they have nothing to guide them except the established principles applicable to actions for fraudulent misrepresentations. *Twycross* v. *Grant*, 25 W. R. 586, 2 C. P. D. 469, decided that section 38 of the Companies Act, 1867, included all contracts by the persons named in the section which might be material to be known by applicants for shares. Lord Bramwell and Kelly, C.B., thought that the words "any contract" ought to be still further restricted, but this opinion did not prevail. In *Twycross* v. *Grant* the jury found as facts that the plaintiff took his shares on the faith of the statements of the prospectus, and that if the contracts there in question had been disclosed or referred to in the prospectus the plaintiff would not have taken the shares. They also found that the defendant *bonâ fide* believed that the contract need not have been set forth. The jury found a verdict for the plaintiff, and gave him as damages the full amount he had actually paid for his shares, although he might have sold them at a premium before he brought this action. The case came before the Common Pleas Division and the Court of Appeal, and the verdict was upheld. The construction put on section 38 in *Twycross* v. *Grant* by the Common Pleas Division has, I believe, been accepted as sound ever since it was decided—viz., 1877; and on the question of damages, and also on the immateriality of the defendants' belief that section 38 did not apply, the decision in *Twycross* v. *Grant* was approved, and followed by this House in *Shepheard* v. *Broome*, 53 W.R. 111 [1904] A. C. 343. *Twycross* v. *Grant* did not raise, and therefore did not settle, the very important question whether section 38 does more than make non-disclosure equivalent to actual fraud in the cases to which the section applies. On proof of the non-disclosure of a contract required to be disclosed, the section declares that the prospectus is to be deemed fraudulent on the part of the persons named in the section. No evidence, therefore, of evil intention on their part is required to be given by the plaintiff, and, on the other hand, the section renders proof by them that they had no evil intention immaterial. But an action for damages based on fraud, or on what is to be deemed fraudulent, can only be maintained by a person who can prove that the fraud, or what is to be deemed fraud, of which he complains has caused him damage, and the question arises how is this principle to be worked out when applied to actions based on section 38? The section in terms gives no remedy or cause of action; but it is a remedial section for the protection of applicants for shares against the wiles of promoters and others. It is noteworthy that what is deemed to be fraudulent is the prospectus, and not merely the non-disclosure of a contract required to be referred to. The language of the section is consistent with the view that any one who is induced to take shares by a prospectus which, although honest and true in all statements, is to be deemed fraudulent, and who has lost his money by so doing, can maintain an action for damages, even although he was not in fact misled in any way whatever. He may have relied only on statements which were true, and the non-disclosed statements may be such that he would have attached no importance to them if he had known of them. The language of the statute is open to such a construction; but if so construed it leads to a result which is so unjust and so inconsistent with the principles which govern actions for damages occasioned by fraud that some other interpretation consistent with the language of the section and with established principles ought to be sought for, and, if found, ought to be adopted. The difficulty has been observed and commented upon in several cases. In *Sullivan* v. *Mitcalfe*, 29 W. R. 181, 5 C. P. D. 455, which arose on demurrer, Thesiger, L.J. (at p. 460), after approving the decision in *Twycross* v. *Grant* on section 38, said that "no person can be said to have taken shares on the faith of a prospectus except a person who can prove to the satisfaction of a jury that he took his shares on the faith of there being no such contract as that omitted to be disclosed, and that if such contract had been disclosed to him he would not have taken his shares." Lord Bramwell adhered to the opinion which he had expressed in *Twycross* v. *Grant*, and on the construction of the first part of section 38 did not agree with Thesiger, L.J. (see p. 477). But, on principle, I think Thesiger, L.J., was right. Lord Blackburn, in his well-known judgment in *Smith* v. *Chadwick*, 32 W. R. 687, 9 App. Cas. 187, pointed out that a plaintiff who sues for damages by reason of having been induced by a fraudulent prospectus to take shares in a company must prove both fraud and damage to himself occasioned by such fraud. *Smith* v. *Chadwick* did not turn on section 38, but that section says no more than that a prospectus shall be deemed fraudulent against certain persons if it does not disclose certain documents. But proof that a document is fraudulent is not all that a plaintiff must prove in order to recover damages. He must further prove damage occasioned to himself by the fraud of which he complains. Proof that he applied for shares on the faith of a prospectus which is to be treated as fraudulent by section 38, and that he obtained them and paid for them and lost his money is *primâ facie* evidence, but only *primâ facie* evidence, of damage by fraud on himself. *McConnel* v. *Wright*, 51 W. R. 661, [1903] 2 Ch. 546, goes no further than this. But if the plaintiff is challenged on this

point, he must go a step further and prove that he was misled by what makes the prospectus fraudulent—*i.e.*, the omission to disclose some document which ought to have been disclosed. This was the view taken in *Nash* v. *Calthorpe*, [1905] 2 Ch. 237, 53 W. R. Dig. 28, which, in my opinion, was correct. And it is noteworthy that Romer, L.J., agreed with the decisions of the Court of Appeal in *McCollen* v. *Wright* and also in the later case of *Nash* v. *Calthorpe*, which was not decided until after the cases now before your lordships came on for trial. Another question which has been much discussed is the meaning of "knowingly issued" in the second part of section 38. It is necessary to prove that the defendant knowingly issued the prospectus; and this has been held to mean issued the prospectus knowing of a contract such as is described in the section, and knowing that the prospectus did not disclose it. The fact that a defendant honestly but erroneously believed that the section did not apply to a particular contract of which he knew would not protect him from liability. This was decided in *Twycross* v. *Grant*, and by this House in *Shepheard* v. *Broome*, 53 W. R. 111, [1904] A. C. 342. The language of the statute in terms applies to directors and others who knowingly issue a prospectus which does not disclose such a contract as is mentioned in the first part of the section, whether they knew of its existence or not. But it can hardly be supposed that the Legislature meant to brand with fraud a director who knowingly issued a prospectus, but who never knew of the existence of a contract which ought to be disclosed. I cannot, however, think that the section can be properly restricted so as not to apply to a director who knew of a contract such as is described in the first part of the section, but who forgot all about it when he issued a prospectus not referring to it. Whether such a director could be properly convicted on an indictment for fraud, or for something short of it, is quite another question, which your lordships have not to consider. I have already pointed out that no intent to deceive is necessary to support a civil action for damages based on section 38. I will merely observe that in common parlance persons talk of knowing perfectly well what for the moment is not present to their mind, and even what they cannot at the moment recall to their memory. With these observations on the construction and legal effect of section 38, I pass to its application to the cases before your lordships.

The Standard Co. was promoted by the Globe Co., and the prospectus of the Standard Co. stated that in the formation and issue of that company there were no promoters' profits in any shape or form whatever. This statement has been proved to be true. But there was a contract, dated the 27th of October, 1898, and made between the Globe Co. and the Standard Co., by which the Globe Co. agreed to transfer to the Standard Co. 5,000 fully paid up deferred shares of £1 each in the Austen Friars Syndicate; and in consideration of this transfer the Standard Co. was to allot and issue to the Globe Co. 40,000 fully paid up shares of £1 each of the Standard Co. This agreement was unfortunately not disclosed in the prospectus of the Standard Co. But I cannot doubt for a moment that it fell within the first part of section 38 of the Companies Act, 1867, and ought to have been referred to in the prospectus. It was a contract which any prudent applicant for shares in the Standard Co. would have desired to understand before he took shares in the Standard Co., and was in that sense to that extent material, as explained in *Twycross* v. *Grant*. Every judge who has had to consider this question has come to the same conclusion, and to my mind this part of the case is so clear that it is unnecessary to say more about it. The prospectus was not issued until May, 1899, and the defendants were directors when it was issued, and when shares were allotted to persons who were induced by it to apply for shares in the Standard Co. All the plaintiffs in these actions did so apply. How it came about that the contract of the 27th of October, 1898, was not disclosed is by no means clear; but, whatever the real explanation may be, it was certainly not intentionally omitted by any of the defendants to these actions. It is clearly proved, and is now admitted, that, whether legally liable or not, they are all innocent of any fraudulent misstatement or concealment. Nevertheless section 38 entitles the plaintiffs to have the prospectus treated as fraudulent, and the next question is, Have the plaintiffs or any of them proved that they have sustained any damage by reason of the non-disclosure of the contract of the 27th of October, 1898? The plaintiffs took shares on the faith of the prospectus, and they have lost their money. This is their case; but it is at most only a *primâ facie* case, and when the facts are more closely investigated it is difficult to believe that a knowledge of the deed of the 27th of October, 1898, would have induced any of them to abstain from applying for shares. In the first place, the examination and cross-examination of the plaintiffs shows conclusively that the plaintiffs paid no attention whatever to the documents which were disclosed, and if another had been added to their number the result would have been the same. But, further, the contract of the 27th of October, 1898, when understood, turns out to be an ingenious but perfectly honest transaction, entered into in order to facilitate the acquisition by the Standard Co. of the preferred shares of the Finance Syndicate, all the shares of which the Standard Co. was formed to acquire. The contract conferred no profit whatever on the Globe Co., and, so far from disproving the statement in the prospectus that there were no promoters' profits, the contract shows that none were or could be made out of the transaction to which the contract related. In short, it is, in my opinion, plain that the non-disclosure of this contract has not caused any damage whatever to the plaintiffs, or any of them.

But, even if I am wrong in coming to this conclusion, I am of opinion that the defendants are entitled to be protected by the plaintiffs' agreements to waive any fuller compliance with section 38 than is contained in the prospectus. This is a case in which all the defendants are honest men. If they are liable, they are so by reason of an unfortunate mistake on their part. None of them had the slightest intention to keep back anything. Whether the same can be said of all the other directors I do not know. In most of the cases in which the effect of a waiver clause has been discussed, the clause has been unsuccessfully relied on as a protection against trickery; but in the first of these, *Greenwood* v. *Leather Shod Wheel Co.*, [1900] 1 Ch. 421, 48 W. R. Dig. 35, it was pointed out that although such clauses were worthless for such purposes, yet they might prove useful to protect honest men from unjust demands. These actions are instances in which the defendants can justly claim the protection of the waiver clauses contained in the prospectus and application for shares. For these reasons I have come to the conclusion that both appeals should be allowed and the actions be dismissed with costs both here and below.

Judgment of Kekewich, J., and order of the Court of Appeal reversed, with costs here and below.

Solicitors, *Burn & Berridge; Gilbert Robbins; Richardson & Co.*

Court of Appeal.

From K. B. Div. (Romer and Cozens-Hardy, L JJ.) Feb. 27.

LAW v. LLEWELLYN. (a.)

Defamation—Slander—Privilege—Magistrate sitting at sessions—Withdrawal of criminal charge—Words spoken in course of judicial proceedings.

A justice of the peace sitting at sessions to dispose of a criminal case which comes before him is acting judicially, and observations made by him on giving leave to withdraw such a charge are made by him in the course of a judicial proceeding, and are therefore privileged and not actionable, even if made maliciously and without reasonable cause.

Allardice *v.* Robertson, 1 *Dow. & Clark* 495, *not followed.*

This was an appeal from an order made by Channell, J., at chambers, under R.S.C. ord. 35, r. 4, directing the statement of claim in the action to be struck out as disclosing no reasonable cause of action.

The plaintiff was a member of the Neath Town Council and of various other public bodies.

The defendant was a justice of the peace for the county of Glamorgan, and was on the 1st of July, 1905, the time of the speaking and publishing of the words complained of, sitting as chairman of the justices at a court of summary jurisdiction at Bridgend, in the said county.

The plaintiff appeared at the court by counsel for the purpose of preferring a charge against two men named Thomas for obtaining money by false pretences. The plaintiff was advised that in the absence of certain witnesses it would be impossible to secure a conviction against the accused. Acting upon his counsel's advice the plaintiff agreed to withdraw the charge and pay the costs of the solicitor of the accused upon their undertaking to bring no action against him in respect of the said proceedings or otherwise. This agreement was duly signed by the legal representatives of the said parties, and the court was then informed by counsel that the plaintiff had withdrawn the charge upon the terms mentioned.

The defendant then falsely and maliciously and without any reasonable cause whatsoever spoke and published of the plaintiff the words following: "It is our opinion that this has been a gross attempt to blackmail and it would have been well if the matter had come before the Public Prosecutor. From what we have heard of this man Edward Law, he has been in the habit of trying to extort money from persons by illegal means, and if he found himself in gaol for twelve months it would possibly do him a good deal of good."

The statement of claim did not show the exact order of events but it appeared, from evidence filed in the case that the defendant, before making these observations, said that the magistrates would allow the case to be withdrawn, and that he repeated this, after having made these observations.

The plaintiff brought the present action for damages for the alleged slander by the defendant.

On the 29th of January, 1906, Channell, J., on the application of the defendant, ordered the statement of claim to be struck out "as disclosing no reasonable cause of action," but gave leave to appeal.

The plaintiff appealed.

Evans, K.C., Lush, K.C., Lewis Thomas, and *H. S. Stowe,* for the appellant.—Admitting the general rule that defamatory words spoken by a person acting in a judicial capacity in the course of any proceeding before him are privileged and not actionable, even if spoken maliciously, these words were not spoken in the course of a proceeding. The charge had been withdrawn, and the court could have had no knowledge of the facts. But even if these words were spoken in the course of a judicial proceeding, *Allardice* v. *Robertson,* 1 Dow. & Clark 495, is an authority that the privilege enjoyed by a judge of the superior court does not extend to a magistrate. This case was referred to without disapproval by Cockburn, C.J., in *Seaman* v. *Nethercliffe,* 25 W. R. 159, 2 C. P. D. 53.

Taylor v. *Nesfield,* 2 W. R. 474, 3 E. & B. 724; *Scott* v. *Stansfield,* 16 W. R. 911, L. R. 3 Ex. 220; *Hodgson* v. *Scarlett,* 1 B. & Ald. 232; *Munster* v. *Lamb,* 32 W. R. 243, 11 Q. B. D. 588; and *Hodson* v. *Pare,* 47 W. R. 241, [1899] 1 Q. B. D. 455, were also cited.

Bankes, K.C., and *Fraser,* for the respondent, were not called upon.

ROMER, L.J.—In my opinion this appeal fails. In opening the appeal Mr. S. T. Evans said, and in my opinion said rightly, that it was hopeless to contend at the present day that a justice of the peace sitting in petty sessions to dispose of a criminal case which comes before him is not acting judicially. Consequently a defamatory statement made by him in the course of the proceedings before him cannot be actionable as against that justice. That has been, to my mind, clearly settled beyond controversy by the two cases which have been referred to: *Munster* v. *Lamb* and *Hodson* v. *Ware.* Both cases are to the same effect and show that a magistrate is "a judge" within the meaning of the rule that defamatory observations made by a judge in the course of his judicial duties—that is, when sitting as a judge—are not actionable even though it is alleged or suggested that the observations were made without reasonable or probable cause and maliciously.

But Mr. Montague Lush boldly attempted to reargue that question, and he did so by referring to the decision in a Scotch case of *Allardice* v. *Robertson.* With reference to that case all I need say is this, that whether it correctly lays down the law in Scotland at the present time or not, as to which I cannot say, certainly it is a case dealing with Scotch law only, and is not binding upon this court. It cannot therefore be regarded as an authority for the proposition for which Mr. Lush cited it. It is not an authority against the law as I have stated it, and as illustrated by the cases to which I at first referred. It is said that *Allardice* v. *Robertson* was referred to without disapproval by Cockburn, L.J., in *Seaman* v. *Nethercliffe.* All I need say with regard to that is this, that if reference is made to the observations of the Lord Chief Justice in the latter case it will be noticed that he was not referring to *Allardice* v. *Robertson* for the purpose of approving it or anything of the sort. It was a case that had been cited to him, and all he said was that it was not an authority precisely covering the question which he had then to decide; and that clearly was so. The reference to the case by the Lord Chief Justice in no wise constituted a recognition by him that *Allardice* v. *Robertson* was an authority binding on the English courts for the point of law which it purports to decide.

That being so, so far as the law is concerned it is clear that this action against the defendant Mr. Llewellyn will not lie, if it be that the observations which are said to have been made by him, and which are said to have been libellous and malicious, were uttered by him in the course of his duty as magis-

(a.) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

trate. To my mind they clearly were uttered in such circumstances as made them privileged. The circumstances are stated in the statement of claim, and shortly they amount to this: The plaintiff had brought a criminal charge against two persons, and when that charge came before the defendant, sitting, as he did, as a justice of the peace in sessions, the plaintiff stated that he had withdrawn the charge and agreed to pay the costs of the solicitor of the persons against whom the charge had been made upon their undertaking to bring no action against him, the plaintiff, in respect of the proceedings he had instituted. Being a criminal charge, it could not have been withdrawn as a matter of course. In the circumstances it was clearly impossible for the magistrates to insist upon the charge not being withdrawn; that would have done no good, especially as the magistrates were of opinion that there was no real crime on the part of the persons against whom the charge had been made. In those circumstances, the chairman, Mr. Llewellyn, had to state why, in his opinion, and in that of his brother magistrates, nothing could be done except to allow the charge to be withdrawn, and it was upon giving leave accordingly that he made the observations which are said to be libellous.

In my opinion it was clearly within his jurisdiction at that time to make observations with regard to a pending summons; the observations he did make were, therefore, observations made in the course of his judicial duty, and consequently are not actionable. In those circumstances it seems to me this action is clearly frivolous and vexatious. As I have stated, the law is clear, the allegations in the statements of claim are clear, and that being so, it appears to me that the learned judge below rightly discharged his duty in striking out the statement of claim as being frivolous and vexatious. I am of opinion his decision was right, and the appeal must be dismissed.

COZENS-HARDY, L.J.—I agree.

Evans, K.C.—Your lordships have dealt with this case upon the assumption which must, of course, be taken from the statement of claim, that the words in question were spoken in the course of the proceedings. But suppose that the magistrates said "We will allow this case to be withdrawn, and then went on and added those words. There, I submit, the words could not have been spoken in the course of the proceedings, and that at any rate that is a matter which ought to be determined, and I ask for leave to amend the statement of claim.

COZENS-HARDY, L.J.—It makes no difference whether the magistrates said at first "We will allow this case to be withdrawn," and then uttered the words complained of, or whether he said, "In our opinion the facts are so and so," and then allowed the case to be withdrawn.

ROMER, L.J.—It makes no difference whatever, as the observations are made in the course of one transaction. We refuse leave to amend, and dismiss the appeal with costs.

Solicitors, *H. G. Rastall*, for *A. Jeffreys*, Neath; *Bell, Brodrick, & Gray*, for *T. J. Hughes & Lewis*, Bridgend.

High Court of Justice.

Chan. Div. } Joyce, J. } Feb. 8, 12, 20, 21, 22.

THELLUSSON v. VALENTIA. (a.)

Club—Sporting—Rules—Power to alter—Object of club—Particular sport—Abolition by resolution—Validity of resolution.

A club was formed in 1868, *one of the objects of which was to provide grounds and facilities for the sport of pigeon-shooting. From time to time provision was made and facilities afforded for polo playing and other sports. One of the rules provided that any of the rules might be altered or added to, at any general meeting of the club, with the assent of a majority of two-thirds of the members. At the annual general meeting of the club, held on the 20th of May,* 1905, *a resolution was passed by the requisite majority that pigeon-shooting should be discontinued as from the* 31*st of December*, 1905.

Held, that this resolution was valid.

Action.

The plaintiffs in this action were the Hon. Francis Thellusson, James Henry Hannay, and John A. Miller (on behalf of themselves and the other members of the Hurlingham Club).

The defendants were the Right Hon. Viscount Valentia, Major-General Sir H. P. Ewart, E. H. Baldock, the Right Hon. the Earl of Ancaster, the Right Hon. the Earl of Haddington (the trustees of the said club), and A. Lindsay Lister (on behalf of himself and the committee of the said club).

The Hurlingham Club was formed in 1868, and its objects were stated in rule 2 as follows: "The club is instituted for the purpose of providing a ground for pigeon-shooting, surrounded with certain accessories, and so situated as to render it an agreeable country resort, not alone to those who take part in pigeon-shooting, but also to their family and friends."

Rule 16 provided that the management of the club should be conducted by the committee, who should have powers to make bye-laws (consistent with the rules of the club).

Rule 30 (now rule 22) provided the means by which the rules of the club could be altered or added to.

Rule 60 (now rule 33) provided that "These rules and regulations shall be printed, and a copy of them shall be delivered to each member on his election, or transmitted to his address, but no member shall be absolved from their effect on any allegation of not having received them or of ignorance of their contents."

These rules were altered and added to from time to time, and the rules so altered and added to are contained in an edition published in 1904. By this edition it appears that rule 2 now provides that: "The club is instituted for the purpose of providing a ground for pigeon-shooting, polo, and other sports, surrounded with such accessories and so situated as to render it an agreeable country resort not only to members, but also to their families and friends." A portion of the club grounds has always been set apart and facilities been provided for pigeon-shooting.

At the annual general meeting of the club, held on the 20th of May, 1905, the following resolution was passed by the requisite (under rule 22) two-thirds majority: "Resolved, that pigeon-shooting be discontinued at the Hurlingham Club after December, 1905."

The plaintiffs then commenced this action asking

(a.) Reported by P. JOHN BOLAND, Esq., Barrister-at-Law.

for a declaration that this resolution is not binding on the members of the club, and that it is null and void, and for a declaration that the premises of the club are provided and held in trust (amongst other purposes) for providing a ground for pigeon-shooting.

Danckwerts, K.C., and *Sturges*, for the plaintiffs.—Pigeon-shooting was the primary object for which the club was instituted, and rule 2 was therefore a fundamental rule that could not be altered, in the manner contemplated, by a two-thirds majority under rule 22. It was not allowable to change the root object of the club and the trusts upon which its property was held: *Baird* v. *Wells*, 39 W. R. 61, 44 Ch. Div. 661; *Allen* v. *Gold Reefs of West Africa*, 48 W. R. 452, [1900] 1 Ch. 656; *Imperial Hydropathic Hotel Co., Blackpool*, v. *Hampson*, 31 W. R. 330, 23 Ch. Div. 1; and *Pickering* v. *Stephenson*, 20 W. R. 654, 14 Eq. 322.

Younger, K.C., and *Austen-Cartmell*, for the defendants.—No rule of the club is so fundamental as to be incapable of being altered in accordance with rule 22. Rule 2 is nothing but an act of management: *Dawkins* v. *Antrobus*, 29 W. R. 511, 17 Ch. Div. 615. Nothing is fundamental except that it shall remain a club: *Walker* v. *London Tramways Co.*, 28 W. R. 163, 12 Ch. Div. 705. The plaintiffs are asking the court to compel the club to do that which it cannot do, to enforce specifically a contract that cannot be specifically enforced.

Andrews v. *Gas Meter Co.*, 45 W. R. 321, [1897] 1 Ch. 361; *Harrison* v. *Marquis of Abergavenny*, 57 L. T. 360; and *Punt* v. *Symons & Co.* (*Limited*), 52 W. R. 41, [1903] 2 Ch. 506, also cited.

JOYCE, J., in giving judgment, said: Every member who had joined this club had done so subject to the exercise of the power of altering the rules under rule 22, and with full notice of all the provisions of the rules, if not otherwise, by virtue at any rate, of rule 60. The power of altering rules had been exercised from time to time, and the rules as they now stood embodied the result of all the alterations, including the alteration to rule 2. The bye-laws contained a provision that the shooting ground should be such portion of the club premises as the general committee for the time being should determine. In effect, it appeared that the management of the club was with the committee, subject to the control of the general meeting. This action was brought by some of the minority, asking to have it determined that the resolution passed at the annual general meeting held on the 20th of May, 1905, was null and void. Generally, the objection to the resolution was that it was incompetent for any majority, however large, to alter rule 2. The terms of the resolution did not, in fact, purport to alter the rules. It was, perhaps, inconsistent with some of the rules and bye-laws, but that inconsistency might be set right by a very few amendments, and possibly without in terms altering rule 2. But the real question was whether, having regard to the specific mention of pigeon-shooting in rule 2, the resolution was, on the face of it, necessarily invalid, whatever the circumstances might have been under which it was passed. There was nothing in the rules prescribing what expenditure or other provision was to be made for the shooting, but it had been the practice in the past to give prizes and make various arrangements to facilitate and encourage the so-called sport. There was, however, no sort of obligation to give these prizes or to invite foreigners to an international meeting. The committee, if so advised, might discontinue all that, and, instead of encouraging the sport, might make arrangements tending to have a contrary effect. It was within their discretion to give prizes for one sport in preference to others. The resolution, at any rate, authorized the committee to adopt that course—that was to say, to discourage pigeon-shooting, and, if and so far as was necessary, to alter the bye-laws accordingly. To that extent at least the resolution was valid, and might be acted upon with propriety by the committee. Under no circumstances could the court positively prescribe what arrangements or bye-laws the committee ought to make. The court could not manage the club and had no jurisdiction to give such positive directions, though it might forbid a definite act in violation of the rules. But was the resolution necessarily invalid at all? It did not propose to divert the funds of the club to any unauthorized objects. That would be illegal and might be restrained by injunction. Rule 2 did not limit the club to a single object, but described a numerous class of sports, among which pigeon-shooting was only one. If pigeon-shooting should be declared illegal the existence of the club would not be affected. There was no rule of law which required any company or association to continue to fulfil each and every of the several purposes for which it was originally formed. If pigeon-shooting were dropped the club might still efficiently fulfil its general purposes as laid down by the rules. If there was any limit to the powers of altering the rules it had not been transgressed. No rule was so fundamental, whatever might be the meaning of that expression, as to exempt it from addition or alteration. The trustees did not hold the ground upon a special or any trust to allow pigeon-shooting to be carried on there. They held it generally upon trust for the club, and subject to the directions of the committee. Without going so far as to say that the resolution was absolutely valid or binding until some corresponding or appropriate alteration had been made in the rules, I have come to the conclusion that I ought not to make any such declaration as was asked for. The action therefore fails, and must be dismissed.

Judgment for defendants.

Solicitors for the plaintiffs, *Wm. Sturges & Co.*

Solicitors for the defendants, *Nussey & Fellowes.*

Chan. Div. } Joyce, J. } Dec. 8, 12, 19.

NORTH-EASTERN MARINE ENGINEERING CO. (LIMITED) v. LEEDS FORGE CO. (LIMITED). (a.)

Patent—Action to restrain threats of legal proceedings—Lapse of patent—Validity of patent—Infringement—Practice—R. S. C., 1883, *ord.* 25, *rr.* 4, 5—*Patents, Designs, and Trade-Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *s.* 32.

The defendants L. F. Co., who were the owners of a patent which expired in 1903 *for an improved boiler flue, brought an action for infringement against a firm, D. & Co., and finally obtained judgment in their favour in the House of Lords. L. F. Co. then threatened to take proceedings for infringement against the plaintiffs, who had purchased boiler flues from D. & Co., and commenced proceedings. L. F. Co. also brought an action against another firm, C. & Co., in which the defence was raised that the patent was invalid, and thereupon L. F. Co. gave an undertaking not to sue C. & Co., and stayed all proceedings. They also discontinued the action against*

(a.) Reported by R. FRANKLIN STUBBING, Esq., Barrister-at-Law.

the present plaintiffs, who thereupon asked for a similar undertaking to that given to C. & Co., which was refused. The plaintiffs thereupon brought the present action for a declaration that the patent was invalid, and that they had not infringed any rights of the defendants, also alleging that they had suffered damages by the threats of the defendants. The point as to whether the plaintiffs were entitled to relief, assuming that the patent was invalid, was ordered to be tried first.

Held, that the plaintiffs had no cause of action, as the mere threat to commence proceedings would not give rise to a right of action, and that the plaintiffs' proper remedy was a petition for the revocation of the patent under section 26 of the Patent Act, 1883, *notwithstanding that the patent had expired.*

Points of law set down for argument by order.

The defendants, who were engineers carrying on business at Leeds, were the owners prior to 1900 of letters patent No. 8,591 of 1889, granted to one Devis, for an invention of "an improved boiler flue." These letters patent expired on the 23rd of May, 1903.

In March, 1900, the defendant company commenced an action against a firm called the Deighton Patent Flue and Tube Co. (Limited), to restrain them from infringing the said letters patent by making and selling boiler flues which were alleged to be infringements. At the trial of the action Cozens-Hardy, J., decided that the letters patent had been infringed. The Court of Appeal reversed this judgment, and in May, 1904, the House of Lords reversed the judgment of the Court of Appeal and restored the judgment of Cozens-Hardy, J.

The plaintiffs in the present action had, prior to the hearing of the appeal in the House of Lords, purchased a large number of boiler flues from the Deighton Co. which were identical in form with those which were the subject of the action against the Deighton Patent Flue and Tube Co.

On the 3rd of April, 1901, and the 19th of March, 1902, the solicitors of the defendant company wrote to the plaintiffs threatening them with legal proceedings in respect of the use of the said boiler flues purchased from the Deighton Co., and on the 17th of June, 1904, after the judgment in the House of Lords, they again wrote "Having regard to the circumstances our clients have decided to take proceedings against you to recover damages for your wrongful action in this respect (*i.e.*, infringing), and we have to ask you to give us the name of your solicitor who will accept service of the proceedings on your behalf." On the 29th of June, 1904, an action was commenced by the defendant company claiming damages from the plaintiffs for their alleged infringement of the said letters patent.

A large number of other firms of engineers and shipbuilders had purchased similar flues from the Deighton Co., and the Leeds Forge Co. had commenced an action against a certain firm, Clayton, Son, & Co., for infringing the said patent. Clayton & Co. pleaded the invalidity of Devis' patent and asked for a declaration that the said letters patent were invalid, and on the 31st of March, 1905, it was ordered that all further proceedings in the action should be stayed upon the Leeds Forge Co. giving an undertaking not to sue Clayton, Son, & Co. or their customers in respect of the use or sale of boilers constructed in accordance with the said patent.

The defendants, the Leeds Forge Co., discontinued the proceedings against the plaintiffs, the North-Eastern Marine Engineering Co., on the 14th of March, 1905.

On the 10th of May, 1905, the plaintiffs' solicitors wrote to the defendants' solicitors complaining of the loss and inconvenience which the plaintiffs had suffered through the above-mentioned threatening letters and the commencement and discontinuance of the action, and asked that the Leeds Forge Co. should give a written undertaking that they would not commence any proceedings against them or any of their customers in respect of the flues purchased from Deighton & Co.

The defendants' solicitors refused to give any such undertaking as was asked for, and alleged that the action had been discontinued against the plaintiffs because the defendants were in a position to claim a larger measure of damages against the maker of the infringing flue, they undertook, however, that they would not proceed against the plaintiffs unless the defendants failed to secure their damages from the makers of the flues used by the plaintiffs.

Thereupon the plaintiffs commenced the present action, in which they alleged that the validity of the letters patent was admitted and was not in fact tried in the action against the Deighton Patent Flue and Tube Co. (Limited) and they claimed a declaration that the letters patent 8,591 of 1889 were invalid at the date thereof, and were so continuously down to the date when the term for which they were granted expired, and also a declaration that the plaintiffs had not infringed any legal rights of the defendants.

The defendants pleaded that, having successfully prosecuted up to the House of Lords an action for the infringement of the said letters patent, the plaintiffs had no cause of action upon the facts appearing in the statement of claim under section 32 of the Patents, Designs, and Trade-Marks Act, 1883, and also that no action would lie under section 32 of the Act of 1883 in respect of letters patent which had expired prior to the commencement of the action, and also that there could not be a suit for a declaration as to the invalidity of letters patent which had expired prior to the commencement of the action.

An order was made on the 11th of August, 1905, by Kekewich, J., that the point of law as to whether the plaintiffs are entitled to relief should be set down to be argued before the court, the defendants admitting, for the purpose of argument, the allegations of fact contained in the statement of claim.

Section 32 of the Patents, Designs, and Trade-Marks Act, 1883, provides that "where any person claiming to be the patentee of an invention by circulars, advertisements, or otherwise threatens any other person with legal proceedings or liability in respect of any alleged manufacture, use, sale, or purchase of the invention, any person or persons aggrieved thereby may bring an action against him, and may obtain an injunction against the continuance of such threats, and may recover such damages (if any) as may have been sustained thereby, if the alleged manufacture, use, sale, or purchase to which the threats related was not in fact an infringement of any legal rights of the person making such threats, provided that this section shall not apply if the person making such threats with due diligence commences and prosecutes an action for infringement of his patent."

Ord. 25, r. 4, provides that "the court or a judge may order any pleading to be struck out on the ground that it discloses no reasonable cause of action or answer, and in any such case or in case of the action or defence being shown by the pleadings to be frivolous or vexatious the court or a judge may order the action to be stayed or dismissed or judgment to be entered accordingly as may be just."

Rule 5: "No action or proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the court may make binding declarations of right whether any consequential relief is, or could be, claimed or not."

Fletcher Moulton, K.C., and *Bousfield, K.C.* (*Walters* and *Colefax* with them), for the defendants, the Leeds Forge Co. (Limited).—There could not be an action under section 32 of the Patents Act for a declaration that the patent was invalid. In reality this was an attempt on the part of the plaintiffs to prevent the defendants from bringing a future action against the plaintiffs for infringement. The cause of action set out in the statement of claim was for damages sustained through the threats. By dropping the claim for damages the plaintiffs had admitted that they had no personal interest in the matter, which was necessary in order to enable any person other than the Attorney-General to bring an action for revocation of a patent. The sole basis of the action was the threatening letters.

Astbury, K.C., and *Graham*, for the plaintiffs, the North-Eastern Marine Engineering Co. (Limited).—The defendants had threatened and had commenced proceedings against another firm for infringment, but when the question as to the validity of the patent was raised they discontinued the action and gave an undertaking not to sue that firm or their customers. The plaintiffs in the present action asked for a declaration which would in like manner protect them. In *Young* v. *Ashley Gardens Properties* (*Limited*), [1903] 2 Ch. 112, 51 W. R. Dig. 83, the court made a declaratory order under ord. 25, r. 5, that the lessor was not entitled to impose unreasonable conditions, and that the lessee was entitled to assign without the further consent of the lessor, and in *London Association of Shipowners and Brokers* v. *London and India Docks Joint Committee*, [1892] 3 Ch. 242, 41 W. R. Dig. 84, a declaration was made, notwithstanding that a claim for consequential relief had been abandoned, that the regulations made by the docks committee were not binding on the shipping company. In *Ellis* v. *Duke of Bedford*, 47 W. R. 170, [1899] 1 Ch. 494, Lindley, M.R., pointed out that under ord. 25, r. 5, actions could be brought merely to declare rights, which was an innovation of a very important kind, and that under that rule an action would lie to assert the preferential rights which the whole class of growers were entitled to. If this patent had not expired the plaintiffs could have brought an action to have it revoked, but now, the patent having gone, they relied on the fact that as they could not petition against it they were entitled to sue for a declaration. They were entitled to get it out of the way in some manner inasmuch as though the patent had expired the liability for what was done during its existence had not expired. The declaration was the real relief that was asked for by the plaintiffs; no reliance was placed upon section 32 of the Patent Act, 1883, and the claim for damages was not persisted in. It was a common practice for the court to make a declaration that a deed was void, and there was no question but that the court had absolute power to make such a declaration. [JOYCE, J.—Why would not a petition lie for declaring the patent to be invalid even although the patent had expired? Would not that be the proper course to pursue?] If that course had been adopted the plaintiff would probably have been met with some technical objection that their remedy was gone, and, further, there was no authority for adopting such a procedure. [*Bousfield.*—It was very doubtful whether such a petition would lie as the form of order provided that the patent should be delivered up in order to be cancelled.] [JOYCE, J.—There was no reason why the paper containing the grant of the patent should not be delivered up after the expiration of the patent. That appeared to be the only remedy.] It was a matter for the discretion of the court rather than a limitation to its power. Ord. 25, r. 5, provided that no action should be objected to on the ground that a declaration was sought thereby, and in *Williams* v. *North's Navigation Collieries*, 52 W. R. 564, [1904] 2 K. B., p. 49, Collins, M.R., expressed a difficulty which he felt in making the declaration asked for, because the declaration would not be ancillary to the putting in suit of any legal right, but that difficulty did not arise in the present case. The only limitation to an action of this sort under the rules was in the discretion of the judge and the objection which the defendants had raised was not a demurrer on a point of law, but was a demurrer to your lordships' discretion, which was an unheard-of proceeding. [JOYCE, J.—As this was a Crown grant could the patent be revoked except in the statutory way.] The answer to the argument that such an action had never been brought before was that the circumstances which gave rise to it had never arisen before. There was no case in which such a declaration had been asked for and been refused.

Bousfield, K.C., in reply.—Even if the plaintiffs were right in saying that the patent was invalid, the mere threat on the part of the defendants to bring an action for infringement would not give the plaintiffs a cause of action. [JOYCE, J.—The plaintiffs now only ask for two declarations, and these were not based on the threats.] The practical outcome was that the defendants were entitled to the order asked for—viz., the dismissal of the action as the plaintiffs had asked for no relief, except what was based on the threats. The real question that had been argued was not the question of the declaration, but as to damages. Even if the court had power to exercise its discretion this was not a proper case in which it would exercise it. The plaintiffs had no cause of action except upon the ground of the threats, and upon that they could not succeed, as they would have to allege the invalidity of the patent, and the House of Lords had decided that the patent was valid. The plaintiffs must rely entirely on the discretion of the court, and there were no cases in which this discretion had been exercised, except where it was ancillary to the relief asked for. In *Faber* v. *Gosworth Urban District Council*, 88 L. T. 549, 51 W. R. Dig. 133, Swinfen Eady, J., pointed out that the jurisdiction to make a declaratory order ought to be exercized with extreme care, and Lord Davey in *Barraclough* v. *Brown*, [1897] App. Cas. 623, said there was nothing in the rule to enable the court to make a declaration on a subject to which its jurisdiction to give relief was excluded by statute. It was obviously incompetent for the judges to make rules of procedure to give the court power to deal with a matter which was outside its jurisdiction. *London Association of Shipowners and Brokers* v. *London and India Docks Joint Committee* was an instance where a declaration was made although it was contended that no right had been infringed. In *Williams* v. *North's Navigation Collieries*, 52 W. R. 564, [1904] 2 K. B. 44, the court did not make the declaration asked for, because on the true construction of the Truck Act they were not entitled to it, and also because it was not ancillary to the putting in suit of any legal right. In *Young* v. *Ashley Gardens Properties* (*Limited*) the question was only one of enforcing rights which the plaintiffs were entitled to. The jurisdiction of the court to make the declaration was not disputed, and *Ellis* v. *Duke of Bedford* was another case in which the question was one of enforcing a right. Such a declaration had never been granted in a case where it was not ancillary to any right claimed. For the purposes of this argument it was immaterial whether the defence was true or not. The defendants only admitted the plaintiffs' conten-

tion that the patent was invalid for the purposes of this argument, so that whether it was valid or not, in either case it afforded no ground of action to the plaintiffs, who were therefore not entitled to the declaration which they asked for, as it was only in the exercise of the discretion of the court, and could not be asked for as a matter of right.

Dec. 19.—JOYCE, J.—This case has been somewhat simplified by the statement made by counsel for the plaintiffs that no reliance is placed upon section 32 of the Patents, Designs, and Trade-Marks Act, 1883, or upon the claim for damages in the statement of claim. At the same time I think the claim for damages could not have been maintained, because upon the pleadings it was stated that the threats complained of were made *bonâ fide* and not without reasonable or probable ground. The action is therefore reduced simply to a claim for two declarations—namely, a declaration that the letters patent 8,591 of 1889 were invalid at the date thereof, and were so continuously down to the date when the term for which they were granted had expired, and a declaration that the plaintiffs have not infringed any legal rights of the defendants. No further relief is asked—I am omitting the last two claims by reason of what was said at the hearing—nor could any relief have been given before the Judicature Act, because there are no equitable grounds alleged nor any matters of equity upon which the defendants could have been restrained from suing the plaintiffs.

Now, the old rule as to actions for declaration was that such an action could not be maintained unless the plaintiff would be entitled to consequential relief whether he asked for it or not. Ord. 25, r. 5, introduced a new rule, which is that "no action or proceeding shall be open to objection on the ground simply that a merely declaratory judgment or order is sought thereby." To the operation of this rule there must, however, be some limitation. It cannot, I think, compel the court to entertain any and every action for a declaration, and it cannot be that a claim for any declaration whatsoever is a good ground of action. What the limitation is I am not prepared to say, and I am not going to attempt to define it, which is a thing which is always dangerous. There is an *obiter dictum* of the present Master of the Rolls in *Williams* v. *North's Navigation Collieries (Limited)*, that the declaration must be ancillary to the putting in suit of some legal right. Whether this be as plain and satisfactory a definition as could be wished I venture to entertain some doubt, but on both sides it was put to me as a matter of discretion, that it was for my discretion, a discretion which certainly exists, and which according to the cases must be exercised with very extreme care and caution.

Really, this action is an action to have it declared that the present plaintiffs would have a good ground of defence if and when the present defendants sue them for infringement of the patent No. 8,591 of 1889, which they may or may not do; and in order to determine this, if the action proceeded there would have to be a trial with a large and possibly extravagant expenditure on both sides, but in particular by the present defendants, with special counsel and expert witnesses and the like as is usual in patent cases. Now, it seems to me that the first objection to this action is that the plaintiffs' proper remedy is that provided by section 26 of the Patents, &c., Act of 1883—viz., a petition for revocation of the patent. I am aware that the term limited by the patent has expired, but no satisfactory or even plausible reason has been suggested to me why that procedure is not available to the present plaintiffs in the circumstances of the present case. Even if that were not so, and the matter be purely one for the discretion of the court, it appears to me that the present defendants have broken no contract, they have committed no tort; it is not a case of conflicting claims to real or personal property, there is no dispute as to the rights or obligations of the respective parties under a will or other instrument the true construction whereof requires to be done by the court, or anything of that kind. Now, speaking generally, in a simple case not within section 32 of the Act of 1883 the mere fact that A. is supposed to contemplate bringing an action against B., or that A. may have stated that he had grounds for such an action does not, in my opinion, entitle B. to institute an action against A. to have it declared that A. has not a good cause of action against B. I think that is so, whether the result depends merely upon questions of law or upon facts as to which there would or might be a conflict of evidence with a protracted trial.

No doubt delay may in certain cases furnish a good ground for defence, but ordinarily an intending plaintiff may postpone his action as long as he pleases, at the risk of finding himself barred by some Statute of Limitations, and he may choose his own time for commencing proceedings. He is entitled to wait until he has collected the necessary evidence or has made such inquiries as he thinks fit, or has obtained the requisite funds or what not. Generally notice by A. to B. of an intended suit does not give B. a cause of action against A. To give such a notice is ordinarily a right and proper thing to do. Indeed, in some cases, previous notice is required by statute as a condition of suit. Section 32 of the Patents, &c., Act of 1883 being out of the way, I think that at the risk of defeat and costs the Leeds Forge Co. is legally and morally entitled if and when it pleases to bring at least an action against the North-Eastern Marine Engineering Co. for alleged infringement of this patent. If I have any discretion I decline to exercise it in favour of the present plaintiffs, notwithstanding their ingenuity in devising this novel form of action, which in my opinion is misconceived; and pursuant to the provisions of ord. 25, r. 4, I order this action to be dismissed with costs.

Solicitors, *J. H. & J. Y. Johnson*, for *Carter, Ramsden, & Carter*, Leeds; *Vincent & Vincent*, for *Day & Yewdall*, Leeds.

K. B. Div.
(Lord Alverstone, L.C.J., and Ridley and Darling, JJ.) March 8.

MADDEN *v.* RHODES. (*a.*)

Trade union law—Wilfully withhold—Criminal mind—Branch union—Trade Union Act, 1871 (34 & 35 *Vict.* c. 31), *s.* 12.

Section 12 *of the Trade Union Act*, 1871, *provides:* "*If any officer, member, or other person being or representing himself to be a member of a trade union, registered under this Act . . . by false representation or imposition obtain possession of any moneys, securities, books, papers, or other effects of such trades union, or having the same in his possession, wilfully withhold or fraudulently misapply the same, or wilfully apply any part of the same to purposes other than those expressed or directed in the rules of such trade union, or any part thereof, the court of summary jurisdiction for*

(*a.*) Reported by MAURICE N. DRUCQUER, Esq., Barrister-at-Law.

the place in which the registered office of the trade union is situate, upon a complaint made by any person on behalf of such trade union may, by summary order, order such officer . . . Provided that nothing herein contained shall prevent the said trade union . . . from proceeding by indictment against such party. . . ."

Held, that no order can be made under this section against any of the persons therein named for "wilfully withholding" unless it be proved that there was fraud or criminality in the wilfully withholding.

Barrett *v.* Markham, *L. R.* 7 *C. P.* 405, *followed.*

Case stated by one of the Metropolitan police magistrates.

A summons was issued under section 12 of the Trade Union Act, 1871, by the appellant on behalf of the Amalgamated Society of Tailors and Tailoresses, a society registered as a trade union under the said Act, against the respondents as trustees of the West-end branch of the said trade union, complaining that they being officers of the said trade union having in their possession certain moneys, securities, books, papers, and other effects of the Amalgamated Society of Tailors and Tailoresses wilfully withhold the same. A copy of the existing rules of the society was exhibited with the case. A general committee of management of the society, termed an executive council, is elected by the conference of delegates of branches which meets periodically. Each branch of the society is "to appoint its own officers and conduct its own business in accordance with rules."

A dispute having arisen between the said executive council and the said West-end branch in respect of the duties and appointment of an officer (not mentioned in the rules) referred to as the out-collector of the West-end branch, the conference of the 10th of August, 1904, resolved "That it be an instruction from the conference that in future the out-collector of the West-end branch must make members and take contributions for all branches of the West-end district and such other branches as the executive council may direct, but no collector can be appointed without the consent of the executive council."

On the 28th of April, 1905, the executive council, reciting the continued refusal of the West-end branch to perform the duty imposed upon it by the above resolution, demanded "the resignation of the branch officers and committee and the appointment of loyal members of our amalgamation," and further authorized the appellant with another trustee to proceed to the West-end branch and "to compel the trustees of that branch to deliver up all moneys, books, vouchers, documents, and all property of whatever description held by them in trust for the Amalgamated Society of Tailors and Tailoresses."

The West-end branch replied with the following unanimous resolution: "This meeting of members of the West-end branch of the Amalgamated Society of Tailors and Tailoresses, having considered the present situation in all its bearings, are satisfied that the branch officials have done nothing to justify the action of the executive council, and hereby demand the withdrawal of all adverse resolutions against the branch, and the acknowledgment of Mr. Willis's position as collector, failing which we authorize the the officers and committee to withdraw the branch from the Amalgamated Society of Tailors and Tailoresses, and pledge ourselves to support such action in any and every possible manner."

It was admitted that there was no fraud or criminality.

The magistrate dismissed the summons and stated this case.

Montague Shearman, K.C. (*Edward Brown* with him), for the appellants.—Unless there is a remedy under section 12 the trade union would have no remedy at all; its civil remedy in respect of disputes amongst the members *inter se* is taken away by section 4, and section 9 (which must be read with section 4) giving the right to sue or be sued by trustees only applies to actions by or against strangers. It is true that the first limb of section 12 speaks of "by false representation or imposition obtain possession . . ." but it is submitted that "wilfully withhold" is a fresh limb. [DARLING, J., referred to *Knight* v. *Whitmere*, 33 W. R. 907.] The magistrate decided against the appellant on the authority of *Barrett* v. *Markham*, L. R. 7, C. P. 405. That was a decision under section 24 of the Friendly Societies Act, 1855, a somewhat similar section to section 12, and it was there held that some fraud or misrepresentation must be shown. It is necessary for me to distinguish that case, and it can be distinguished. The words of the sections are not identical, it must be noted, as section 12 includes the word "wilful." Moreover, the Act of 1855 does not contain a section corresponding to section 4 of the Trade Union Act, which in certain disputes takes away civil remedy. In the Act of 1855 section 22 provided a civil remedy for the cases in question to which Wills, J., refers. [Lord ALVERSTONE, L C.J.—That was not the principle of the decision.] Finally, the magistrate there held as a fact that the inability to pay by the treasurer was not a withholding or misapplying under section 24 of the 1855 Act.

Hermann Cohen, for the respondent, was not called upon.

Lord ALVERSTONE, L.C.J.—In my opinion the magistrate has come to a right conclusion. If *Barrett* v. *Markham* is to be taken as an authority on this statute it is distinctly in point. The decision of Willes, J., in respect to an analogous section—viz., section 24 of the Friendly Societies Act, 1855—was that there could only be a prosecution in respect of a *quasi*-criminal case. The principle of that authority seems to me to rest on two grounds—(1) that there was an alternative civil remedy; (2) that the withholding must be "under circumstances imputing misconduct," which was the language used by Willes, J., one of the greatest judges. If Mr. Shearman could have distinguished that Act we should have been obliged to say that that case was not an authority binding upon us. He admits that the language of the sections is so very much alike that the principle seems to be the same; but he suggests that the alternative civil remedy given by the 1855 Act is not given by the Act of 1871. In my opinion section 9 of the 1871 Act goes quite as far as section 22 of the 1855 Act in respect to a civil remedy, and when it is said that that is taken away by section 4 I cannot agree with that contention. Section 4 has been considered more than once recently, and I think it will be found in general that the section is applicable to disputes between members of a trade union, and not between trades unions or between the branch of a trade union and the trade union. The section does not point to a dispute of this kind.

This was a claim against four trustees of a branch union and in my opinion it came directly within the remedy contemplated by section 9. I think the appeal fails, and, in my judgment, on the authority of the previous case.

RIDLEY and DARLING, JJ., concurred.

Appeal dismissed.

Solicitors for applicant, *Pattinson & Brewer.*

Solicitors for respondent, *Andrews & Andrews.*

K. B. Div.
(Lord Alverstone, L.C.J., and Ridley and Darling, JJ.) Feb. 21.

CLACK v. CLACK. (a.)

Practice—County court—Right to reply.

If the defendant calls evidence to support his defence, the plaintiff by his counsel or solicitor has the right to reply in the county court, following the practice observed in the High Court.

This was an appeal from the County Court of Oxford, holden at Witney.

At the trial, after the close of the plaintiff's case, witnesses were called to support the defendant's case.

Upon the conclusion of the defendant's case, counsel for the plaintiff rose to reply, when the county court judge stated that there was no absolute right to reply, and he should not allow it in this case.

The solicitor appearing for the defendant supported the objection.

The jury having found a verdict for the defendant, the plaintiff applied to the county court judge for a new trial on the grounds—(1) Counsel had been denied his right to reply; (2) verdict was against the weight of evidence.

The county court judge refused the application on the first ground, but did not deal with the second.

The plaintiff now appealed.

Ames, for the appellant.—There is no statute which gives the right to reply in a county court after the defendant has put in evidence. The practice in the High Court is governed by ord. 36, r. 36, which is based on section 18 of the Common Law Procedure Act, 1854, and practically repeats the concluding words of that section—viz., "and the right to reply shall be as heretofore." This throws one back on the common law. Prior to 1854 the practice was universally observed that the plaintiff had the right to reply when the defendant had put in evidence: *vide* Tidd's Practice (9th ed.) and Chitty's Practice, 1842. There is nothing in the County Courts Acts to take away the right to reply given by common law. Section 164 of the County Courts Act, 1888, provides (*inter alia*): "In any case not expressly provided for the general principles of practice in the High Court of Justice may be adopted and applied to actions and matters." In *Dymock* v. *Watkins*, 31 W. R. 331, 10 Q. B. D. 451, the Divisional Court refused to interfere, but there it was the defendant's counsel who claimed the right to sum up, and it was expressly held that at common law the right did not exist.

Turrell, for the respondent.—Section 164 of the County Courts Act, 1888, is not imperative, the words being "may be adopted." The rules of practice observed in the High Court need not necessarily be followed in the county court, as the decision in *Dymock* v. *Watkins* clearly shows. The court would not grant a new trial merely on the ground now put forward. The courts would never interfere where the appellant attempted to show that the court below had not rightly decided the question which party had the right to begin: *Booth* v. *Millnes*, 15 M. & W. 669. These cases are directly in point, as the right to reply depends upon the exercise of the right to begin.

Ames in reply.

Lord ALVERSTONE, L.C.J.—I am of opinion that this case requires further consideration by the learned county court judge; at present he has not dealt with the matter from a satisfactory point of view. I doubt, for reasons I shall give later, whether we can order a new trial in this case. The application for a new trial must be made to the county court judge. This is an appeal from his refusal to grant it. He has not considered on a proper basis what he ought to do after the argument of Mr. Ames on the application. In my judgment it would be better first to state what is the law with regard to this matter. It seems to me that section 72 of the County Courts Act, 1888, recognized the right of counsel to address the county court judge on behalf of his clients. I agree that there is no statute which gives the right to reply either in the superior courts or in the county courts. In the superior courts it originally depended upon section 18 of the Common Law Procedure Act, but now depends on ord. 36, r. 36, which is based on section 18, and has words also found in section 18, "The right to reply shall be as heretofore."

In the superior courts the right to reply depends upon a long-established custom that where the defendant calls evidence the counsel for the plaintiff has the right to reply. There have been a number of decisions to which it is not necessary to refer, but in which there has been a considerable amount of discussion whether the defendant has done enough to give the right to reply, as where he had referred to particulars of demand to prove the credit. Pollock, B., held, after consultation, that evidence having been given there was a right to reply. I need scarcely point out that this discussion could not have taken place if there had not been recognized a right to reply where the defendant had put in evidence. In the county courts to a very large extent the practice of the Supreme Court has been followed, and though it does not carry the matter far, yet section 164 of the County Courts Act, 1888, cannot be overlooked, which enacts that the practice should be assimilated to the practice of the Supreme Court where not otherwise expressly provided. But I think there must be some discretion in the conduct of this matter to be exercised by county court judges as by other judges. I can conceive that in the way cases are there tried it may be a necessity that the county court judges have a large discretion in regulating the practice, but they must exercise it consistently with old principles. One of those principles, the right to reply, depends upon the defendant having given evidence. I call attention to the book which Darling, J., has brought to my notice, Best's Treatise on the Right to Begin. Chapter 3 deals with the matter upon principles I have attempted to summarize, and cites a number of cases for the authority. The passage is: "It is universally admitted in every-day practice that where a party calls evidence or puts in evidence . . . the counsel who began has the right to reply." There are a large number of authorities cited for that, ending with the year 1832, the book having been written in the year 1837. That is an authoritative statement by a learned man for this rule, and I see no reason why it should not be followed in county courts, subject to a reasonable discretion to judges to point out that speeches need not be too long and subject to their endeavour to keep the matter to a reasonable length. Speaking for myself I think counsel has a right to reply in county courts in cases where the defendant has put in evidence. But should we in consequence order a new trial. There arises the difficulty which makes one think the application should be further considered. I think the right to begin is a guide as to what we ought to do, not only on the ground that the right to begin carries with it the right to reply. It is a kindred subject; it is a question of procedure. It appears from a number of cases (*Hickman* v. *Ferine*, 3 M. & W. 517, *Branford* v. *Freeman*, 20 L. J. Ex. 36, and also the the later case in *Booth* v. *Millnes*, 15 M. & W.) that

(a.) Reported by MAURICE N. DRUCQUER, Esq., Barrister-at-Law.

where there has been an error in the way in which the case had been conducted in the court below, and in a matter which involves the same considerations—namely, on whom the onus of proof lies, the courts would not order a new trial unless of opinion that the decision of the judge "did clear and manifest wrong," that is, if the judge was of opinion that no injustice had been done, no new trial would be ordered. In this case, although Mr. Ames did not obtain the privilege of exercising his right, he tells us that the judge summed up in favour of the plaintiff. Still, if the county court judge arrives at the conclusion that the course he took led to a denial of justice he should grant a new trial. I am entitled to say further that in considering this matter the learned county court judge ought to regard our ruling that under ordinary circumstances there is a right to reply in the county court. The case ought to go back to the county court judge to further hear the application for a new trial.

RIDLEY, J.—I agree.

DARLING, J.—I should like to say this: It appears that objection was taken in the county court by the solicitor for the defendant, who asked the judge to say that there was no right to reply in the county court. I dare say that there is among solicitors some such impression which the judgment of my lord is sufficient to show is a false impression. It arose at a time when the county court dealt only with small debts, but people who practice now in county courts must remember that a large jurisdiction has been conferred, and the county courts now try cases as important as many cases tried in this court, and which were commonly tried at assizes. Therefore they should be careful to observe the rules which have long been laid down, and which, although they might have been neglected without harm when the courts were for small debts, would now lead to injustice where cases involving difficult points of law are now under their jurisdiction.

Re-hearing of the application for a new trial ordered.

Solicitors for appellant, *Eldridge & Newnham.*

Solicitor for respondent, *Hatt*, Oxford.

K. B. Div. (Walton, J.) — Dec. 5, 6, 21.

ATTORNEY-GENERAL v. GLOSSOP. (a.)

Inland revenue—Estate duty—Property passing on death—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *s.* 5, *sub-section* 3; *s.* 21, *sub-section* 5—*Finance Act*, 1896 (59 & 60 *Vict. c.* 28), *ss.* 14, 15, *sub-section* 1.

Certain property described as the husband's fortune, and other property described as the wife's fortune, were settled upon trust (subject to certain life interests) to sell and invest and pay out of the income during the joint lives of husband and wife an annuity of £400 to the wife, and the residue of the income during the life of the wife to the husband; and after the death of the wife, if the husband survived, to pay the whole income to the husband for life; and after the death of the husband to pay the whole income to the wife for life, and after the death of the survivor upon certain trusts for children; and failing children, that the trustees should, after the death of the husband and wife, stand possessed of the husband's fortune in trust for his executors, &c., and should stand possessed of the wife's fortune, if the wife should survive the husband, for her executors, &c. There was no issue of the marriage, and the wife survived her husband. The question was whether estate duty was payable on the wife's fortune.

Held, following Attorney-General *v.* Penrhyn, 83 *L. T.* 103, *that the case was not within the saving clause in section* 15, *sub-section* 1, *of the Finance Act*, 1896, *and, following* Attorney-General *v.* Strange, 46 *W. R.* 663, [1898] 2 *Q. B.* 39, *not within section* 21, *sub-section* 5, *of the Finance Act*, 1894, *but that, following* Attorney-General *v.* Wood, 45 *W. R.* 663, [1897] 2 *Q. B* 102, *the case was within the meaning of section* 5, *sub-section* 3, *of the Finance Act*, 1894, *and that so much therefore of the wife's fortune as formed part of the capital which produced the income of £400 a year must not be deemed to have passed on the husband's death. Estate duty was therefore payable on the wife's fortune, except as to so much as her share of the capitalized value of the fund which produced the income of £400 a year.*

Information filed by the Attorney-General on behalf of the Crown.

By an indenture dated the 18th of November, 1873, and made between Samuel Francis Bythesea of the first part, Mary Prideaux Michell, spinster, of the second part, and certain trustees (who were represented by the defendants in the action, and were thereinafter referred to as the trustees) of the third part, being a settlement made in consideration of a marriage then agreed upon and shortly afterwards solemnized between Samuel Francis Glossop Bythesea and Mary Prideaux Michell, it was recited that certain hereditaments, the property of the said Samuel Francis Glossop Bythesea, thereinafter referred to as the "husband's fortune," had become vested in the trustees upon trust for sale and to stand possessed of the sale moneys upon the trusts of the said indenture.

It was further recited that certain hereditaments, the property of Mary Prideaux Michell, had become vested in the trustees, but subject to the life estate of her mother Jenny Eleanor Michell therein upon trust after solemnization of the marriage to sell the same and to stand possessed of the sale money upon the trusts of the said indenture, and that certain sums of money being property of the said Mary Prideaux Michell had also became vested in the trustees. It was also recited that the said Mary Prideaux Michell had before the date of the said indenture transferred to the trustees certain stock (being property of Mary Prideaux Michell), and that Mary Prideaux Michell was by virtue of several assurances entitled to the securities and property, but subject as to certain parts thereof to the life interest of Jenny Eleanor Michell. It was also recited that the moneys to be produced by the sale of the hereditaments, securities, and property were thereinafter referred to as the wife's fortune, and that the husband's fortune and the wife's fortune should after the said marriage be held by the trustees on the trusts thereinafter declared.

The indenture witnessed that in pursuance of the said agreement, and in consideration of the said marriage. Mary Prideaux Michell, with the consent of Samuel Francis Glossop Bythesea, assigned to the trustees certain property, including that known as the wife's fortune, to hold the same to the trustees their executors, &c., but subject as to part thereof to the life estate of Jenny Eleanor Michell, and as to one-tenth part of the same of stock and premises subject also to the life interest of the said Eleanor Michell Clark, upon the trusts thereinafter declared, and it was thereinafter agreed and declared that the trustees after the said marriage stand possessed of the husband's fortune and wife's fortune upon trust to invest the same as therein mentioned, out of the income arising

(a.) Reported by ALAN HOGG, Esq., Barrister-at-Law.

therefrom to pay during the joint lives of Samuel Francis Glossop Bythesea and Mary Prideaux Michell an annuity of £400 to Mary Prideaux Michell for her separate use without power of anticipation, and subject thereto to pay the residue of the income, and after the decease of Mary Prideaux Michell to pay the whole income to Samuel Francis Glossop Bythesea during his life, and after his decease to pay the whole income to Mary Prideaux Michell during her life. And it was thereby agreed and declared that after the decease of the survivor the trustees should stand possessed of the trust property for such of the children and issue as Samuel Francis Glossop Bythesea and Mary Prideaux Michell should by deed jointly, or the survivor should by deed or will appoint, and that failing issue then the trustees, after the death of Samuel Francis Glossop Bythesea and Mary Prideaux Mitchell, should stand possessed of the husband's fortune in trust for Samuel Francis Glossop Bythesea, his executors, &c., and should stand possessed of the wife's fortune and of the securities upon which the same might be invested, or of so much thereof as should not have been vested or been applied as aforesaid, upon trust if Mary Prideaux Michell should survive Samuel Francis Glossop Bythesea, her executors, administrators, and assigns, but if Mary Prideaux Michell should die in the lifetime of Samuel Francis Glossop Bythesea then in trust for such person as she should by will appoint, and in default of appointment for the persons who at the time of the failure of the trusts declared would be entitled under the statutes of distribution in case Mary Prideaux Michell had died intestate and without having been married.

On the 3rd of May, 1904, Samuel Francis Glossop Bythesea died. There was no issue of the marriage. His will was proved in the Principal Registry by the executors, Mary Prideaux Bythesea, Augustus Bythesea Todd, and George Henry Pownall Glossop. Estate duty was paid at 5½ per cent. on £93,477 14s. 5d., including the sum of £5,710 3s. the value of the property settled by Samuel Francis Glossop Bythesea by the indenture of the 18th of November. 1873, but not including any part of the property in the settlement called the wife's fortune. The Commissioners of Inland Revenue claimed that under these circumstances estate duty, under the provisions of the Finance Act, 1904, became payable on the death of Samuel Francis Glossop Bythesea in respect of the principal value of the property settled by Mary Prideaux Bythesea, and referred to in the settlement as the "wife's fortune." They accordingly applied to the defendants for payment of the duty, but the defendants refused to pay the same and contended that no such duty was payable.

The informant concluded by praying that it might be declared that upon the death of Samuel Francis Glossop Bythesea estate duty became payable under the provisions of the Finance Act, 1894, upon the principal value to be ascertained as provided in the Act of 1894 of all the property therein settled by Mary Prideaux Bythesea by the indenture of the 18th of November, 1873, therein called the wife's fortune (with the exception before mentioned) as property passing on the death of Samuel Francis Glossop Bythesea within the meaning of the Act, and that an account might, if necessary, be directed to ascertain the amount of the estate duty and interest thereon payable in respect of such property, and that the defendants might be ordered to pay the amount of the said duty and interest to the Commissioners of Inland Revenue.

By the Finance Act, 1896, s. 15, sub-section 1: "Where by a disposition of any property an interest conferred on any person other than the disponer for the life of such person or determinable on his death, and such person enters into possession and thenceforward retains possession thereof to the entire exclusion of the disponer or of any benefit to him by contract or otherwise, and that the only benefit which the disponer retains in the said property is subject to such life or determinable interest, and no other interest is created by the said disposition, then on the death of such person after the commencement of this part of the Act the property shall not be deemed for the purpose of the principal Act to pass by reason only of its reverter to the disponer in his lifetime."

By the Finance Act, 1894, s. 21, sub-section 5: "Where a husband or wife is entitled either solely or jointly with the settlor to the income of any property settled by the other under a disposition which has taken effect before the commencement of this part of the Act, and on his or her death the survivor becomes entitled to the income of the property settled by such survivor, estate duty shall not be payable in respect of that property until the death of the survivor."

By section 5, sub-section 3: "In the case of settled property where the interest of any person under the settlement fails or determines by reason of his death before it becomes an interest in possession, and subsequent limiationt, under the settlement continue to subsist, the property shall not be deemed to pass on his death."

By section 14: "When property is settled on a person on himself for life, and after his death on any other persons with an ultimate reversion of an absolute interest or absolute power of disposition to the settlor the property shall not be deemed for the purpose of the principal Act to pass to the settlor on the death of any such person after the commencement of this part of this Act by reason only that the settlor being then in possession of the property as tenant for life, becomes, in consequence of such death, entitled to the immediate reversion or acquires an absolute power to dispose of the whole property."

Sir R. B. Finlay, A.G., and *Vaughan Hawkins*, for the Crown.

Danckwerts, K.C., and *Austen Cartmell*, for the defendants.

The arguments sufficiently appear from the judgment.

Cur. adv. vult.

WALTON, J., having set out the facts as above, continued: It is not disputed that the wife's fortune passed on the death of the husband, and estate duty is payable in respect of it unless the case can be brought within one or or other of the saving enactments relied on by the defendants. It can scarcely be said that section 15 (1) of the Finance Act, 1896, was relied on by the defendants, because it cannot be doubted that if I am bound by the decision of the Divisional Court in *Attorney-General* v. *Penryn*, 83 L. T. 103, the present case is within it. Section 15 (1) of the Act of 1896 is as follows: "Where by a disposition of any property an interest is conferred on any person other than the disponer for the life of such person or determinable on his death, and such person enters into possession of the interest and thenceforward retains possession thereof to the entire exclusion of the disponer or of any benefit to him by contract or otherwise, and the only benefit which the disponer retains in the said property is subject to such life or determinable interest, and no other interest is created by the said disposition, then, on the death of such person after the commencement of this part of the Act, the property shall not be deemed for the purpose of the principal Act to pass by reason only of its reverter to the disponer in his lifetime." But if I am bound by

that case section 15 (1) affords no defence to the claim of the Crown. It is open to the defendants to contend in the Court of Appeal that the judgment in that case was wrong, but I think that I am bound by it. The next enactment which I have to consider is section 21 (5) of the Finance Act, 1894. As applied to the facts of the present case, the sub-section may be read as follows: "Where the husband is entitled to the income of property settled by his wife and on his death the wife becomes entitled to the income of the property settled by her, estate duty shall not be payable in respect of that property until the death of the wife." The husband in the present case died, and there were no children. Under these circumstances, what did the survivor, the wife, become entitled to? Following the form of the settlement, the trustees on the death of the husband stood possessed of the property settled by the wife—that is, the "wife's fortune," and also of the "husband's fortune"—to pay the income of the husband's fortune and the wife's fortune to the wife during her life, and upon her death, as to the husband's fortune, for the husband, his executors, administrators, and assigns, and as to the wife's fortune for the executors, administrators, and assigns of the wife. It is only as to the wife's fortune that any question arises in this case. On the death of the husband the trustees stood possessed of the wife's fortune in trust to pay the income to the wife during her life and after her death for her executors, administrators, and assigns. If it is permissible to consider the wife's fortune separately from the husband's fortune, it seems to me that on the husband's death the wife became entitled absolutely not only to the income, but also to the corpus of the part described as the wife's fortune. And I see no reason why the wife's fortune should not be dealt with separately. It seems to me that the present case is governed by the judgment of the Court of Appeal in *Attorney-General* v. *Strange*, 46 W. R. 663, [1898] 2 Q. B. 39. I think that on the death of the husband the wife was entitled to say to the trustees, "I am entitled to the property described as the wife's fortune; give it to me." In the words of Lord Lindley in *The Attorney-General* v. *Strange*: "They obviously have no choice in the matter. If she were to bring an action against them to compel them to transfer the funds they would clearly have to pay the costs." If this be so and she became entitled on the death of her husband not merely to the income but also to the corpus of the property, then, following *Attorney-General* v. *Strange*, I must hold that the present case is not within section 21 (5). The next section relied upon by the defendants is section 5 (3) of the Finance Act, 1894. It is in these words: "In the case of settled property, where the interest of any person under the settlement fails or determines by reason of his death before it becomes an interest in possession, and subsequent limitations under the settlement continue to subsist, the property shall not be deemed to pass on his death." It is said that this section applies, not to the whole of the wife's fortune, but to the capitalized value of the annuity of £400 a year. It is said that the husband had an interest in this property, as he would have been entitled under the settlement to the income of it—that is, to £400 a year—during his life if he had survived his wife; that this interest failed by reason of his death before it became an interest in possession, and the subsequent limitations to the wife continued to subsist. I think that the husband had an interest under the settlement, which failed by reason of his death before it became an interest in possession. But it is necessary to consider what interest he had which failed. What would he have been entitled to if he had survived his wife? The corpus out of which the £400 a year was payable was made up in part of the husband's fortune and in part of the wife's fortune. As I have already held, the husband's fortune may be considered separately from the wife's fortune. As to so much of this corpus producing £400 a year as was part of the husband's fortune, the trustees on the death of the wife would, if the husband had survived her, have held it on trust for the husband for life, and on his death for his executors, administrators, and assigns. In other words, as I have held with regard to the "wife's fortune," the husband on the death of the wife would have been entitled to this part of the corpus absolutely. It appears to me that his interest in this part of the corpus producing the £400 a year did not fail on his death. On the wife's death it would still belong to him, his executors, administrators, and assigns. But as to so much of the corpus producing the £600 a year as was part of the "wife's fortune" the case is different. If he had survived his wife he would have been entitled to a life interest in this, and this interest failed on his death before it became an interest in possession. The question remains whether as to this any subsequent limitations continued to subsist after the death of the husband. I have already held in effect that upon the death of the husband the wife became entitled to this property absolutely. But it appears to me that if this be so it has been decided in *Attorney-General* v. *Wood*, 45 W. R. 663, [1897] 2 Q. B. 102, that in such a case a limitation under the settlement does continue to subsist within the meaning of section 5 (3). In my judgment, therefore, so much of the "wife's fortune" as formed part of the capital which produced the income of £400 a year must not be deemed to have passed on the husband's death. In order to arrive at the amount an apportionment will be necessary. There will probably be no difficulty in making the apportionment. I think it can be made, and if any difficulty arises with regard to it I must deal with it. For this purpose there must be liberty to apply. The Attorney-General contended that the judgment of the House of Lords in *Earl Cowley* v. *Commissioners of Inland Revenue*, 47 W. R. 525, [1899] A. C. 198, afforded an answer to the contention of the defendants upon section 5 (3). It is quite clear that this section was not referred to in the arguments or judgments in *Lord Cowley's case*. And I think it had no application to the facts in that case. *Lord Cowley's case* shows that if section 5 (3) did not apply to the facts of this case no deduction could be made in considering what property passed on the death of the husband in respect of the annuity of £400 a year payable to the wife during the lifetime of the husband. *Lord Cowley's case* is not an authority upon the construction of section 5 (3). It is scarcely necessary to consider the other enactment which was relied upon by the defendants. This was section 14 of the Finance Act, 1896. This section admittedly can apply only to so much of the "wife's fortune" as formed part of the corpus which produced the income of £400 a year. And it seems to me to apply only where the property in question is settled on the settlor for life. In the present case the property in question was not settled by the wife on herself for life. It was settled upon herself for the joint lives of herself and her husband. But, however this may be, if the defendants are right under section 5 (3) of the Act of 1894, it is unnecessary for them to rely on section 14 of the Act of 1896. The result of my judgment is that the Crown is entitled to succeed except as to so much of the "wife's fortune" as is her share of the capitalized value of the fund which produced the income of £400 a year. Each party must pay its own costs.

Judgment accordingly.

Solicitor for the Crown, *Solicitor of Inland Revenue.*

Solicitors for defendants, *Young, Jones, & Co.*

K. B. Div. (Bray, J.) Nov. 6; Dec. 21.

WILLIAMS *v.* GABRIEL AND OTHERS. (*a.*)

Landlord and tenant—Lease—Sale of the reversion—Covenant for quiet enjoyment—Liability of lessor.

A lease contained the following covenant for quiet enjoyment: "And the lessor for himself, his heirs, executors, administrators, and assigns doth hereby covenant with the lessee that the lessee . . . shall and may peaceably enjoy the demised premises during the said term without any interruption or disturbance by the lessor or any person claiming under him." A breach of this covenant was committed by the assignee of the reversioner.

Held, that the lessor was not liable for wrongful or negligent acts committed by an assignee of the reversioner whom he has not expressly or impliedly authorized to do the acts.

Action tried by Bray, J.

The facts and arguments are fully set out in the considered judgment of the learned judge.

Morle, for the plaintiff.

English Harrison, K.C., and *J. T. Tanner*, for the defendants.

Cur. adv. vult.

BRAY, J., read the following judgment: In this action the plaintiff sued the defendants as the representatives of Arnold Gabriel, deceased, for damages for breach of a covenant for quiet enjoyment. The statement of claim contained an alternative claim for trespass, nuisance, and negligence, but at the trial the plaintiff rested his case, as he was bound to do, on breach of covenant. The facts were as follows: On the 19th of October, 1886, Arnold Gabriel demised to the plaintiff a shop and a kitchen on the ground floor of a building known as Aberdeen-buildings, in Emmett-street, Limehouse, and four rooms on the first floor above the shop and kitchen, and portion of a yard adjoining the premises, to be occupied for the purpose of a coffee-house. The lease was for twenty-one years determinable by the lessee at the end of the seventh or fourteenth years, and the rent was £40. The only material covenant by the lessor was the covenant for quiet enjoyment, which was in these terms: "And the lessor for himself, his heirs, executors, administrators, and assigns doth hereby covenant with the lessee that the lessee paying the rent hereinbefore reserved and performing and observing the covenants on his part hereinbefore contained shall and may peaceably enjoy the demised premises during the said term without any interruption or disturbance by the lessor or any person claiming under him." Aberdeen-buildings was a block of buildings recently built, intended to be let out in flats or tenements, and there were several floors above the premises demised to the plaintiff. About the year 1891 Gabriel assigned his reversion in the whole of the buildings to Jackson. There was no evidence that at this time the buildings were out of repair. Some considerable time before 1904 the buildings other than those occupied by the plaintiff got very much out of repair; all the tenants other than the plaintiff left, and the plaintiff's rooms became injured by wet. In 1904 Aberdeen-buildings got so dilapidated that proceedings were taken against the owners by the London County Council under the London Building Act, which resulted in the order of the 25th of March, 1904, by which the owners of Aberdeen-buildings were ordered to take down the structure on the ground that it was so far dilapidated as to have become and be unfit for use or occupation. At this time the reversion was vested in Messrs. Attenborough as mortgagees, a Mr. Hargreave being the mortgagor. On the 4th of July these gentlemen commenced to pull down the buildings, after a time completely exposing a part of the plaintiff's premises, and the plaintiff was forced by these operations to leave in May, 1905. The plaintiff alleged that this was an interruption of his quiet enjoyment for which the representatives of the original lessor were liable. There was no doubt that the plaintiff had suffered considerable damage, but the defendants denied liability *in toto.*

I have now to construe the covenant for quiet enjoyment. This form of covenant has been under the consideration of the courts in several cases, and has received judicial interpretation from several judges. The most important of these cases is *Harrison, Ainslie, & Co.* v. *Muncaster*, 40 W. R. 102, [1891] 2 Q. B. 680. In that case the defendants had let a mine to the plaintiffs with a covenant for quiet enjoyment, and subsequently let the adjoining mine to a tenant who, in the course of ordinary and proper working of the mine, struck a feeder, with the result that a large body of water flooded that mine and the plaintiffs' mine, and the plaintiffs claimed that the quiet enjoyment of their mine had been interrupted, and that the defendant, their lessor, was responsible. The first question that arose was whether there had been an interruption, and Lord Esher says: "The case of *Sanderson* v. *Mayor of Berwick-on-Tweed*, 33 W. R. 67, (1884) 13 Q. B. D. 547, is a clear authority that the interruption contemplated by the covenant need not necessarily be an interference with the title, but may extend to an interference with the enjoyment; and that decision, interpreted in that way, was, in my opinion, authorized by the case of *Shaw* v. *Stenton*, (1858) 2 H. & N. 858." He then proceeded to hold that on the facts of the case there had been an interruption. In my opinion I must hold that there has been an interruption here, and, indeed, this point was not seriously contested; but the interruption was by Messrs. Attenborough, the assignees of the reversion. I have to consider whether it was an interruption by any person claiming under the lessor. The word "lawfully" is not in the covenant, but I do not think its omission is of any importance. The words "any person claiming under the lessor" were interpreted by Lord Esher to mean a person claiming under him (*i.e.*, the lessor) the right to do the acts which caused the interruption. The other Lords Justices do not use the same words, but I see nothing in their judgment to shew that they differed from Lord Esher. It may perhaps only be a *dictum*, as the Court of Appeal held that the defendants were not liable on grounds that do not apply here; but whether this be so or not, or whether I am bound by this decision or not, Lord Esher's interpretation is, in my opinion, the correct one. If it were not so the lessor would be liable for all interruptions by any persons claiming title through him, whether assignee or under tenant, and however wilful or negligent the interruption was. There must be some limit, and I think the limit suggested by Lord Esher is the right one. It comes to this, that the lessor agrees to be bound for any act of interruption by himself or by any person whom he has expressly or impliedly authorized to do the acts. If the lessor part with

(*a.*) Reported by MAURICE N. DRUCQUER, Esq., Barrister-at-Law.

the property or adjoining property to a person, and that person is in a position to rightfully claim under his title from the lessor, that he is authorized to do these acts, the lessor will be responsible. This is reasonable, and what the parties might well have contemplated, because the lessor has really authorized the acts to be done; but to hold that the parties contemplated that the lessor was to be responsible for wrongful or negligent acts which he had not authorized would, in my judgment, be beyond reason. I was referred to a number of other authorities, and I must notice some of them: In *Davies* v. *Town Property Investment Corporation*, 51 W. R. 42, [1902] 2 Ch. 635, Byrne, J., cites and agrees with and acts upon Lord Esher's construction of the covenant. In *Jenkins* v. *Jackson*, 37 W. R. 253, (1888) 40 Ch. D. 71, Kekewich, J., holds the landlord liable for noise and vibration caused by dancing, on the ground that the landlord had authorized his tenant to use the room for dancing after he had repeated notice that the dancing caused a nuisance. That would be right on Lord Esher's definition. In *Sanderson* v. *Mayor of Berwick-upon-Tweed* Fry, L.J., giving the judgment of the Court of Appeal, held a lessor responsible because his tenant had in the proper and contemplated use of certain drains damaged the plaintiff, but refused to hold the lessor responsible for the excessive user of those drains. There is nothing in the judgments in *Anderson* v. *Oppenheimer*, (1880) 5 Q. B. 602, 29 W. R. Dig. 112, to the contrary. The lessor had put up the cistern, and if it had been improperly constructed it would be right that he should be responsible. In *Shaw* v. *Stenton* the excavation which caused the damage had been done by the defendant himself. If Lord Esher's construction be the right one, as I think it is, I have no difficulty in holding on the facts here that Messrs. Attenborough could not claim under the lessor, Arnold Gabriel, the right to do the acts complained of, and, therefore, that his representatives were not liable for what Messrs Attenborough did. There must be judgment for the defendants with costs, including costs of and occasioned by the adjournment.

Judgment for defendants.

Solicitor for plaintiff, *Joseph Sykes.*

Solicitor for defendants, *W. W. Wynne & Sons.*

K. B. Div. (Walton, J.) — Dec. 8.

JOHN HALL, JUN. *v.* RICKMAN. (*a.*)

Inland Revenue—Income tax—Depreciation by reason of wear and tear—Customs and Inland Revenue Act, 1878 (41 & 42 *Vict. c.* 35), *s.* 12.

The appellants, a firm of shipowners, were the owners of a fleet of vessels, whose average age during the years of assessment was thirty-one years, also of a wooden hulk forty years old used by them in a coal-bunkering business. Prior to the first year of assessment the appellants had been allowed from their gross profits deductions by reason of wear and tear of sums amounting in all to 96 per cent. of the prime value, including sums expended on them by way of additions and repairs, other than ordinary repairs. The Commissioners of Inland Revenue found as a fact that the breaking-up value of the ship was considerably more than 4 per cent. of the prime cost, together with the repairs and additions referred to, and refused to allow any further sum for depreciation in respect of the ships under section 12 *of the Customs and Inland Revenue Act,* 1878, *or in respect of the hulk, on the ground that it was not "plant" within the meaning of the section.*

Held, that the commissioners were not entitled to take the depreciation allowed in previous years, and that they were bound under section 12 *to make a just and reasonable allowance in respect of the diminution in value by reason of wear and tear during the years of assessment.*

Held, also, that the hulk was "plant" within the meaning of section 12.

Case stated by Commissioners of Income Tax.

The appellants, a firm of shipowners, were the owners of a fleet of vessels whose average age during the years of assessment was thirty-one years, also of a wooden hulk forty years old used by them in a coal-bunkering business.

The question which came before the commissioners for consideration was what was a fair and reasonable allowance to be made from the assessment as representing the diminished value by reason of wear and tear during the years of assessment of the ships and hulk comprised in the appellants' fleet.

It was admitted that prior to the first year of assessment the appellants' firm had been allowed from their gross profits assessed to Schedule D an amount by way of deduction for diminished value by reason of wear and tear in respect of their vessels, other than one called *The Peninsula*, sums amounting in the aggregate to not less than 96 per cent. on their first or prime cost, including such sums as had been expended upon them by way of addition or repair other than ordinary annual repairs; the latter had been allowed from time to time as an expense chargeable against repairs.

The commissioners found as a fact that these allowances had been made, and also that the breaking-up value of the ships in 1901 was considerably more than 4 per cent. of the first or prime cost together with the additions and repairs referred to. The hulk was formerly a sailing ship, but it had been dismantled and its rudder removed, and it was used as a floating warehouse for coal at Gibraltar; it was found as a fact that the total of the amounts allowed to the appellants in previous years in respect of her exceeded 100 per cent. of the first or prime cost together with expenditure by way of addition or repairs other than ordinary annual repairs.

The claimants claimed to be allowed in respect of all ships and of the hulk such amount as fairly represented the diminished value by reason of the wear and tear during the year of assessment of each of the ships and of the hulk, and contended that for the purpose of ascertaining the diminished value regard should be had only to the value at the year in question, and that no regard should be had to the allowances made in previous years, and they referred to the terms of the Customs and Inland Revenue Act, 1878.

The respondent contended that as the appellants had received in the previous years an allowance for the diminution in value by reason of wear and tear of 96 per cent. of the prime cost (together with additions and repairs) and as the breaking-up value of the ships was more than 4 per cent of their prime cost, the appellants were not entitled to any further allowance in respect of them. He further contended, on the same ground, that no allowance could properly be made in respect of the hulk, and also on the further ground that the hulk was a floating warehouse and was not plant nor machinery within the meaning of

(*a.*) Reported by ALAN HOGG, Esq., Barrister-at-Law.

section 12 of the Customs and Inland Revenue Act, 1878.

The commissioners came to the conclusion that the allowance already made and received by the appellants was a sum which was just and reasonable as sufficiently representing the diminished value by reason of wear and tear during the years of assessment, and they were further of opinion that no allowance could be made in respect of the hulk on the ground that it was a floating warehouse and was not plant or machinery within the meaning of the section.

By section 12 of the Customs and Inland Revenue Act, 1878, notwithstanding any provision to the contrary contained in any Act relating to income tax, the commissioners for general or special purposes shall, in assessing the profits and gains of any trade, manufacture, adventure, or concern in the nature of trade chargeable under Schedule D, or the profits of any concern chargeable by reference to the rules of that schedule, allow such deduction as they may think just and reasonable as representing the diminished value by reason of wear and tear during the year of any machinery or plant used for the purposes of this concern, and belonging to the person or company by whom it is carried on.

Asquith, K.C. (*Maurice Hill* with him), for the appellants.

Sir E. H. Carson, S.G. (*Rowlatt* with him), for the respondent.

The arguments sufficiently appear from the judgment.

WALTON, J., after reading the sections and stating the contentions above set forth, continued: The contention of the commissioners seems to me not in itself unreasonable, assuming, of course, that the vessels have been the property of the same owners during the whole of the period, which seems to be the fact in the present case. But what I have to do, however, is not what would be fair and reasonable having regard to all the facts past and present; I have to give effect to the Act of Parliament. Now it is not denied that during the two years in question the value of these vessels has diminished by reason of wear and tear; that being so, I think the commissioners must consider what would be a just and reasonable allowance to make in respect of that depreciation. I do not think that they are entitled to take into account the allowances that have been made in previous years. Those allowances may have been too large or too small, but that consideration cannot affect the question as to what is a just and reasonable allowance for the years in question. I think it can make no difference that the vessels continue to be the property of and to be used by the same owners; all the commissioners have to deal with is the amount of the depreciation during the years in question, and they must consider what is a fair and reasonable allowance.

As to the hulk, I think it is clearly plant, indeed, the Solicitor-General has not argued to the contrary.

Appeal allowed.

Solicitors for the appellants, *Cattarns & Co.*

Solicitor for respondent, *Solicitor of Inland Revenue.*

House of Lords.

From C.A. (England). Dec. 15.

UNDERGROUND ELECTRIC RAILWAYS CO. OF LONDON v. COMMISSIONERS OF INLAND REVENUE. (*a.*)

Inland revenue — Stamp — Conveyance on sale — Ad valorem *duty — Purchase-money on contingency — Stamp Act,* 1891 (54 & 55 *Vict. c.* 39), *ss.* 56, 57.

A company agreed to sell its undertaking to a new company, part of the consideration being that the purchasing company should, after providing for certain payments to their own shareholders, pay to the vendors a dividend of 3 per cent. per annum upon the amount paid up on the original capital issued by the new company.

Held, that, though payable on a contingency, this was "money payable periodically" within section 56, sub-section 2, of the Stamp Act, 1891.

Order of the Court of Appeal (53 *W. R.* 325, [1905] 1 *K. B.* 174) *affirmed.*

Appeal from an order of Court of Appeal (53 W. R. 325, [1905] 1 K. B. 174) (Collins, M.R., and Stirling and Mathew, L.JJ.), reversing a decision of Channell, J. (53 W. R. 61, [1904] 2 K. B. 198).

The case is set out at length in the court of first instance, and raised the question whether stamp duty was payable under section 56, sub-section 2, of the Stamp Act, 1891, under the following circumstances.

In 1902 the Metropolitan District Electric Railways Co. (Limited) agreed to sell its undertaking to the appellants, and part of the consideration was provided for by article 3 of the agreement as follows:

"The profits of the new company (the appellants) available for dividend in respect of each year shall be applied in the following order and manner, that is to say: First, in payment of a cumulative dividend at the rate of 5 per cent. per annum to the end of such year on the amount for the time being paid up on any shares for the time being issued by the new company, and, secondly, in paying to the Traction Co. or its assigns as a further part of the consideration for the said sale such a sum as shall be equal to a dividend of 3 per cent. for such year on the amount for the time being paid up on such of the original ordinary share capital of £5,000,000 in the new company as shall for the time being have been issued by the new company."

At the date of the agreement the whole of the ordinary share capital of £5,000,000 above referred to had been issued, and £1,300,000 had been paid thereon. Upon this sum of £1,300,000 a dividend of 3 per cent. for the year would be £39,000.

Section 56 (2) of the Stamp Act, 1891, provides: "Where the consideration, or any part of the consideration, for a conveyance on sale consists of money payable periodically for a definite period exceeding twenty years or in perpetuity, or for any indefinite period not terminable with life, the conveyance is to be charged in respect of that consideration with *ad valorem* duty on the total amount which will or may, according to the terms of sale, be payable during the period of twenty years next after the day of the date of the instrument."

The commissioners were of opinion that the annual sum payable (contingently on there being profits sufficient to provide the same) was "part of the consideration for the sale," and that, so far as such sum was capable of ascertainment at the date of the agreement, *ad valorem* conveyance duty at the rate of 10s.

(*a.*) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

per cent. was chargeable in respect thereof. The commissioners were further of opinion that, as the said annual sum was payable either in perpetuity or for an indefinite period within section 56 (2) of the Stamp Act, 1891, duty fell to be charged upon the sum of £39,000, multiplied by twenty, making at 10s. per cent. a duty of £3,900. They accordingly assessed duty at such figure in addition to other duty on the remaining parts of the consideration as to which there was no question.

Channell, J., took a different view.

This decision was reversed by the Court of Appeal.

Roskill, K.C., and *Austen-Cartmell*, for the appellants.

Sir R. Finlay, A.G., and *Rowlatt* (*Sir E. Carson, S.G.*, with them), for the respondents.

Earl of HALSBURY, L.C.—I have had an opportunity of reading the opinion upon this case which my noble and learned friend Lord Lindley has written. I quite concur in it, and have nothing to add.

Lord ROBERTSON.—I think the judgments in the Court of Appeal are right.

Lord LINDLEY.—When the stamp duty payable on the conveyance in this case had to be ascertained, part of the consideration for the sale was 3 per cent. of the then paid-up capital of the purchasing company. This sum was a minimum sum, and it was payable periodically for an indefinite time. The amount payable in future was liable to be increased, but not to be diminished, except in certain events, to which I now allude. One of these events, and the only one in my opinion which creates any difficulty, was the possible insufficiency of the profits of the company to pay the amount referred to after paying a dividend of £5 per cent. on the paid-up capital of the company. That dividend of 5 per cent. had to be paid out of the profits of the new company to its shareholders before any further payment became payable to the selling company. The minimum sum payable periodically was so payable subject to a contingency—viz., the existence of a sufficiency of profits to pay, first, a dividend of 5 per cent. and then a further dividend of 3 per cent. We have, therefore, an ascertained minimum amount payable periodically as part of the consideration of the sale, but payable on a contingency. Is such a sum within section 56, clause 2, of the Stamp Act, 1891? I need not read it again.

Its language is very wide. It is contended that the words "money payable periodically" in that section do not apply to money payable on a contingency, because contingent payments are dealt with by section 57. I do not myself see how section 57 assists the appellants. Its effect seems to be that where the consideration for a sale consists of money payable on a contingency, such money is to be taken into account in ascertaining the stamp duty to be paid on the conveyance of the property sold. I see nothing in section 57 which either cuts down or excludes section 56. It is also contended that the words "money payable" in section 56 do not include money payable upon a contingency, because the contingency may never happen and no money may be payable. But the words of section 56 appear to me to be wide enough to cover all moneys which may become payable, and the latter part of clause 2 certainly favours this construction. Moreover, section 57 says that money payable on a contingency is to be taken into account; and that, to my mind, removes any doubt which might otherwise arise as to the inclusion of contingent payments in section 56. Then it is said that the purchasing company may be wound up, or may at some future time reduce its capital, and so reduce in future the minimum sum payable periodically to the selling company. No doubt these are possible events, but at most they are merely other contingencies on which the payment of the minimum sum depends. Unless the contingency of winding up or reducing the capital happens, the minimum sum continues to be payable. The fact that the minimum sum is payable on more contingencies than one is, in my opinion, quite immaterial. They only affect the ability of the purchasing company to pay, which is the only contingency of any importance. For these reasons I am of opinion that the decision of the Court of Appeal was correct, and that this appeal should be dismissed with costs.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Solicitors, *Bircham & Co.; Solicitor for Inland Revenue.*

Privy Council.

(*On appeal from the Court of Appeal for New Zealand.*)

Dec. 1.

CLOUSTON & CO. (LIMITED) v. CORRY. (a.)

Master and servant—Wrongful dismissal—Damages for—Duty of judge—Justification—Jury.

Misconduct inconsistent with the fulfilment of the express or implied conditions of service will justify dismissal, but there is no fixed rule of law defining the degree of misconduct which will suffice.

In cases of alleged wrongful dismissal where the trial takes place before a judge and jury, it is for the judge to direct them by informing them of the nature of the acts, which as a matter of law justify dismissal, and he may guide them by calling their attention to the facts material to the determination of the issues raised.

The action was brought for wrongful dismissal.

The whole circumstances of the case appear in their lordships' judgment.

Lush, K.C., and *Northcote*, for the appellants.

Tyrrell Paine (*Cohen, K.C.*, with him), for the respondent.

The judgment of their lordships (Lords Macnaghten, Davey, James of Hereford, Robertson, and Sir Arthur Wilson) was delivered by

Lord JAMES OF HEREFORD.—This is an appeal from a judgment of the Court of Appeal of New Zealand, directing judgment to be entered for the plaintiff (the present respondent) for £875 and costs.

The material facts of the case appear to be as follows:

Prior to September, 1902, the plaintiff had carried on business in New Zealand as an agent for the purchase of barley and as a dealer in farm produce. He also conducted an insurance office business. The appellant company carried on a similar business in the same district.

On the 18th of September, 1902, an agreement was entered into between the plaintiff and the defendant company whereby the plaintiff undertook faithfully

(a.) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

to serve the defendant company for five years as manager of the grain and produce department of the business of the company. He also undertook to obey all commands and instructions given to him, and to use his best endeavours to bring to the defendants the business agencies and clients of the firm to which he had belonged. In return the defendants undertook to pay the plaintiff £500 per annum and a percentage on the profits made on business introduced by him.

The plaintiff entered upon his duties under this agreement, and continued in the defendants' service until the 17th of November, 1903, when he was dismissed. It is for this dismissal, alleged to be wrongful, the action was brought.

The statement of claim set out the above facts, and contained a claim for £3,000 damages.

The statement of defence justified the dismissal of the plaintiff on the grounds: First, that the plaintiff had disobeyed the orders of the directors of the defendant company. Secondly, that the plaintiff had on the 9th of November, 1903, been arrested in the streets of a township called Havelock, on a charge of drunkenness and disorderly conduct, and fined for such offences.

The trial took place in March, 1904, before the Chief Justice of the Supreme Court of New Zealand and a jury. In support of the allegations in the statement of defence that the defendants were justified in dismissing the plaintiff evidence was given to show that the plaintiff had, as agent for the defendants, made purchases of goods contrary to the orders given him by the directors of the defendant company; and secondly, that the plaintiff had in the month of November, 1903, grossly misconducted himself at a place called Havelock and had been convicted by a magistrate of drunkenness.

The first ground of justification was, during the argument before their lordships, very properly abandoned by the counsel for the appellants (the defendants), inasmuch as the second ground of defence presented facts of a much more serious character than the first. The evidence given by the defendants as to the plaintiff's drunkenness and the use of foul language at Havelock was very strong and virtually admitted by the plaintiff. His own account is as follows:

"I went to Havelock on the 8th of November. . . . I stopped on the night of the 8th at Duggan's Hotel. I arrived there at 7.30 p.m. I think I was sober when I arrived, but I am not sure of anything that happened there. I might have got drunk on the night of the 8th. I do not remember, but I misconducted myself on the 9th. I remember Mr. Taylor coming to me on the morning of the 9th. I was not drunk then. He came to me on business. I told him to go to hell because he had accused me of not replying, acknowledging the receipt of money he had sent to me. . . . The receipt of the money had been acknowledged. . . ."

Question: "Did you use foul and coarse language in a public street when there were ladies in the balcony of the hotel close by?" Answer: "I would not say that I did not. I think I did go to the sergeant of police to ask him to compel the publican to give me more drink. I do not know that I wanted to fight. I do not remember two gentlemen asking me to desist because there were ladies on the balcony. I got out of the lock-up at 11 p.m. on the 9th and started drinking again. I think I was mad when I was in the police-court on the 10th. There was a report of the affair in the *Pelorus Guardian* of what took place in the police-court. I cannot say whether or not it is inaccurate. Some of my friends tried to get the paper not to publish it. (Report put in.) I do not say anything in extenuation of my conduct, and it was not fit conduct for any person who held my office. I cannot say how many times a man can so act."

He also said, "I have commonly been drunk," and it was further alleged that the habitual drunkenness was known to certain officers of the defendant company.

In respect of this misconduct, the plaintiff was charged before and convicted by a magistrate at Havelock, and a report of the proceedings appeared in the press.

At the conclusion of the evidence the counsel for the defendants submitted—

(1) That unless the jury disbelieved the evidence as to the conduct at Havelock they must find a verdict for the defendants.

(2) That certain purchases admittedly made by the plaintiff were made in direct violation of the orders given to him by the board of directors of the defendant company, and that on that ground also the verdict should be entered for the defendants.

The learned Chief Justice declined to accede to this submission, but leave was reserved to the full court to enter a non-suit, or to enter a verdict for the defendant company.

The following questions were left to the jury:

"(1) Did the plaintiff obey the order and direction of the defendant company in the purchase of chaff from Woodward?

"(2) If so, was the defendant company justified in dismissing the plaintiff?

"(3) Was the defendant company justified in dismissing the plaintiff for his conduct at Havelock on the 9th and 10th of November, 1903?

"(4) What damages, if any, is the plaintiff entitled to recover?"

To the first of the above questions the jury answered, Yes. To the second and third, No. To the fourth, £875.

After the verdict had been given the learned Chief Justice expressed considerable doubt as to the course he ought to pursue, but in the result allowed the verdict to be entered for the plaintiff for £875, reserving "full power for the court to enter a verdict for the defendant if it should turn out that the matter is wholly one of law." The Chief Justice added: "The facts in this case are not in dispute, and if it is the function of a judge to determine that the dismissal was justifiable, then the court is to have power to do so and to enter a verdict for the defendant, and also to grant a non-suit if it should be the opinion of the court that the plaintiff's conduct justified the defendants in dismissing him."

The defendants duly gave notice of motion, pursuant to leave reserved, to enter judgment for them—

(1) Upon the ground that upon the facts admitted by the plaintiff the learned judge ought either to have entered judgment for the defendant company or to have directed the jury to find for them, or to have directed a non-suit.

(2) Upon the ground that the learned judge refused to direct the jury as requested by the defendant's counsel that if they believed the defendant's evidence (which was uncontradicted) they must find a verdict for the defendant company.

(3) That the learned judge misdirected the jury in directing them that, the facts being admitted, the question whether such facts justified the dismissal of the plaintiff was a question for the jury.

(4) In the alternative, that there should be a new trial on the ground that the verdict was against the weight of evidence.

By consent it was ordered that the motion founded on these notices should be removed into the Court of Appeal for hearing.

The case was argued in the Court of Appeal of New

Zealand before the Chief Justice and Williams, Edwards, Denniston, Chapman, and Cooper, JJ. The case was fully considered, and elaborate and learned judgments were given by the members of the court The Chief Justice was of opinion that his direction at the trial was wrong, and that the verdict should have been entered for the defendants. The other members of the court were of opinion that the case was rightly submitted by the Chief Justice to the jury, and that the verdict they arrived at was correct, and ought not to be disturbed. From that judgment the defendant company obtained leave to appeal to his Majesty in Council.

Both in the arguments of counsel and in the elaborate judgments delivered by the judges of the Court of Appeal very many cases were referred to. Reliance cannot be placed upon all of them, for very much must depend upon the exact words used in the judgments given, and summaries composed by the reporters of trials at *Nisi Prius* may not always convey the exact ruling of the presiding judge. It is difficult also to determine whether the words quoted in the reports represent words of advice or of absolute direction. Still there are cases which can be quoted in support of either side of the question involved, and between some of them it is apparently impossible to avoid a conflict. It seems unnecessary to pass all these cases again in review, but their lordships have fully considered them, and are aided by them in arriving at the conclusion they now express.

In an action brought to recover damages for alleged wrongful dismissal from service, a defence which in former days would have been embodied in a plea of justification, is set up. Allegations of misconduct, drunkenness, the use of foul language in public, resulting in conviction, are made, supported by strong evidence virtually admitted by the plaintiff to be true. And upon such facts the question arises what is the power and the duty of the presiding judge. Ought he to withdraw the case from the jury and with his own hand enter a verdict for the defendant, or ought he to leave the case to the jury, asking them if they think the facts proved justified the dismissal of the plaintiff?

In the present case the tribunal to try all issues of fact was a jury. Now the sufficiency of the justification depended upon the extent of misconduct. There is no fixed rule of law defining the degree of misconduct which will justify dismissal. Of course there may be misconduct in a servant which will not justify the determination of the contract of service by one of the parties to it against the will of the other. On the other hand, misconduct inconsistent with the fulfilment of the express or implied conditions of service will justify dismissal. Certainly when the alleged misconduct consists of drunkenness there must be considerable difficulty in determining the extent or conditions of intoxication which will establish a justification for dismissal. The intoxication may be habitual and gross, and directly interfere with the business of the employer or with the ability of the servant to render due service. But it may be an isolated act committed under circumstances of festivity and in no way connected with or affecting the employer's business. In such a case the question whether the misconduct proved establishes the right to dismiss the servant must depend upon facts—and is a question of fact. If this be so, the questions raised in the present case had to be tried by the jury.

But in cases where the trial must so take place the presiding judge has important duties to fulfil. It is for him to say whether there is any evidence to submit to the jury in support of the allegation of justifiable dismissal. If no such evidence has in his opinion been given, he should not submit any issue in respect of such allegations. The judge may also direct, guide, and assist the jury. He may direct by informing them of the nature of the acts which as a matter of law will justify dismissal. He may guide them by calling their attention to the facts material to the determination of the issues raised, and he may assist them in a manner and to an extent there is no reason to define. There have been judges—more numerous in the past than in the present—who possessed and exercised the power of addressing a jury in terms of apparent impartiality, and yet of placing before them views which seldom failed to secure the verdict desired by the judge to be recorded. Some trace of the exercise of this influence may be found in the following terms in which Sir Frederick Pollock guided the jury in the case of *Horton* v. *McMurtry*, 5 H. & N. 667, 29 L. J. Ex. 260: "Gentlemen, I believe it is for you to decide whether this was a proper ground of dismissal—but if it be a matter of law . . . my opinion is that it is a good ground of dismissal." The jury found for the defendant.

For these reasons their lordships are of opinion that the learned Chief Justice was correct in submitting the issues of fact to the jury, and that in this respect the judgment given by the majority of the Court of Appeal is also correct. But a further question has to be determined. During the course of the argument before their lordships no information could be obtained as to the existence of any rules of procedure in New Zealand corresponding to those existing in this country enabling judgment to be entered according to the evident justice of the case: ord. 58, r. 4, 1875.

But since the conclusion of the arguments their lordships have been referred to rule 5 in the schedule to the Court of Appeal (New Zealand) Act, 1882, which apparently confers powers substantially identical with those existing in this country.

But so far as their lordships can gather from the judgments delivered in the Court of Appeal of New Zealand the point that judgment should be entered for the defendants by that court was not submitted to it, and it certainly was not referred to in the judgments of the learned judges. And the learned Chief Justice, whilst expressing a strong opinion that the verdict was unsatisfactory, contented himself with saying: "I may further add that if I had come to the conclusion that it was a case for the jury only, then I should have been of opinion that their verdict was against the weight of evidence and that a new trial should be ordered; for I do not think that the verdict was one twelve reasonable men should have found."

Under these circumstances, while their lordships are of opinion that the verdict found for the plaintiff is so unsatisfactory that it ought not to be maintained, yet they refrain from exercising powers apparently not sought to be enforced by the appellants in the court below, or from exceeding the views expressed by the learned Chief Justice, and so they have come to the like conclusion, that the proper course to pursue is to direct that a new trial shall take place.

Their lordships will therefore humbly advise his Majesty that the judgment of the Court of Appeal should be discharged and this appeal allowed to the extent of ordering that the costs of all proceedings in the courts below shall depend upon the result of the new trial. The respondent will pay to the appellants their costs of this appeal.

Solicitors of appellants, *Blyth, Dutton, Hartley, & Blyth.*

Solicitors for respondent, *Paines, Blyth, & Huxtable.*

High Court of Justice.

Chan. Div.
Kekewich, J. } Feb. 14.

In re KEMPSTER.
KEMPSTER *v.* KEMPSTER. (*a.*)

Administration — Marshalling assets — Debts, funeral and testamentary expenses—Insufficiency of personal estate— Pecuniary legatees— Specific devisees— Land Transfer Act, 1897 (60 & 61 *Vict. c.* 65), *s.* 2, *sub-section* 3.

Where a will contains a direction charging debts upon the real estate, and the personal estate is exhausted in paying the debts, the Land Transfer Act does not alter the old rule under which the pecuniary legatees were entitled to have the assets marshalled as against the specific devisees.

In re Roberts, Roberts *v.* Roberts, 51 *W. R.* 89, [1902] 2 *Ch.* 834, *followed.*

Adjourned summons.

By his will dated the 9th of October, 1903, Thomas Kempster appointed his wife, the plaintiff Deborah Kempster, and his daughter, the defendant Elizabeth Sparman Kempster, his executrixes, and bequeathed to each the sum of £50 free of legacy duty. He then directed that all his just debts and funeral and testamentary expenses should be paid as soon as possible after his decease. He further bequeathed various specific legacies, and devised his real estate and gave the residue of his personal estate to the plaintiff for life, and after her death to be equally divided between his four children, one of whom was the defendant Deborah Sheppard.

The testator died on the 20th of January, 1905, and probate was taken out on the 25th of March, 1905.

The debts, funeral and testamentary expenses of the testator amounted to more than £200, and his personal estate did not amount to more than £156 The real estate of the testator was estimated to be of the value of about £750.

This summons was taken out by the plaintiff for the determination (*inter alia*) of the following question: Whether the debts and funeral and testamentary expenses of the testator ought to be raised and paid (so far as might be necessary) out of the real estate devised by the will in exoneration of the personal estate, so as to leave the personal estate not specifically bequeathed available for the payment of the pecuniary legacies given by the will.

The question turned on whether the Land Transfer Act, 1897, had altered the old rule in regard to the marshalling of assets. Section 2, sub-section 3, of the Act provides that: "In the administration of the assets of a person dying after the commencement of this Act, his real estate shall be administered in the same manner, subject to the same liabilities for debt, costs, and expenses, and with the same incidents, as if it were personal estate, provided that nothing herein contained shall alter or affect the order in which real and personal assets respectively are now applicable towards the payment of funeral and testamentary expenses, debts or legacies, or the liability of real estate to be charged with the payment of legacies."

Maugham, for the plaintiff.—The Land Transfer Act does not alter the old rule in regard to the marshalling of assets in such a case as this. The proviso in sub-section 3 of section 2 provides against any such alteration. The pecuniary legatees are, therefore, entitled to have the assets marshalled as against the specific devisees: *In re Roberts.*

Greenland, for the defendant devisee.—The Land Transfer Act has rendered the charge contained in the will futile: Theobald on Wills (6th ed.), 819. The proviso in section 2, sub-section 3, does not conflict with the doubts expressed by Theobald.

P. T. Blackwell, for the defendant executrix.

KEKEWICH, J.—Previous to the passing of the Land Transfer Act a direction such as that contained in the will in this case was treated as a charge of the debts of the testator on his real estate. From that it was concluded that if resort were had to the personal estate for the payment of debts, the pecuniary legatees could come against the specific devisees of the real estate on the ground that the testator had intended the debts to be paid out of the real estate. Since the passing of the Act, real estate is treated as personal estate for the purpose of discharging debts, so that the necessity for a charge such as is contained in the will in this case no longer exists. The Act says that such a charge is unnecessary, not that it is not there. Also notwithstanding the doubts expressed by Theobald, section 2, sub-section 3, of the Act preserves the order in which assets were applicable before the Act. *In re Roberts* is applicable, and the pecuniary legatees are entitled to have the assets marshalled as against the specific devisees of the real estate.

Solicitors for the plaintiff and the defendant devisee, *Foulgar, Robinson, & Miller*, for *E. J. Vine*, Exmouth.

Solicitor for the defendant executrix, *S. Myers.*

(*a.*) Reported by P. JOHN BOLAND, Esq., Barrister-at-Law.

Chan. Div.
Swinfen Eady, J. } March 1.

In re J. W. CLARK, DECEASED. (*a.*)

Practice—Costs—Compulsory powers of purchase—Funds in court—Reinvestment in land—Part only of invested money provided from funds in court—Costs of application and expenses—Apportionment.

Upon an application for reinvestment in land of a fund paid into court by the London County Council as the price of land bought by the council under compulsory powers of purchase, the fund in court formed less than half the sum proposed to be reinvested,

Held, that the usual order must be made as to costs, following the form appearing on p. 2457 *of Seton's Forms of Judgments and Orders, no special provision being made for the apportionment of the surveyor's and conveyancing fees.*

Summons.

This summons was adjourned into court to be disposed of on a question of costs alone. The summons was issued under the following circumstances:

On the 4th of February, 1902, the London County Council served a notice to treat on the trustees of the will of J. W. Clark, with a view to acquiring the interest of the trustees in certain property situate in Walworth. Negotiations ensued, and ultimately the council agreed to pay £930 and the costs of the negotiations. Accordingly the sum of £950 was paid into court on the 19th of July, 1904, and the trustees conveyed their interest to the council by a conveyance dated the 18th of August, 1904.

(*a.*) Reported by F. HARDINGE DALSTON, Esq., Barrister-at-Law

On the 4th of December, 1905, the trustees contracted, subject to the approval of the court, to buy twelve pieces of land situate at Southfields, with twelve messuages thereon, for the price of £2,178 17s. 3d. from a vendor registered with an absolute title. The investment was, therefore, one for which the funds were provided partly from a fund in court and partly from money in the hands of the trustees.

The trustees issued a summons asking (*inter alia*) that, pursuant to section 80 of the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), the council might be ordered to pay to the applicants their costs as thereby provided for including therein all reasonable charges and expenses of and incident to the said investment in the purchase of the said hereditaments and of this application and of all proceedings relating thereto, such costs, charges, and expenses to be taxed by the taxing-master in case the parties differed.

They desired that the order as to costs made upon their application should follow the form appearing on p. 2457 of Seton's Forms of Judgments and Orders, 6th edition.

It was, on the other hand, submitted by the council that the order as to costs should take the following form:

"And it is ordered that it be referred to the taxing-master to tax the costs of the applicants on this application, including therein all reasonable charges and expenses of and incidental thereto of the investment of the sum of £2,178 17s. 3d. in the purchase of the said land and of obtaining this order and of all proceedings relating thereto, and in such taxation the master is to distinguish thereupon the costs, charges, and expenses of the investment of the said sum of £2,178 17s. 3d. including all *ad valorem* fees and brokerage and scale fees . . . and it is, pursuant to section 80 of the Land Clauses Consolidation Act, 1845, ordered that the council do pay to the applicants their costs of this application to be taxed as aforesaid and such proportion of the costs, charges, and expenses so to be distinguished as aforesaid as the amount of the purchase-money contributed by the council bears to the whole purchase-money of £2,1781 7s. 3d.

Eve, K.C., and *E. S. Ford*, for the trustees of the will of J. W. Clark.—The order as to costs should be as appears on p. 2457 of Seton's Judgments and Orders. That form meets the requirements of the case, and does not work any injustice.

R. J. Parker, for the London County Council.—Seton's is not the only form to be considered. The form used must depend upon what is fair in the particular case. Under the form in Seton the taxing-master would not apportion the fees of conveyancing counsel or the surveyor's fees, or the non-sale conveyancing fees charged in the case of registered titles. In this case it would be unreasonable to adopt the form given in Seton. Why should the council pay a larger surveyor's fee because the applicants choose to increase the purchase price by adding money beyond the funds in court? It is unfair that the council should have to bear the whole of the conveyancing costs of purchasing an estate larger than the funds in court can buy: *Ex parte The Perpetual Curate of Bilston*, 37 W. R. 460, (1889) W. N. 17, and *In re Power's Settlement*, (1876) W. N. 205.

Eve. K.C., in reply.—When a surveyor charges a scale fee, then it is apportioned between the funds in court and the extra invested funds. In this case the title is an absolute title registered at the Land Registry, but the conveyancing counsel refuse that title and insist on making investigation, thus causing greater expense.

SWINFEN EADY, J.—This is an application for re-investment in land of the proceeds of land taken by the London County Council. The sum proposed to be invested is over £2,000, so that the money paid into court by the London County Council amounts to less than half that sum, the remaining part of it being provided by the applicants themselves. The only question now to be answered is, what order is to be made in respect of costs? The practice in such cases is well settled, and it follows the order found on p. 2457 of Seton's Forms of Judgments and Orders (6th ed.). That form is adapted to cases where part only of the purchase-money is provided out of funds in court. The taxing-master is not to allow costs incurred in a purchase so far as they are occasioned by the purchase-money exceeding the fund in court: see *In re Metropolitan Railway Co.* v. *Gonville and Caius College, Cambridge*, before Kay, J., at chambers, March 24th, 1887. A memorandum of the practice was prepared by one of the registrars, and submitted to Kay, J., and he adopted the principle embodied in it. That case was followed by Chitty, J., in *Reg.* v. *The Corporation of Carlisle*. There is a different form of order for use in cases where the applicant provides part of the purchase-money from that which is to be used in cases where different companies contribute the whole of the purchase-money. In such cases as the present the practice is that when the purchase-money exceeds the fund in court and the applicant provides the balance the undertakers have to pay the whole of the costs except in so far as they have been increased by the fact of the outside purchase-money exceeding the fund in court. In this particular case it has been said that the rule may cause hardship by throwing upon the council the burden of a large part of the surveyor's fee and the costs of conveyancing. The council urge that they should have to bear only an amount in proportion to the fund paid into court, and that under the usual order the taxing-master will not apportion these fees and costs. There may, however, be cases in which there would be no necessity for employing a surveyor but for the fact of a part of the purchase-money being in court.

On the other hand, it is certainly difficult to say that the fees should not be apportioned when the purchase-money is large and the fund in court so small in proportion that it would be equalled by the fees.

There may, of course, be extreme cases in either direction, but I am not prepared to say that the form which has been in use for so many years works any injustice. In my opinion it would be impracticable, and provocative of additional expense, for the question as to what is the proper order to make in view of costs incurred, and how such costs should be apportioned, always to be entered into by the judge. It is always open for any party aggrieved by taxation to take out a summons to review taxation, but all those matters of detail properly belong to the province of the taxing-master. The order will therefore be made as in the form given in Seton and already referred to.

Solicitors, *Burchell, Wilde, & Co.*; *Seager Berry*.

Chan. Div.
Warrington, J. } Jan. 24, 25, 26; Feb. 6.

In re BRITISH POWER TRACTION AND LIGHTING CO. (LIMITED).

HALIFAX JOINT STOCK BANKING CO. (LIMITED) *v.* BRITISH POWER TRACTION AND LIGHTING CO. (LIMITED). (*a.*)

Company—Receiver and manager—Debenture-holders' action—Express authority to borrow—Borrowing beyond amount authorized—Right to indemnity out of assets—Rights of creditors of the receiver and manager.

W. was appointed receiver and manager of the undertaking and property of a company in an ordinary debenture-holders' action, and by an order of the court he was authorized to borrow on mortgage of the assets of the company a sum not exceeding £3,000 and interest. W. carried on the business and borrowed the £3,000 for the purpose from his bankers, B. & Co. In addition, and without any further authority from the court for the same purpose, he borrowed £1,500 more from his bankers, and also incurred debts and liabilites to other creditors. The company was in course of liquidation under an order of the court. W. became bankrupt, and a new manager was appointed. The creditors of W., in right of his indemnity, claimed to be paid out of the assets of the company in priority of the claims of the debenture-holders.

Held, that the order authorizing the limited borrowing was intended to limit the general authority of W. to borrow as such manager, and that having incurred liabilities exceeding that limit without having obtained the previous authority of the court, he was not entitled to be be indemnified against them unless he could show that, having regard to all the circumstances under which they were incurred, he was justified in incurring them without first obtaining leave; that what circumstances would justify the conduct of a manager in so increasing such liabilities without leave could not be defined in general terms, except that it would not be enough to show that the expenses or liabilities were incurred bonâ fide *and in the ordinary course of business; and consequently the claims of the creditors were referred to the registrar to be examined, having regard to the above declaration.*

Summons.

This was a summons taken out by the plaintiffs in the action, which was an ordinary debenture-holder's action, for purpose of ascertaining whether a receiver and manager appointed in the action was entitled to be indemnified out of the assets of the company in respect of debts and liabilities incurred by him in carrying on the business of the company in excess of the amount which he had been expressly authorized by the court to borrow.

On the answer to this question depended whether the creditors of the manager in respect of such debts and liabilities were to be paid out of the assets of the company, the manager having become bankrupt.

There appeared to be no decision upon the question. The summons asked in the alternative that the respective priorities of the debenture-holders and the several classes of creditors might be determined.

The following are the facts as stated by the learned judge:

By an order in the action dated the 27th of August, 1902, Herbert Watkins was appointed receiver of the undertaking and property of the defendant company and to manage its business, but he was not to act as manager after the 30th of December, 1902, without the leave of the judge.

By an order of the 28th of August, 1902, it was ordered that for the purpose of paying the current week's wages and the amount due for gas, as mentioned in an affidavit of Mr. Hodgson therein referred to, the manager was to be at liberty to raise on mortgage of the assets of the defendant company a sum not exceeding £750 at interest at a rate not exceeding £5 per cent. per annum, and that such money, when raised, and interest was to be a first charge upon the assets of the defendant company and all the property and effects included in the debentures.

By a further order dated the 4th of September, 1902, it was ordered that the manager was to be at liberty to raise on mortgage of the assets of the defendant company such a sum as with the sum of £750 in the order of the 28th of August, 1902, referred to would not exceed £3,000, with interest at a rate not exceeding £5 per cent. per annum, and it was ordered that such money, when raised, and interest, was to be a first charge upon the assets of the defendant company and all property and effects included in the debentures. This order, as well as that of the 28th of August, was made upon the affidavit of Mr. Hodgson; and from that it appears clearly that except the £750 mentioned in the order of the 28th of August the money was required for the ordinary current expenses of carrying on the business of the company.

On the 4th of September, 1902, a petition for winding up the company was presented, upon which a winding-up order was made on the 16th of December, 1902. Meanwhile judgment was obtained in the action on the 29th of November.

On the 15th of December leave was given to the manager to carry on the business till the 13th of January, 1903, and on the 14th of January, 1903, further liberty to carry on the business for a period of three months was given. Each of the applications on which leave was so given was supported by an affidavit of the manager.

No application was, on either of these occasions, or at any other time, made for leave to borrow any further sum or to incur any further liability.

On the 11th of February, 1903, an order was made by which, after stating that Herbert Watkins desired to retire from his office of receiver and manager, and he consenting to the order, one George Pepler Norton was appointed receiver and manager, and it was ordered that he should forthwith, out of any assets coming to his hands, other than money borrowed by him for payment of wages as thereinafter authorized, pay the debts, if any, of the company which might have priority over the claims of the debenture-holders, and make provision for paying the liabilities properly incurred by the said H. Watkins as receiver and manager. By the same order Watkins undertook within ten days to lodge his first and final account. The order contained other directions not material for the purposes of this judgment.

On the 13th of February, 1903, Watkins left the country and took with him £465, the moneys of the company, insisting that he was entitled to retain that sum for his indemnity. Watkins did not lodge his account as directed by the order of the 11th of February, 1903, and on the 2nd of March, 1903, the registrar directed the new receiver to make out such an account of the receipts and payments of Watkins as he could.

By an order of the 10th of March, 1903, it was ordered that the new receiver and manager should be at liberty to raise on mortgage of the assets of the defendant company such sum or sums, not exceeding in all £1,000, as he might think necessary, with interest as therein mentioned, and that such moneys when advanced with interest should be a charge on

(*a.*) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

the assets of the defendant company, ranking immediately after any moneys (not exceeding in all £3,000) borrowed by the said Herbert Watkins pursuant to the leave given to him by the orders of the 28th of August, 1902, and the 4th of September, 1902; but, subject to the direction as to the priority of the sum or sums thereby authorized to be borrowed therein-before contained, the order to be without prejudice to any right of Barclay & Co. (Limited) to obtain repayment out of the assets of the defendant company in priority to the debenture-holders of any sum in excess of the said sum of £3,000 which they might have lent to the said Herbert Watkins as receiver and manager. Barclay & Co. were the bankers of the former manager, and he had borrowed from them the £3,000 authorized by the order of the 4th of September, 1902, by means of an overdraft. He had overdrawn his account to the extent of £1,500 in addition. It is this excess in the overdraft to which the order refers. On the 5th of May, 1903, the account of the receipts and payments of Watkins as prepared by Norton under the directions given on the 2nd of March was filed, whereby it appeared that the total overdraft was £4,500, and that there were, in addition, outstanding debts to a considerable amount. Subsequently directions were given for the winding up of the business and a sale of the assets. These are now represented by a sum of about £8,700 Consols and a sum of about £50 cash in court. By an order dated the 19th of July, 1904, two inquiries were directed—first, what creditors there are in respect of debts and liabilities incurred by Watkins as receiver and manager, and what are the amounts due to such creditors respectively; and, secondly, whether the said Herbert Watkins, as such receiver and manager, is entitled to be indemnified out of the assets of the defendant company in respect of the said debts and liabilities or any of them, and, if so, to what extent. By an order of the 26th of July, 1904, it was declared that Barclay & Co. were entitled, in priority to all the holders of debentures issued by the defendant company, to a charge on the assets of the defendant company for £3,000 with interest as therein mentioned, being the amount borrowed in pursuance of the orders of the 28th of August, 1902, and the 4th of September, 1902; but that order was to be without prejudice to any question as between Barclay & Co. and the creditors in the order mentioned, whether the charge thereby declared was in priority to any right of indemnity out of such assets to which the said Herbert Watkins might be found to be entitled, and also to the rights, if any, of his creditors claiming the benefit of any such indemnity, and also without prejudice to the right, if any, of Barclay & Co. to claim the benefit of such indemnity as one of such creditors. Under the inquiry directed by the order of the 19th of July, 1904, claims have been carried in for sums amounting to upwards of £6,000 in addition to the authorized sum of £3,000. Watkins has returned to this country and has been adjudicated bankrupt. It was thought convenient that the court should settle the principle upon which the alleged right of Watkins to an indemnity and the consequent right of his creditors to be paid out of the assets of the company should be determined before the registrar proceeds to consider the details of the several claims. The present summons was accordingly issued by the plaintiff bank, which were holders of the above-named company.

Norton, K.C., and *P. Wheeler*, for the plaintiff bank.—The manager was limited to borrowing £3,000. He was not entitled to exceed that amount without obtaining the authority of the court. He has therefore no right to indemnity out of the assets of the company for anything more than the £3,000, at any rate in priority to the debenture-holders. Barclay & Co., from whom he borrowed, as to anything beyond £3,000, and the other creditors to whom he incurred debts can only claim against the assets through the manager's right of indemnity, and as he has no such right their claims fail. There is no case directly in point, but our contention is consistent with the authorities. [They referred to *Morris* v. *Elme*, 1 Ves. jun. 139; *Thornhill* v. *Thornhill*, 14 Sim. 600; *Taylor* v. *Neate*, 37 W. R. 190, 39 Ch. D. 538; *Burt, Boulton, & Hayward* v. *Bull*, 43 W. R. 180, [1895] 1 Q. B. 276; *Strapp* v. *Bull & Co.*, 43 W. R. 641, [1895] 2 Ch. 1.] The manager is personally liable for the debts he has incurred: *Ex parte Garland*, 10 Ves. 110.

Buckmaster, K.C., and *Hon. Frank Russell*, for Barclay & Co. stated that their clients considered it their interest to support the view of the plaintiffs.

Upjohn, K.C., and *J. R. Atkin*, for creditors.—The manager incurred the debts *bonâ fide* in the conduct of, and for the purposes of the current expenses of the business, and of preserving the assets, and he ought to be indemnified out of them. He had a special authority to borrow up to £3,000, but he also had a general authority to borrow the moneys necessary for carrying on the business which he was appointed to manage, and having done so, the court will confirm his action. This principle underlies *Strapp* v. *Bull* and *Taylor* v. *Neate*.

They also referred to *Batten* v. *Wedgewood Coal and Iron Co.*, 33 W. R. 303, 28 Ch. D. 317; *Mersey Steel and Iron Co.* v. *Naylor, Benzon, & Co.*, 32 W. R. 989, 9 App. Cas. 434, 438.

Cave, K.C., and *L. Riley*, for other creditors, supported the same view, and referred to *Ex parte Izard*, 31 W. R. 418, 23 Ch. D. 75, and *In re Glasdir Copper Mines*, 22 Times L. R. 100, W. N. (1905), p. 172.

Norton, in reply, referred to *Leadham* v. *Chawner*, 4 K. & J. 458, 7 W. R. Dig. Ch. 86, and *In re Dunn*, 52 W. R. 345, [1904] 1 Ch. 648, as cases where a receiver and manager was not allowed out of the assets costs and debts incurred by him as manager.

WARRINGTON, J.—The law as to the position of a manager appointed by the court, where no special provision is made for meeting expenses and liabilities incurred by him, is not disputed, and is, indeed, beyond dispute. It is, on the one hand, his duty to carry on the business, and for that purpose to enter into proper contracts on his own responsibility, and it is, on the other hand, his right to be indemnified out of the assets against expenses and liabilities properly incurred in the execution of his duty: *Burt* v. *Bull*, [1895] 1 Q. B., p. 276, and *Strapp* v. *Bull*, [1895] 1 Ch., p. 1. Moreover, though I do not find this anywhere expressly laid down, I think that expenses and liabilities *bonâ fide* incurred in the ordinary course of the business would *primâ facie* be treated as having been properly incurred. But is the position of the manager the same in cases where, as here, he is authorized to borrow a sum not exceeding a certain limit for the general purposes of the business he is carrying on? I say advisedly, "for the general purposes," for what I am about to say is not intended to apply to cases where the authority to borrow is for some special purpose. The effect of an authority to borrow for general purposes is to provide at the expense of the parties interested in the

assets a special fund out of which the manager can indemnify himself, and the amount of that fund is fixed after considering what the parties interested state as to the requirements of the business. What is the result as the manager's general right to indemnity? That he is not deprived of it altogether follows, in my opinion, from the decisions in *Strapp* v. *Bull* above referred to, and *In re Glasdir Copper Mines* (1905). On the other hand, when the court thus protects the manager by providing a special indemnity, it cannot be that he is nevertheless entitled, without any further authority, to incur expenses and liabilities to an unlimited extent and to require them to be met out of the assets. It seems to me that the true position in these cases is that the order is intended to limit his general authority, and if he finds that the fund provided by the court is not sufficient, it is his duty to cause the matter to be brought before the court, so that, if it sees fit, it may increase it, or give him leave to incur further expenses or liabilities, which come to the same thing. If, without such an application, being made he incurs, expenses and liabilities exceeding the limit, he is, in my opinion, not entitled to be indemnified against them unless he can show that, having regard to all the circumstances under which they were incurred, he was justified in incurring them without first obtaining leave. If he succeeds in showing this, then I think the expenses and liabilities would be properly incurred, but not otherwise. What circumstances would justify the conduct of the manager, in so increasing such expenses and liabilities without leave cannot, I think, be defined in general terms, but must be determined in each particular case. I will only say that in my opinion it would not be enough to show that the expenses or liabilities were incurred *bona fide* and in the ordinary course of business. As regards authorities, there is, in my opinion, none which throws any light upon the case. It is true that in *Strapp* v. *Bull* and *In re Glasdir Copper Mines* managers with special powers to borrow were treated as entitled to an indemnity for expenses outside the limit; but in neither case was the present question raised; and I cannot but assume that the parties there did not desire to question the propriety of the manager's conduct in incurring such expenses. It was argued that the rights and duties of the manager were fixed once for all by the original order. I cannot take this view. It seems to me that the court can at any time limit the authority of its own officer. The result is that it is still open to the manager, and through him to the claimants, to show that his liabilities to the latter were properly incurred so as to entitle him to an indemnity, and them to payment through him. I was, indeed, asked to say that, under circumstances which were put in evidence, the manager in this particular case was entitled to no indemnity at all. I cannot come to this conclusion; and I think it better not to discuss the evidence, inasmuch as it will have to be gone into on the examination of the several claims before the registrar, and I am anxious not to prejudice questions the complete materials for deciding which may not be before me. I propose to declare that Herbert Watkins, the late receiver and manager, is entitled to be indemnified against those debts and liabilities only (over and above the permitted overdraft of £3,000) as to which he shall satisfy the judge that, having regard to all the circumstances under which the same respectively were incurred, he was justified in incurring them without first obtaining the leave of the judge. That part of the summons which refers to the priorities of the several classes of creditors had better stand over until the registrar has dealt with the several claims having regard to the above declaration. The costs of all the parties of the present application to be allowed (other than the bankrupt's trustee) out of the assets.

Solicitors, *Jacques & Co.*, for *Dickons & Aked*, Halifax; *Howe & Rake*, for *Lucas, Hutchinson, & Meek*, Darlington; *Herbert Smith & Co.; Tippetts*, for *J. W. Wall*, Bootle.

Chan. Div.
Warrington, J. } Jan. 23, 30.

In re Mercantile Lighterage Co. (Limited). (*a*.)

Taxation of costs—Liquidator of company—Solicitor and client costs—Inclusion of taxed party and party costs—Method of calculation of one-sixth part—Disbursements—Professional charges—Existing practice in taxing office—Taxation of liquidator's bill of costs—Ord. 65, r. 27 (38b).

In a bill of costs of a retiring liquidator to be taxed as between solicitor and client, costs which have been already taxed and paid as between party and party are properly included, and in determining whether one-sixth part of the bill has been disallowed, these party and party costs must be treated as part of the bill, and in determining the same question the professional charges are alone to be considered, and disbursements should be disregarded. These principles apply both to bills taxed under the Solicitors Acts and to others. The existing practice of the Taxing Office upon this question is not in accordance with the rules, and is incorrect.

This was a summons to review a taxation of costs, which raised two important questions as to what ought to be included in such bills for the purpose of determining whether one-sixth part of the amount of the bill had been disallowed under ord. 65, r. 27 (38*b*).

The applicant, R. Wood, was a former liquidator of the above company.

By an order of the 5th of May, 1905, made in the voluntary winding up of the company, it was directed that the costs, charges, and expenses of Mr. Wood as between solicitor and client properly incurred in the winding up should be taxed and ascertained accordingly, and a new liquidator was appointed.

Mr. Wood accordingly brought in his bill, showing in separate columns disbursements of £239 3s. 9d. and professional charges £563 9s., making together £802 12s. 6d. Of this amount two items of £162 13s. 4d. and £9 4s. 6d. (called in the schedule of objections items 3 and 4) represented certain party and party costs of Mr. Wood as liquidator which had already been taxed and paid, and for which he was ready to give credit. The sum of £162 13s. 4d. consisted of £73 17s. 6d. disbursements and of £88 15s. professional charges, and the sum of £9 4s. 6d. consisted of £3 3s. 6d. disbursements and £6 10s. professional charges.

Upon taxation of the bill the registrar had struck out these sums upon the ground that, as they had already been taxed and paid, it was unnecessary to include them. Having thus reduced the amount of the bill, he taxed the remaining items, and disallowed items amounting to £139 2s. 5d., consisting of £62 1s. 7d. disbursements and £77 0s. 10d. professional charges. Regarding all the disbursements as part of the bill for this purpose, in conformity with the existing practice in the Taxing Office, he held that more than one-sixth part had been disallowed;

(*a*.) Reported by Neville Tebbutt, Esq., Barrister-at-Law.

and accordingly, under ord. 65, r. 27 (38*b*), he struck out £18 6s for drawing and copying the bill of costs and £7 6s. 8d. for attending taxation (called items 1 and 2).

The present summons was thereupon taken out.

T. L. Wilkinson, for the applicant.—First, the sums of £162 13s. 4d. and £9 4s 6d., party and party costs, were properly inserted in the bill and should not have been struck out; and, secondly, professional charges only, and not disbursements, should have been considered in determining whether the bill had been reduced by one-sixth part. If this course had been adopted the amount disallowed would have been less than one-sixth of the bill, and consequently items 1 and 2 should have been allowed. As regards the second question, the existing practice in the taxing office is contrary to the rules and wrong. Ord. 65, r. 27 (38*b*), under which the registrar proceeded, and under which alone he could disallow these items, applies to professional charges only, and not to disbursements. "Professional charges" cannot include disbursements, and the two classes are contrasted in rule 19*h* of the same order. In *In the Goods of Rose Kennedy, Cunningham* v. *M'Donagh*, [1904] 2 Ir. Rep. 417, the Irish court held, upon similar rules, that professional charges only were to be considered. The Solicitors Act, 1843 (6 & 7 Vict. c. 73), in section 37, with reference to the taxation of bills, speaks of "fees, charges, and disbursements." Until June, 1889, when the present sub-rule was passed, disbursements were expressly ordered not to be included. *In re Remnant*, 11 Beav. 603, only decided what were professional disbursements and what not. Next the party and party costs were rightly inserted in the bill. Theoretically the whole of the items of these costs should be inserted, but in practice and to avoid unnecessary trouble in copying only the lump sum is put down: *Waller* v. *Lacy*, 1 M. & G. 54.

J. D. Israel.—Rules 19*h* and 27 (38*b*) were made in different years, and the contrast between "disbursements" and "professional charges" may not have been intended in the latter sub-rule. The words "exclusive of disbursements" which were in the former rule have been omitted, showing the intention to alter the rule. The practice of the office of including disbursements is settled and should not be disturbed. As regards the insertion of items 3 and 4 for party and party costs these are quite unnecessary, the bill having been already taxed and paid, and should not be inserted merely to prevent the operation of rule 27 (38*b*). *Waller* v. *Lacy* was decided under the Solicitors Act, and does not apply to a taxation of a person not a solicitor.

WARRINGTON, J.—The order is to tax, not the difference between the party and party and the solicitor and client costs, but the costs as between solicitor and client, and I should have thought, independently of authority, that this means the whole costs, and not merely so much as has not already been paid. But the form in which the bill has been carried in is in accordance, as I understand, with the long-established practice of the taxing office, which practice rests on the authority of several cases, of which *Waller* v. *Lacy*, 1 M. & G. 54, is an example. Tindal, C.J., on this point says (at p. 69): "The third question is whether the charges in respect of extra costs are sufficiently stated, and it appears to me they do not comply with the requisites of the statute. Those charges by themselves are not intelligible to the officer of the court. An attorney's bill, generally speaking, ought to give a history of the cause, so as enable the officer to judge of the propriety of the various items of which it is composed; but if part only of the charges are set forth he has not sufficient materials whereon to form his judgment. A delivery of a bill containing merely the extra costs is certainly not according to the general practice, which is for the attorney to deliver a bill of the whole costs, giving his client credit for the sum that has been received. Here these separate and disjoined items do not furnish the necessary information, and are consequently not a sufficient compliance with the statute, which requires a bill to be delivered for the purpose of enabling the client, should he think proper, to have it taxed." It has been suggested that this and the other cases are confined to taxations under the Solicitors Act. I can see nothing to limit their application to such taxations, and the reasons given by Tindal, C.J., apply as much to taxations such as the present as to taxations under the Act. There seems to be no valid objection to the mode in which the costs taxed and paid are included—viz., in a lump sum. This is also in accordance with the usual practice. For these reasons I think the registrar was wrong in the course he took, and I allow the objection, so far as these items are concerned. The other objection is this: The registrar, purporting to act under ord. 65, r. 27 (38*b*), has disallowed the costs of drawing and copying the bill and of attending the taxation. Ord. 65, r. 27 (38*b*), is as follows: "If on the taxation of a bill of costs payable out of a fund or estate (real or personal), or out of the assets of a company in liquidation, the amount of the professional charges contained in the bill is reduced by a sixth part, no costs shall be allowed to the solicitor leaving the bill for taxation, for drawing and copying it, nor for attending the taxation." The registrar, for the purpose of arriving at the sixth part, has added to the professional charges the amount of the disbursements. In doing so he has followed the settled practice of the taxing office, though I understand if he had felt himself at liberty to act on his own construction of the rule he would have taken a different course. Is the practice in accordance with the true construction of the rule? The question turns on what is the meaning in the rule of "the professional charges contained in the bill." In the same ord. 65, r. 19, it is provided: "In every bill of costs the professional charges shall be entered in a separate column from the disbursements, and every column shall be cast before the bill is left for taxation." This shows that in this order "professional charges" has a meaning of its own, distinct from, and, indeed, contrasted with, "disbursements"; and speaking for myself I can see no doubt or ambiguity in the matter, and I think the sixth should be arrived at by taking the "professional charges" by themselves without regarding the disbursements. This is in accordance with the Irish case of *In the Goods of Rose Kennedy*. As, however, I found that the contrary practice was established, I requested Master Shearme to furnish me with a memorandum as to its origin. This I have received. The facts appear to be that sub-rule 38*b* as first published in May, 1889, contained after the words "professional charges" the words "exclusive of disbursements." The words "exclusive of disbursements" were afterwards struck out, and the rule of June, 1889 was signed as it now appears. In my opinion, even if I were entitled to look at the rule of May, 1889, in order to construe the rule now in force (which I do not think I am), it would not help me. The words omitted did not really alter the sense, and I could only conclude that the committee struck them out as redundant and in the interests of good draftsmanship. But I am also informed by the taxing-masters that the Incorporated Law Society made representations to the Lord Chancellor upon the rule as first drawn, with the object of having disbursements

included for the purpose of arriving at the sixth, and that the intention of the Rule Committee in altering the rules was to give effect to these representations. These are matters to which I am not entitled to listen. I must take the rule as it stands and say what it means. As to this I have already expressed my view, and I must, therefore, allow this objection also, and refer the taxation back to the registrar accordingly. I need not say that I have been reluctant to interfere with a practice which has been so long established; but when there is, as I think, a plain construction of a rule, I consider it my duty to give effect to it. If the rule so construed is not in accordance with the intention of the Rule Committee, it is open to them to alter it.

Solicitors, *Atkinson & Dresser; Walter B. Styer.*

K. B. Div.
(Lord Alverstone, L.C.J., and Ridley and Darling, JJ.) Feb. 27.

CROCKER *v.* MAYOR, &c., OF PLYMOUTH. (*a.*)

Local authority — Education authority — Salaries of teachers—Control of managers by education authority —Privity of contract between teacher and education authority—Education Act, 1902 (2 *Ed.* 7, *c.* 42), *s.* 7.

A teacher who has been engaged by the managers of a school maintained but not provided by the local education authority, cannot sue the local education authority to recover unpaid salary, there being no privity of contract, although the local education authority may have always paid the salary direct to the teacher up to the period in dispute.

Appeal from the County Court of Devonshire, holden at Plymouth.

By an agreement of the 22nd of March, 1899, the plaintiff was engaged by the managers of Compton School, Plymouth, as assistant schoolmistress at a salary of £50, increasing to £80, subject to three months' notice on either side.

The 1st of April, 1903, was the day appointed for the coming into operation of the Education Act, 1902. New managers were duly appointed, and the plaintiff continued to give her services the same as heretofore.

The local education authority paid the salaries of the teachers direct.

On the 4th of August, 1903, the following resolution was passed by the local education authority: "Resolved, that the marriage of principal and assistant mistresses in provided and non-provided schools shall be equivalent to three months' notice to terminate the engagement."

On the 11th of August, 1903, the following letter was sent by the town clerk to the managers of Compton School: "I beg to inform you that the authority have decided that the marriage of principal and assistant mistresses in future shall be equivalent to three months' notice to determine the agreement."

No express notice of this resolution was given by the authority to the plaintiff, although she heard of it from an outside source.

The plaintiff married on the 9th of August, 1904. She had from the 1st of April, 1903, to the 30th of November, 1904, been paid her salary by the authority.

On the 30th of November, 1904, she received the following letter from the town clerk: "I beg to inform you that the three months' notice, to which under the regulations your marriage was equivalent, having now expired, the salary sent herewith will be your final payment as a teacher on the staff of the Compton Mixed School."

The plaintiff continued to teach down to the month of April, and it was in respect to the salary for this period that she sued the local education authority.

The county court judge gave judgment for the plaintiff.

The defendant now appealed.

Education Act, 1900, s. 7, sub-section 1: "The local education authority shall maintain and keep efficient all public elementary schools within their area which are necessary, and have the control of all expenditure required for that purpose other than expenditure for which, under this Act, provision is to be made by the managers; but in the case of a school not provided by them only so long as the following conditions and provisions are complied with: (*a*) The managers of the school shall carry out any directions of the local education authority as to the secular instruction to be given in the school, including any direction with respect to the number and educational qualifications of the teachers to be employed for such instruction, and for the dismissal of any teacher on educational grounds; and if the managers fail to carry out any such directions, the local authority shall, in addition to their own powers, have themselves the power to carry out the direction in question as if they were the managers; but no direction given under the provision shall be such as to interfere with reasonable facilities for religious instruction during school hours." Sub-section 3: "If any question arises under this section between the local education authority and the managers of a school not provided by the authority that question shall be determined by the Board of Education." Sub-section 7: "The managers of a school maintained but not provided by the local education authority . . . shall (subject to the powers of the local education authority under this section) have the exclusive power of appointing and dismissing teachers."

Rawlinson, K.C. (*Mackenzie* with him).—Admitting that the contract with the old managers continues with the new managers, still the contract is with the managers, not the local authority. The local authority may be under a statutory obligation to provide funds for the managers, but that would not inure to the benefit of a third party. There is no priority of contract between the local authority and the teacher. It is true the local authority has paid the salary direct, but there is nothing in the Act to compel it to do so; it need only put the managers in funds. The managers could not bring an action themselves against the local authority but would have to proceed as provided by section 7, sub-section 3, and section 16: *Young* v. *Cuthbert*, 22 T. L. R. 252. Secondly, if the local authority is bound in the general case to the school teacher the obligation came to an end when the managers did not carry out the direction open to them: section 7, sub-section 1 (*a*). Thirdly, if this be an action for services rendered, the local authority has paid for services rendered up to the 30th of November, 1904, after which date express instructions were given to the plaintiff that her services would no longer be required; the local authority could only be bound from that date by an express contract which would require to be under seal. Fourthly, assuming a binding contract, the plaintiff was aware of the "resolution," and therefore continued the contract with that condition added.

(*a.*) Reported by MAURICE N. DRUCQUER, Esq., Barrister-at-Law.

Hence she broke the contract herself on the day of the marriage.

Barlow, for the respondent.—The local authority is a party to the contract, as evidenced by their conduct —(*a*) payment of salary, (*b*) the passing of a resolution to bind the plaintiff. The alleged direction was no direction at all. It was not in respect to an "educational ground." The court can construe the section to ascertain what the Legislature meant by an "educational ground," section 7, sub-section 3 notwithstanding.

Lord ALVERSTONE, L.C.J.—This is a case of extreme difficulty, and if the view I take of it is not the correct one, it should receive further consideration. As far as I am concerned we are face to face with this question, as to the effect of section 7. Has the education authoriy to make a personal contract between itself and the teachers? After the best consideration I can give I am not satisfied that it has. If the statute to which I am about to refer did not contemplate the providing of money by the local authority for the purposes of the managers, I think there would be a great deal in Mr. Barlow's point that an implied contract might be raised by the mere payment of money by the education authority to the teacher. In ordinary circumstances there arises what has sometimes been called a novation, where it would be held that by arrangement a person not originally a party to the contract, in this case the local education authority takes the place of one of the parties to the original contract, and in his place becomes bound to the other party—in this case the teacher. If this case had to be determined solely by these considerations we might hesitate to reverse the judgment of the county court judge. If that were so we should have to consider the point which I do not think was really for us, as to what is the effect as the education authority purporting to limit the employment of teachers upon grounds which it might be contended was something other than educational qualifications. I think we must not shut our eyes to the scheme of this Act. This is one of those Acts of Parliaments which should be considered as far as possible in respect to its intention and we ought to give effect to the provisions from a reasonable point of view. It was from such a point of view that we have expressed our opinion in respect to an Act of Parliament a little time ago, and the same observation applies to other cases which have come before us. Now, at the time this Act was passed there were teachers who had contracts with managers under ordinary private contracts. The managers would be responsible for the payment of the salaries and would meet the expenditure out of the Government grant or from other sources where the schools were supported by voluntary contribution; but the persons liable to pay would be the managers. Now this Act of Parliament comes in and makes certain changes, which are referred to in this case before us. Whilst it leaves to the old managers the duty of keeping the school in order such as repairing the schoolhouse and other matters, it takes away from them the obligation to provide the funds. We have to consider whether it is a necessary consequence of the provisions regarding the finding of the funds that the State has therefore created a contract between the educational authority and the teacher or whether it has imposed a statutory obligation upon it to pay the salary of the teacher. I am not dealing with the form, but with the substance. I exclude the case of a contract between the teacher and the education authority where the facts clearly show a contract between them; the case which presses me most is this: Does not this statute show that there was a duty upon the educational authority to pay a properly appointed teacher, and this might be put as an action alleging a new appointment by the managers, the rendering of services under that appointment, and the obligation of the local education authority to pay.

If the effect of this statute is that these allegations could be established I think that this action might be maintained and the plaintiff entitled to recover. I think the declaration could be so framed. Without repeating myself, but bearing in view what was the existing state of things, what has section 7 provided? Apart from the direction of novation, Mr. Barlow must find an obligation to pay personally the teacher in section 7. The first words upon which he relies are "and have the control of all the expenditure required for that purpose other than expenditure for which, under this Act, provision is to be made by the managers"; that refers to what I have already stated—viz., providing school accommodation and other matters. Therefore these particular words do not help him at all. [His lordship then read section 7 (1) (*a*).] It must be stated in Mr. Barlow's favour that if and although the teacher be appointed by the managers and the managers do not dismiss the teacher on "educational grounds," the education authority can so dismiss him. Then comes sub-section 3, as to which I shall say a word later on as to disputes between the local education authority and the managers as to what is an "educational ground." The comes sub-section 7. [His lordship read it.] The power of appointing teachers carries with it the power to fix the salary to be paid by the managers, and although I do not attach too much importance to the practice under the Act, it is a fact that the contracts are made by the managers. Therefore, it seems to me, the statute recognizes the appointment by managers, involving the duty of paying the salary and the dismissal by the managers. It seems to me to be recognized by the statute that the ordinary contractual relationships were to remain as before the Act. Then the words "have the control of all the expenditure required for that purpose," and I assume to these words be added the following "of paying the teacher." Would such words be sufficient to give effect to an implied contract between the education authority and the teacher. In my opinion they would not. I think they point clearly to the expenditure under their control; to provide sufficient funds to meet the demands of the managers. The section indicates that the education authority is the paymaster of the teachers in respect of contracts made between the managers and teachers. Therefore, it seems to me, looking at the existing state of things and the changes made by the Act, that there is not sufficient evidence in the Act of Parliament to displace the *primâ facie* inference that the contract was in fact made between the managers and the teachers. There is not sufficient evidence that it is correct to take the view that this statute meant the duty to be upon the education authority to pay the teachers, which could be enforced by the teacher by action.

One word on the other point, which does not arise after the decision I have come to, but as at present advised it seems to me that a question between the educational authority and the managers touching the qualifications of a particular teacher from an educational point of view is a matter to be decided under section 7, sub-section 3, and not a matter which can be raised in a court of law. I come to the conclusion that this action fails on the ground that there is no privity of contract by operation of the statute between the teacher and the education authority, and that the mere payment is consistent with the duty that the education authority has to discharge and is

not sufficient to establish privity of contract so as to enable the teacher to recover in this action. Therefore, though the point is a difficult one, the appeal must be allowed.

RIDLEY, J.—I must say that I should have been inclined to think that, although the contract was with the managers, still, if it be shown that there is a statutory obligation upon the education authority to provide money to fulfil the contract, a declaration, or, in modern terms, a statement of claim, might be framed. It would be sufficient to prove an obligation on the part of the educational authority to provide money for the fulfilment of the contract. But we must look at section 7. We see the obligation is not an absolute one, and only so long as the managers carry out the directions of the authority "as to the secular instruction to be given in the school, including. . . ." [His lordship read the section.] In the present instance a resolution has been passed which affects the plaintiff, and subjects her to three months' notice. We know that the matter has been submitted to the Board of Education, and has been determined by that board; and, as I understand it, the ground of dismissal was an "educational ground," and it therefore follows that the obligation which arises on the education authority ceased to exist, for it only existed so long as the managers carry out the directions of the education authority. I do not think that there is anything which compels us to say that there is a novation, but an action might have been maintained if it could have been shewn that there was a contract and a statutory obligation imposed by an Act of Parliament providing that a third person must pay. I have nothing more to add to the judgment of my lord.

DARLING, J.—I am of the same opinion. The section turns on section 7 of the Act of 1902, and it is rather curious when one looks at it that no direct provision is made for the payment of salary to the teacher by anybody at all, neither by the manager or the education authority and the only way in which one can gather that they are to be paid and who is to pay them is by looking at section 7, where it says: [His lordship read section 7, sub-section 1.] The Act does not say the managers are to pay the salaries. The school cannot be kept efficient without teachers and therefore it follows from that that anyone would consider that the education authority should provide the money to pay the teachers. They shall control the expenditure; that gives them very great powers, powers with regard to the teachers, but there is nothing in this Act of Parliament to prevent the education authority, if they choose to do so, paying what they pay in respect of teachers to the managers of the schools, leaving the managers of the schools to pay the teachers according to the agreements that the managers of the schools have with the teachers, for it is the managers who have to engage the teachers, who engaged them before the statute and have to still. It is true that the section gives power to the education authority to exercise some amount of control over the teachers themselves, as to what they teach, as to the number and educational qualifications, but still it is left to the managers to engage and dismiss, and to the local education authority is given the power to control the managers in the doing of these things. Here the education authority did what I understand to be the common practice, they paid the teachers direct, and it is said that for that reason that there was privity between the education authority and the teacher to pay the teacher, and if it did not pay the teacher would sue. I do not think so. I think the claim is as pointed out by my lord and my brother Ridley. Then section 7, sub-section 1, provides "in the case of a school not provided by the education authority only so long as the following conditions are complied with." [His lordship read sub-section 1 (*a*).] I take a simple case. Suppose the education authority were to say "you are teaching Greek and we won't have Greek taught," and the managers were to decline to obey the directions: "this is a most useful language and we intend to teach it." Then the section says they shall only maintain and keep the school so long as such a condition is complied with as they have the right to exact and they would have the right to say "if you will not accept our instructions we will not provide the money." It seems to me they would have a perfect right. But if Mr. Barlow is right, that would be no control. The statute would not have given the managers the slightest trouble, because the managers would say to the teachers "we cannot pay though we do not mean to satisfy the education authority, but you can bring actions against them; we advise you to bring your action against the education authority. We will provide what to teach, and you bring your action." That is the dilemma which the Act of Parliament could not have contemplated. And that very case seems to have arisen because a statute was passed in 1904 [Education (Local Authority Default Act), c. 18] which says (section 1, sub-section 1 (*b*)) that "if it appears to the Board of Education that the managers . . . have . . . incurred any expenses for which provision should have been made by the local education authority . . . pay to the managers such amount in respect of these expenses. . ." and such sums shall be a debt due to the Crown from the education authority. It looks as though the very kind of thing what I have put either had happened or it was contemplated would happen, and instead of leaving the teachers to sue the education authority, this statute was passed. It may be the Act was required for other purposes; possibly they refused to pay money for objects other than the salary of teachers; I do not know, but it does seem to me it had in view what I have suggested but I do not say it is conclusive. It may be that there was the remedy advocated by Mr. Barlow and the Act was passed in order to provide a better remedy, or it may be that this statute was absolutely necessary because the teachers could not sue the education authority. I am inclined to think that the statute was passed because the Legislature agreed with our decision that the teachers could not sue the education authority. I agree with the judgments given by my lord and brother Ridley.

Appeal allowed.

Solicitor for appellant, *Sharpe, Parker, & Co.*, for *Ellis*, Town Clerk of Plymouth.

Solicitor for respondent, *Crowders, Vizard, Oldham, & Co.*, for *Shelley & Johns*, Plymouth.

K. B. Div.
(Lord Alverstone, L.C.J., and Ridley and Darling, JJ.) Feb. 21.

LAVELL v. RICHINGS. (a.)

Landlord and tenant—Distress—Implements of trade—"To the value of £5"—Law of Distress Amendment Act, 1888 (51 & 52 *Vict.* c 21), *s.* 4—*County Courts Act,* 1888 (51 & 52 *Vict. c.* 43), *s.* 147.

A hired cab is an implement of trade.

Law of Distress Amendment Act, 1888, *s* 4, *provides:* "*From and after the passing of this Act the following goods and chattels shall be exempt from distress for rent—namely, any goods or chattels of the tenant or his family which would be protected from seizure in execution under section* 96 *of the County Court Acts,* 1846, *or any enactment amending or substituted for the same.*"

Section 147 *of the County Courts Act,* 1888, *the present operative section referred to in the above statute, provides:* "*Every bailiff . . . may seize and take any of the goods and chattels of such person (excepting . . . the tools and implements of his trade to the value of £5 which shall to that extent be protected from such seizure).*"

Held, that if there be upon the premises only one implement of trade, and no other goods there, although its value exceeds £5 it cannot be distrained for rent, but comes within the protection of section 147 *set out above.*

This was an appeal from the County Court of Middlesex holden at Southwark.

For the purposes of this case it will only be necessary to state briefly the grounds of appeal, viz.: (1) That a hired cab is not an implement of trade; (2) that its value being admittedly in excess of £5, it does not come within the protection of section 147 of the County Court Act, 1888, although at the time of the distress there were no other goods whatsoever but the cab upon the demised premises.

Francke, for the appellant.—A cab is not an implement of trade; it was only hired, and there was nothing to prevent the cabman pursuing his calling by hiring another cab. Darling, J., refers in *Marten* v. *Fraser,* 85 L. T. 611, to the origin of this class of legislation. On the second point there is no decision, but the section seem plain, "tools to the value of £5."

Radcliffe, K.C. (*Schwabe* with him), for the respondent.—The same argument might be used as to all implements of trade—viz, that the workman might hire tools elsewhere after the distress. The second point turns purely upon the wording of the section. It is submitted that you must protect the tenant to the extent of £5, and if incidentally you must protect him to a greater extent that is the landlord's misfortune.

Lord ALVERSTONE, L.C.J.—This case raises an interesting point, and I dare say a novel point, although it seems to me it was indirectly before the court in *Churchward* v. *Johnson,* 54 J. P. 326. The question is whether the learned county court judge was right in taking the view that a cab, at the time being used by a person who owed the rent, comes within the words "excepting the tools and implements of his trade, which shall to that extent be protected from such seizure." It is admitted that the cab was worth £35, therefore largely in excess of £5, and it is admitted that it was the only thing upon the premises for the distraint. It has been ingeniously argued that this is not an implement of trade because he could go elsewhere and earn his trade by hiring another cab. That may be true in some aspects, but in *Fenton* v. *Logan,* 9 Bing. 676, where the question was as to the limited protection of implements of trade, the plaintiff sought to set aside the verdict on the ground that the threshing-machine was an implement of trade in use, and as such privileged from distress. In dealing with the case Tindal, C.J., says: "It was held that materials delivered by a manufacturer to a weaver to be by him manufactured at his home were privileged from distress . . . but that a frame or other machinery delivered by the manufacturer to the weaver for the purpose of being used in the weaver's house . . . was not privileged unless there were other goods upon the premises sufficient to satisfy the rent due."

Therefore I point out that that case recognized two things, that the hired threshing-machine would have been privileged if in use, that it was an implement of trade to which the limited privilege would attach, but that they must go to other articles first. Therefore the cab which this man has hired is properly regarded as an implement of trade. I do not think it is absolutely clear, but it seems to me the learned county court judge came to a right conclusion.

What is the meaning of the section having regard to the limited value? That depends on the words "to the value of £5."

It seems to me that the view of the learned county court judge is the better view, that you must at least leave tools to the amount of £5, and if by accident there are no tools of less value than £5, the protection is not taken away. In order to give effect to Mr. Francke's argument you must go the length of saying that in the case, say, of ten sewing-machines each of the value of £10 there could be no protection because no one of the machines was below the value protected. In *Churchward's case,* in 54 J. P., a sewing-machine was seized, and Mr. Radcliffe says this point was incidentally referred to; it was a point open to consideration. I come to the conclusion that where there is only one thing upon the premises, and that exceeds £5 in value, the protection applies, and the county court judge was right.

RIDLEY, J.—I agree.

DARLING, J.—I am of the same opinion. I think the fact that this is an implement of trade is shown by the analogy of a sewing-machine. On the second point I also agree with my lord that the statute does not only apply to what Mr. Francke contends, where you can seize something of less value than £5; I think it must apply where the thing exceeds £5 in value where that is the only thing to be seized. It must be remembered that in taking away implements of trade the workman may have no trade to which he could go, and that in its turn might lead to a public danger; I think that was the reason of this kind of exemption. But at the same time I have not said, and have not meant to say, in *Marten* v. *Fraser* that because that was the original reason therefore the exemption was to be confined to those persons only who could not live without the implements protected. The burden is not cast upon the bailiffs of deciding such a point as that. The section is specific—they are not to take the implements of a man's trade.

Appeal dismissed.

Solicitor for appellant, *H. E. Tudor.*

Solicitor for respondent, *J. Aplin Nicholls.*

(a.) Reported by MAURICE N. DRUCQUER, Esq., Barrister-at-Law.

K. B. Div.
(Lord Alverstone, L.C.J., and Wills and Darling, JJ.) Oct. 26.

MORLEY v. MAKIN AND OTHERS. (a.)

Principal and agent—Undisclosed principal—Baptist minister—Appointed to the pastorate by a document signed by the deacons of the chapel—Fund insufficient to pay salary—Claim against deacons to make good deficiency.

Held, that the defendants were not personally liable as agents for an undisclosed principal to make up arrears of salary due to the plaintiff, although they had invited him to become pastor of the Baptist chapel of which they were the deacons, and had signed the document under which he became pastor, because there was evidence on the face of the document that the salary of the pastor was to be payable out of the chapel fund, of which fund the plaintiff himself was treasurer, and from which he had paid himself salary as it became due, so long as the fund was sufficient to meet it.

Appeal by the plaintiff against a judgment of the judge of the Hadleigh County Court, who held that the defendants were not personally liable for the sum claimed in the action.

The plaintiff was appointed pastor of a Baptist church by a document signed by the defendants, who were four deacons of the church.

The document, which was dated December, 1901, was in the following terms: "From the Strict Baptist Church, worshipping at George-street, Hadleigh, Suffolk, to Mr. G. W. Morley, minister of our Lord Jesus Christ, we send you Christian greetings. Dear Brother,—In the providence of our Triune God you have been brought into our midst to preach the Gospel of our Lord and Saviour, which has been food to our souls. We, the undersigned, as deacons of the above church, do now invite you to pastorate (authorized by a unanimous vote at our last church meeting. Also at our finance committee meeting a unanimous vote was recorded and a good majority of the congregation) at a present salary of 25s. per week. We regret to state that our present income will not warrant anything higher now, but we hereby promise that if the dear Lord shall prosper us financially you shall be benefited thereby. In case of termination of pastorate by three months' notice. We do earnestly desire and pray that our God will abundantly bless us as a pastor and people, and add to the church daily souls that are eternally saved: John Makin, F. Wright, C. Woods, W. Watson (deacons)."

The fifth defendant was a Mr. Sewell, who was not a deacon, but had taken a leading part in the matter and on whose behalf the notice of dismissal was given to the plaintiff and which the county court judge had held to be valid.

Since 1902 the plaintiff had himself acted as treasurer, and out of the surplus from time to time left in his hands had paid himself the salary due to him. On the 20th of November, 1904, the three months' notice to cease acting as minister was given him. At the termination of the notice £34 13s. 8d. was due to him as salary, and it was this sum that was claimed by him in the action from the four deacons who, it was alleged, were personally liable, as deacons of a Baptist Church, for the salary of the pastor.

C. E. Jones, for the plaintiff.—Under the document of December, 1901, the pastor was to receive a salary of 25s. per week. That document was signed by the deacons of the chapel, and the plaintiff is entitled to recover arrears of salary from them personally as they contracted with him as agents for an undisclosed principal: *Burls* v. *Smith*, 7 Bing. 705.

Henlé, for the defendants, was not called on.

Lord ALVERSTONE, L.C.J.—When the facts of this case are fully appreciated it is to my mind clear that the decision come to by the learned county court judge was quite right. No doubt if this had been, as Mr. Jones contended it was, a case of the defendants acting as agents for an undisclosed principal, they would have been personally liable on the document. But this is not that case at all. It is a case where the pastor accepted the pastorate hoping and believing that the congregation would be able to pay him. On the face of the document itself the plaintiff had pointed out to him the fund out of which he was to be paid and there is not a word in it to indicate that the defendants were to be personally liable. We have been told that from 1902 he acted as treasurer and paid himself out of the surplus of these funds the salary due to him. Then he was dismissed, and he turns round and in effect says, "Although I have been paying myself out of these funds, nevertheless I look to you as deacons of the chapel for payment of the balance." As my brother Wills pointed out, it is a fallacy sometimes to say that someone must pay for service rendered, for often a fund and not an individual must be held liable. That was the case here. The appeal must be dismissed with costs.

WILLS, J.—I am of the same opinion. I think the facts here show clearly that this was a class of case in which the judge was justified in holding that the defendants were not liable and dismissing the action.

DARLING, J.—I concur.

Appeal dismissed.

Solicitors for the plaintiff, *Bankes, Ashton, & Holley*, Bury St. Edmunds.

Solicitors for the defendants, *Birkett, Ridley, & Francis*, Ipswich.

(a.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

C. C. R.
(Lord Alverstone, L.C.J., and Wills, Darling, Walton, and Jelf, JJ.) Nov. 3.

REX v. PALIN. (a.)

Criminal law—Falsification of an account—Employer's account—Falsification of Accounts Act, 1875 (38 & 39 *Vict. c.* 24), *s.* 1.

By the Falsification of Accounts Act, 1875 (38 & 39 *Vict. c.* 24): "*Whereas it is expedient to amend the law so as to punish the falsification by clerks, officers, servants, and others of their employers' accounts, books, writings, or documents: Be it enacted . . .* (1) *That if any clerk, officer, or servant, or any person employed or acting in the capacity of a clerk, officer, or servant shall wilfully and with intent to defraud, destroy, alter, mutilate, or falsify any book, paper, writing, valuable security, or account which belongs to or is in the possession of his employer, or has been received by him for or on behalf of his employer, or shall wilfully and with intent to defraud, make, or concur in making any false entry in, or omit or alter or concur in omitting or altering any material particular from or in any such book or any document or account, then in every such case the person so offending shall be guilty of a misdemeanour.*

Held, that in the second part of the section the word "such" governed not only "book," but also the subsequent words "document or account," and in consequence it is incumbent upon the prosecution to prove that the account alleged to have been falsified "belongs to or is in the possession of his employer, or has been received by him for and on behalf of his employer."

Case stated for the opinion of the Court for the Consideration of Crown Cases Reserved by the chairman of Quarter Sessions for the County Palatine of Lancashire, sitting at Preston.

(1) The defendant was indicted under 38 & 39 Vict. c. 24 (Falsification of Accounts Act), s. 1, the the second part of the section.

(2) The first count of the indictment was: "That Benjamin Higginson Palin, on the 30th day of July in the year of our Lord one thousand nine hundred and five, then being servant to Edmund Arthur Le Gendre Starkie, unlawfully, wilfully, and with intent to defraud did make and concur in making a false entry in a certain account, to wit, an account of certain rabbits delivered by the said Benjamin Higginson Palin to certain tenants of the said Edmund Arthur Le Gendre Starkie, his master, by falsely entering in such accounts twenty-two rabbits as having been delivered by the said Benjamin Higginson Palin to one John Coates, a tenant of the said Edmund Arthur Le Gendre Starkie, whereas in truth and in fact the said twenty-two rabbits were not delivered to the said John Coates, as he, the said Benjamin Higginson Palin, well knew at the time when he made such false entry as aforesaid, and which said entry was in the words and figures following: 'List of rabbits, Coates 22,' against the form of the statute," &c.

(5) At the close of the prosecution counsel for defendant objected that as there was no evidence that the account belonged to or was in the possession of the defendant's employer or was received by him for or on behalf of his employer, the prosecution "had failed to prove an offence under the said statute."

(6) He referred to the preamble of the said statute as defining its scope and purpose, and further contended that the word "such" governed not only "book," but also the subsequent words "document or account."

The prisoner was found guilty, sentenced to six months' imprisonment with hard labour. The question for the court was whether the defendant was rightly convicted on the indictment.

No counsel appeared for the defendant.

George Elliott, for the prosecution.—The section makes a difference between book and document or account. Archibald's Criminal Pleading (23rd ed.), p. 592, points out that the account need not belong to or be in the possession of the employer. Section 83 of the Larceny Act, 1861 (24 & 25 Vict. c. 29), which deals with the falsification of books, &c., belonging to a public company or body corporate is couched in similar language, and there it states "in any book of account or other document."

Lord ALVERSTONE, L.C.J.—We all think this conviction cannot stand. I express no opinion as to the wording of section 83 of the Larceny Act, or whether that section requires that the documents therein should be the property of the company or not. We have to deal with the Falsification of Accounts Act, 1875, and it seems to me that the preamble is important. [His lordship read it.] In this case the prisoner appears to have made a false entry in his own account, and that does not seem to me to fall within the statute. It is quite plain that under the first part of the statute the book, paper, writing, valuable security, or account—the word "document" does not occur there—must be in the possession or constructive possession of the employer; but it is contended that the last part of the section as to making false entries is wider in its scope, and that as it refers to any such book "or any document or account"; it is not essential that the document or account should belong to the employer. That construction would reduce the section to an absurdity and would make the first part of the section unnecessary. To say that it is an offence to destroy, alter, mutilate, or falsify any document belonging to an employer, and also that it is an offence to make a false entry in any document or account, whether belonging to an employer or not, is to make the second and subordinate part of the section far wider than the first part and to go beyond the purview of the Act as declared in the preamble. This conviction must therefore be quashed.

WILLS, DARLING, WALTON, and JELF, JJ., concurred.

Conviction quashed.

Solicitors for prosecution, *W. J. & E. H. Tremellen,* for *Baldwin, Weeks, & Baldwin,* Clitheroe.

(a.) Reported by MAURICE N. DRUCQUER, Esq., Barrister-at-Law.

High Court of Justice.

Chan. Div.
Kekewich, J. } Feb. 22.

BISGOOD v. NILE VALLEY CO. (LIMITED). (a.)

Company—Reconstruction—Memorandum of association—Sale of property of company to new company for partly paid-up shares—Winding up—Option to shareholders of old company to take up new shares—Time limit for exercising option—Realization by liquidator of shares not taken up—Division of proceeds among dissentient shareholders—Scheme held ultrà vires.

The defendant company, being in financial difficulties and desiring to raise more capital, proposed to enter into an agreement with a new company for the sale of its property and undertaking to that company in consideration of partly-paid shares therein, and the shareholders of the old company were to have the option of taking these shares in exchange for their existing shares. Shares not accepted within a certain time were to be sold by the liquidator, and the proceeds, after paying expenses, divided rateably among the shareholders who would, had they claimed, have been entitled to those shares. By its memorandum of association the company was empowered to sell its undertaking for shares in any other company, whether wholly or partly paid up, and to distribute the shares in specie. A shareholder in the old company brought an action to obtain a declaration that the agreement was ultrà vires *and void, and also for an injunction to restrain the company from carrying into effect any agreement in the terms of the draft agreement.*

Held, that the draft agreement was ultrà vires, *as not being a sale justified by the provisions of the memorandum, and as being in substance an attempt to force the shareholders to provide more capital under penalty of forfeiting their shares.*

Manners *v.* St. David's Gold and Copper Mines (Limited), [1904] 2 *Ch.* 593, 53 *W. R. Dig.* 28, *followed.*

Motion to restrain the defendant company and its directors from acting upon a resolution passed at an extraordinary general meeting of the company authorizing the directors to enter into a certain agreement for the sale of the assets of the defendant company to a new company upon the terms of the draft agreement.

The Nile Valley Co. (Limited) was incorporated on the 6th of April, 1903, under the Companies Acts, 1862 to 1900, with a nominal capital of £250,000, divided into 250,000 shares of £1 each, of which 218,257 were issued as fully paid or credited as fully paid.

The objects for which the company was established, as set out in clause 3 of the memorandum of association, were, *inter alia*, as follows:

(1) To acquire (from another company) certain mining rights or concessions over lands situate in Egypt, and all other its undertaking and assets, subject to its liabilities.

(2) To carry on the business of an exploration, financial, investment, and mining company in all its branches.

(3) To invest in or upon, subscribe for, purchase, or otherwise acquire and obtain options over, and either conditionally or otherwise, stocks, shares, investments or securities of all classes and descriptions, and whether or not fully paid up, and to make payments thereon as called up, or in advance of calls, and the same to hold, sell, exchange or otherwise dispose of, advertise, deal with, turn to account, give options over and re-acquire from time to time as may be expedient.

(10) To sell, let, dispose of, or deal with the undertaking of the company, or any part thereof, for such consideration as the company may think fit, and in particular for shares, debentures or securities of any other company having objects altogether or in part similar to those of this company. To distribute any of the property of the company among the members in specie.

(15) To sell, improve, manage, develop, lease, mortgage, dispose of, turn to account, or otherwise deal with all or any part of the property and rights of the company.

(20) To distribute among the members in specie by way of dividend or bonus, or upon a return of capital, any property of the company or any proceeds of sale or disposal of any property of the company, but so that no distribution amounting to a reduction of capital be made except with the sanction (if any) for the time being required by law.

Clause 156 of the articles of association provided that in the event of the liquidation of the company the surplus assets of the company, available for distribution among the members, shall belong to and be divided among the members in proportion to the amounts paid up or credited as paid up on the shares held by them respectively.

157. If the company should be wound up (whether voluntary or otherwise) the liquidators may, with the sanction of an extraordinary resolution, divide among the contributories in specie any part of the assets of the company, and may, with the like sanction, vest any part of the assets of the company in trustees upon such trusts for the benefit of the contributories as the liquidators, with the like sanction, shall think fit, and if thought expedient any such division may be otherwise than in accordance with the legal rights of the contributories of the company, and in particular any class may be given preferential or special rights, or may be excluded altogether or in part, but in case any division other than in accordance with such legal rights shall be determined on, any contributory who would be prejudiced thereby shall have a right to dissent and ancilliary rights as if such determination were a special resolution passed pursuant to section 161 of the Companies Act, 1862.

On the 3rd of February, 1906, the company issued a circular to the shareholders which stated that, the directors having found that the funds in hand were not sufficient to enable the company to bring its operations to a successful issue, had decided to ask the shareholders to authorize the sale of the undertaking and assets of the company to a new company to be incorporated with a capital of £250,000 in 250,000 shares of £1 each. The short heads of the scheme were set out in the circular as follows: (1) All the assets and undertaking of the company are to be sold to the new company for 218,257 shares of £1 each credited as 16s. paid, that is to say, with a liability of 4s. per share. (2) It is then proposed to ask the shareholders to put the company into liquidation so that each shareholder of the present company shall be entitled to subscribe for the one new share credited as 16s. paid for each share now held by him. All shares not subscribed by shareholders will be sold by the liquidator.

A notice dated the 3rd of February, 1906, was given that an extraordinary general meeting of the company would be held on the 12th of February, 1906, for the purpose of considering and, if thought fit, passing the following resolution—viz.: "That an agreement expressed to be made between this company (therein called the old company) and the Nile Valley (New) Co. (Limited) (therein called the

(a.) Reported by R. FRANKLIN STUBBING, Esq., Barrister-at-Law.

new company), proposed to be formed for the purpose of acquiring the assets and liabilities of the old company on the terms therein mentioned, in the form of the draft which has been read and explained to this meeting be and the same is hereby approved, and that the directors be and are hereby authorized to enter into the said agreement with the new company when formed, and to carry the same into effect with such modifications (if any) as they may approve."

The meeting was held on the 12th of February, when the resolution was passed by the shareholders.

The terms of the draft agreement so far as they are material were as follows:

(1) The old company shall sell and the new company shall purchase as on the 1st day of January, 1906, all and singular the lease, concessions, lands and buildings, plant, machinery, ore, gold, goods, chattels, moneys, credits, shares, debts, bills, notes, and things in action of the old company and the undertaking and business thereof with the full benefit of all contracts and agreements and of all securities in respect of the said things in action to which the old company is entitled and all other the real and personal property of the old company whatsoever and wheresoever.

(3) As a further part of the consideration for the said sale if the old company shall go into liquidation within six calendar months from the date hereof, the new company shall pay and at all times hereafter keep the old company, its liquidators and contributories, indemnified against all the costs and expenses of and incident to the winding up of the old company and of carrying the said sale into effect.

(5) The new company shall allot and issue to the old company or its nominees 218,257 shares in the new company of £1 each, with the sum of 16s. credited as having been paid up thereon, to be numbered 1 to 218,257, both inclusive.

(6) If the old company shall go into liquidation before the said 218,257 shares shall have been allotted to the old company or its nominees the following provisions shall apply and the said shares shall be allotted accordingly:

(*a*) Every member of the old company (including holders of bearer share warrants) shall in respect of each share therein held by him be entitled as of right to claim an allotment to himself or herself or to his or her nominees of one £1 share in the new company, with the sum of sixteen shillings credited as having been paid up thereon, and the new company shall allot the shares so claimed. The remaining four shillings per share shall be paid as to one shilling when the claim is made, and as to one shilling on allotment, and as to the balance as and when required.

(*b*) The liquidator of the old company shall, within fourteen days after the old company shall have gone into liquidation, give notice in writing to each registered member of the old company stating the number of shares the member is entitled to claim as of right under this agreement, and the amount per share payable on claiming the same and the situation of the registered office of the new company and the time within which the claim for allotment must be sent in to the new company, and there must be enclosed therewith proper forms of claim addressed to the new company for signature by the member. (The clause also provided that the notice in the case of registered members was to be given by post, and in the case of holders of bearer share warrants such notice was to be given by advertisement.)

(*c*) A registered member entitled to claim an allotment as aforesaid must claim the same within fourteen days from the date of the notice to be given by the liquidator informing him thereof or within such extended time as may be fixed by the liquidator, and a holder of bearer share warrants entitled to claim an allotment as aforesaid must claim the same within one calendar month from the date of the first advertisement of the notice of such right to claim as hereinbefore provided or within such extended time as may be fixed by the liquidator by sending in to the new company a claim in writing for the allotment of the shares, and such claim must be signed by the member making the same and must be accompanied by a sum of one shilling per share claimed, and where it requests that the allotment of the shares may be made to a nominee or nominees of such member it must be countersigned by such nominee or nominees.

(*d*) As regards that proportion of the said shares in the new company which members of the old company shall be entitled to claim as aforesaid, but shall not within the periods of fourteen days or one calendar month within such extended time as aforesaid claim, the said liquidator shall use his best endeavours to sell the same for what they will fetch, and the proceeds of sale thereof, after paying all expenses of and incident to the sale, shall be distributed rateably among the members who if they had claimed would have been entitled to such shares in accordance with their rights and interest, and in substitution for such shares the new company shall upon the request of the said liquidator allot to such purchasers the shares sold to them respectively credited as aforesaid, but such request to be effective must be made within three months from the date of the liquidation or such later date as may be agreed upon by the new company.

(*e*) Any such sale as aforesaid may be made by the said liquidator either by public auction or private contract and either together or in lots and either with or without reserve and subject to any special or other conditions with power to sell parts thereof with calls of additional shares and with power to buy in and resell and generally upon such terms and conditions and in such manner as the said liquidator shall in his absolute discretion think fit.

(12) If within four calendar months from the date hereof 100,000 shares shall not be claimed by the old company or the members of the old company under the provisions of clauses 4, 5, and 6 hereof, the new company may by notice in writing to the old company or its liquidator determine this agreement, in which case neither the old company nor its liquidator nor the new company shall have any claim on any account against the other, except that the old company or its liquidator shall pay the costs, charges, and expenses of and incidental to the preparation of this agreement and the stamp duty thereon and of and incidental to carrying the said agreement into effect, the formation and registration of the new company and the registration fee and stamp duties in connection therewith.

The resolution to carry this draft agreement into effect having been passed, notice was given of another extraordinary general meeting to be held on the 22nd of February for the purpose of passing a resolution that the company be wound up voluntarily, but before this meeting was held, the plaintiffs, who were dissentient shareholders, thereupon commenced these proceedings, by which they asked for a declaration that the resolution passed at the extraordinary general meeting of the defendant company held on the 12th of February, 1906, was *ultra vires*, and for an injunction to restrain the defendant company and its directors from entering into and carrying into effect any agreement on the terms and in the form of the draft agreement.

P. O. Lawrence, K.C., and *Beebee*, for the plaintiffs.—What is attempted to be done by this draft agreement is *ultrà vires*, and the plaintiffs are entitled to prevent the company from dealing with its undertaking in such a way as to deprive them of their rights under section 133 of the Companies Act, 1862. The attempt in clause 6 (c) of the draft agreement to fix a limit of time within which the shareholders must claim the shares they were entitled to vitiates the agreement. Clause 12 of the agreement is a threat to the shareholders that if they did not subscribe the necessary number of shares the whole agreement would fall to the ground, with the consequence that the company would have to bear a heavy expense for which they obtained no benefit. The whole object of the agreement is to exclude those shareholders who were not willing to come in under the scheme and to forfeit their shares. It is an attempt to get out of the obligation of complying with 161 of the Companies Act, 1862. The question is whether the company had power to do this. The most recent case where such an agreement has been considered is *Manners* v. *St. David's Gold and Copper Mines* (*Limited*), [1904] 2 Ch. 593, where the scheme provided that the members of the old company had an option to take shares in the new company upon which there was a considerable liability, but which they could not be compelled to take, the consequence of refusal being the loss of the existing paid-up shares held by the refusing members, as under the scheme their share of the assets was forfeited and the proceeds handed over to the purchasing company, and it was held that the contract was *ultrà vires*, and that the whole transaction was a mere device to compel the members to provide additional capital when no further call could be made. It is true that there is a distinction between that case and the present one, in that there the unapplied-for shares were to be sold and the proceeds applied in reduction of the obligation of the new company under the scheme. The agreement in the present case is framed to get round this difficulty, but the effect is the same, as in point of fact the shares that were unapplied for became forfeited, therefore the decision in that case applied. If the purchasing company made default all the expenses would be thrown upon the dissentient shareholders, as the liquidator would have parted with all the assets, except with the money from the realization of the unapplied-for shares which belonged to the dissentient shareholders. The scheme therefore was not one which the court would approve; it was only a device to make shareholders provide further capital. In *Mason* v. *Motor Traction Co.* (*Limited*), [1905] 1 Ch. 419, 53 W. R. Dig. 29, where one of the objects of the company was, as in the present case, to sell its undertaking for shares, it was decided by Buckley, J., that the company could sell for partly-paid shares, as the word "shares" was not confined to shares fully paid. But it had never been held that such a reconstruction as was involved in the present scheme could be carried out.

Stewart Smith, K.C., and *Shewell Cooper*, for the company.—The agreement is in the form that is very commonly used, and the company wish to know whether it is *ultrà vires*. When the capital of a company is exhausted, further capital must be raised, or the company be wound up. The scheme in the present case has been framed so as to give equal benefit to all the shareholders, who have the option of taking shares in the new company with a small liability, the liquidator selling the shares not taken up and dividing the proceeds among the dissentient shareholders rateably. It is an advantage for the liquidator to be able to deal with the shares in blocks as a better price can be obtained for them thereby. In *Postlethwaite* v. *Port Philip and Colonial Gold Mining Co*, 38 W. R. 246, 43 Ch. D. 452, it was held that such an option to take shares could not remain open for ever, and that it was only reasonable for the purchasing company to stipulate, and for the liquidator and shareholders of the selling company to agree, that a limited time should be fixed within which alone the option should be exercisable, and also that the scheme was not vitiated by the insertion of a time limit. That was a case under section 161, but the principle is the same whether the agreement is outside or inside section 161. The present case is entirely different from *Manners* v. *St. David's Gold and Copper Mines* (*Limited*). In that case the company got the benefit of the shares that were not taken up; that was the especial hardship in the case, and Romer, L.J., held that the contract was *ultrà vires* of the selling company because it contained that provision. Cozens-Hardy, L.J., also based his judgment upon the same grounds. That provision is entirely wanting in the present case and, therefore, that case does not apply. The scheme has been framed to give each class of shareholders the maximum they can possibly get, and it ought, therefore, not to be objected to as being *ultrà vires*. If the precedure provided by section 161 be adopted the company would have to value its assets and the claims made against it, and the dissentient shareholder would then get his share of the balance, but that is a ruinous procedure when, as here, the dissentient shareholder holds only a few shares; instead of this, under the scheme a shareholder obtains his quota of shares with the liability attached, and if he does not take up the shares the proceeds of them, which is much more advantageous for him. Rateably according to their rights and interests means in proportion to the shares held by the dissentient shareholders.

KEKEWICH, J.—I have no doubt that this agreement cannot stand as it is. I do not propose to go through the whole of it. It is admitted that this is not an agreement intended to be effected under the provisions of the Companies Act, 1862, ss. 161 and 162. There is to be a winding up and the sale of the company's undertaking and assets is to be carried through in that winding up, and through the machinery of the liquidator, but not under the statutory provisions to which I have referred. Therefore we need not inquire what the statute gives. We need not inquire whether this is anything different from what the statute gives, because the statute has nothing whatever to do with it. There is a liquidation of the company which is a voluntary liquidation, and the company is still in existence, still carrying on business, and still entitled to sell, if they have any power at all to sell under the memorandum and articles of association, as a going concern.

The first question is, have they power to sell? That is easily answered. Under sections 10 and 15 of clause 3 of this memorandum of association there is power to sell not only "the undertaking"—which is all that is covered by section 10—but also "all or any part of the property and rights of the company." They might sell the undertaking, or they might sell the whole or any part of the assets as a going concern; and they may sell that, according to section 10, at any rate "for shares." They may sell the undertaking for shares; and I will assume, though it is not expressed, that they may sell any part of the property for shares. That is not expressed, and there may be a small point upon that; at any rate, they may sell their undertaking for shares, and the expression "the undertaking" would cover a great

deal. If they may sell for shares they may sell for partly paid-up shares—shares which are not wholly paid up—in some other company. So far there is no difficulty. They might, therefore, make a sale of the whole undertaking and assets of the company to another company for partly paid-up shares in that other company. To work it out properly, all the shares would have to be under the control of the liquidator, but if there were no liquidator, under the control of the directors, in which case they would have to realize those shares as part of the assets of the company, and, after paying the costs and expenses, and, of course, clearing the company from debts, they would have to divide those proceeds among all their shareholders, in proportion to their nominal interests in the company. Of course, a question might arise where shareholders had not paid calls and so on, and the partnership rules would come in; but substantially in a case of this kind, where they are all fully paid up, it would be in proportion to their nominal interest in the company. That would be the proper mode of proceeding. It is not, however, proposed to follow that course in the present case. They propose to allot the shares in the new company direct to the shareholders in the old company. I am not sure that they have the right to do anything of the kind. The shares in the new company are intended to be partly paid-up shares, and I do not see how this old company, or the liquidator, can compel a shareholder in the old company to take shares in the new company, one or more, whether it is the rateable proportion or any other number, imposing thereby a liability. That is a difficulty in the way of the scheme. But that has been foreseen and an attempt has been made to get over it. Those shareholders who are willing to accept partly paid-up shares and the liability, are to have their shares. Then comes the difficulty, what are you to do with those who will not? You cannot force it. You cannot force anything upon them at all. They are entitled to their shares in the assets of the company, including, of course, as it is a winding up, their share in their proper proportion of the proceeds of sale of those shares which are allotted to the consenting shareholders. But it is not proposed to give them anything of that kind. It is proposed, as they are obstinate and refuse to take any allotment—I am not using the word in an offensive sense, because they are entitled to be obstinate and refuse—it is proposed, as they are obstinate and refuse to take an allotment of shares, that they shall have something else. Now, what is that something else to be? Those shares which are not taken are to be sold by the liquidator for what he can get for them. There is a certain time-limit fixed within which the obstinate refusal is to be expressed. There is a certain time within which the liquidator is to sell. As at present advised, I see no objection to a reasonable time-limit in either case, and I see no reason for supposing that the time-limit fixed is not reasonable in either case. But undoubtedly he is to sell—not necessarily, of course, all at once, because probably that would be impossible, but he is to sell when and as he can. But he is to sell. If eventually he has to sell for "an old song," as the saying is, then for "an old song" the shares must go. He has got to realize, and when he has got it all, or, of course, if he prefers, when he has got a substantial sum in hand, he is to distribute it, of course after paying the expenses of the sale. That means, as I understand it, the sale of all those shares which he has sold up to the time of distribution, and if there is no distribution then undoubtedly all of them that have been realized. What remains in his hands is to be distributed among those members who have not come in, the dissenting members—what I have called the obstinate refusing members. They are to have a share in this fund, be it small or be it large.

Now I confess that I cannot follow the meaning of the language in which the rateable distribution is expressed. I am told that it is perfectly clear, and that it only means that all the rights and interests of the shareholders are to be taken into consideration at the time of the distribution. I do not understand what rights and interests have to be taken into consideration, how there can be anything open for discretion. "Rateably" implies that there is some proportion which has to be ascertained; and the proportion, it seems to me, must necessarily be the value that the interest of the particular shareholder receiving his quota bears to the total interest of those who have stood out. I do not think there is any other right or interest to be considered, "rateably" seems to me necessarily to imply that. Therefore, each shareholder in each distribution (and there may be only one distribution) will get his share with the others, his proportion of the proceeds of sale less expenses. That may be extremely unfair to some shareholder whose shares may have been sold for a good price on the market; there may have been a slump, and the rest of the shares may have been sold, as I have said before, for "an old song." Then those shareholders whose shares were sold for "an old song" will have their proportion calculated exactly in the same way as his, though his shares were very likely sold for a larger sum. That seems to me to be unfair and to work injustice. But, apart from that, is this fair to these dissenting shareholders at all? It seems to me that it is (to use a common expression) putting a pistol to their heads and telling them, "If you do not come in, all you will get is your proportion, whatever it may be, of the sale of those shares which are held by dissentient shareholders; if you do come in, you will have to accept shares with a liability, and, if you will not take that—and we admit and must admit that we cannot force you to take that—then you will have to take what you can get in that way, which must be a very small amount. You will have nothing whatever to do with the new company; you will have nothing to do with shares in the new company, of course, because you said you would stand out; all you get is your rateable proportion ascertained in that way." That seems to me to be unfair. I do not propose to go into the rest of the agreement, because I think it all turns on that as a hinge. I think it comes precisely within what Romer, L.J., describes in the case of *Manners* v. *St. David's Gold and Copper Mines* (*Limited*). He says, at the top of p. 606: "It is a scheme whereby the shareholders of a company, who have paid up their shares in full and are not under any liability to furnish any further capital, are told, 'You must pay up more capital, and if you do not, you shall forfeit all share and interest in this company as a going concern.' Such a scheme is wholly improper and *ultra vires*." The distinction between that case and this is obvious, as, of course, has been relied upon. There the dissenting shareholder would get nothing. The proceeds of sale of their shares was to go to the company, to go away from them altogether. The observations of Romer, L.J., and the observations to be found in the other judgments are of course relied upon here. There is that difference in substance, that here the shareholder is to get his rateable proportion, that is the substance. It seems to me to come to the same thing. The directors in effect say, "You are under no liability, we cannot force you to come under liability, but we can force you and will force you to forfeit your shares."

Whether the shares are forfeited by taking them all away or forfeited by dealing with them in a way that is not sanctioned by any contract between the parties, and not to be even justified by any passage in the memorandum and articles of association, seems to me to be perfectly immaterial. You take away from the shareholders that which is their own. You say to them, "If you do not come in, at any rate you shall not have your shares, you shall have something else," which I do not think will be ascertained fairly, but whether it is ascertained fairly or not it is not in the bond. I think the shareholders are entitled to insist on the bond, and, therefore, I propose to restrain the company from proceeding on the agreement in its present shape. How far alterations will modify all difficulties is another matter, but I do not think the agreement can stand as it is.

An injunction was granted until the trial or further order restraining the company from entering into or carrying into effect the draft agreement.

Solicitors, *Bisgood & Marshall; Worthington, Evans, Dauney, & Co.*

Chan. Div.
Swinfen Eady, J. } Feb. 6.

In re VALPY.
VALPY *v.* VALPY. (*a.*)

Will—Exemeration—Mortgage debt—Contrary intention —Locke-King's Acts (17 & 18 *Vict. c.* 113; 30 & 31 *Vict. c.* 69; 40 & 41 *Vict. c.* 34) *—Real Estate Charges Act,* 1867 (30 & 31 *Vict. c.* 69).

A testator, by clause 9 of his will, devised the X estate to specific devisees. By clause 14 he devised the Y estate and all other real and personal estate not by will or codicil otherwise disposed of to trustees on trust for sale and conversion. By clause 15 he directed the trustees to pay out of moneys arising from sale and ready money his debts, except charges and mortgage debts (if any) on property specifically devised, which debts were to be paid primarily out of the property charged therewith. At the dates of the testator's will and death the only mortgage was on the Y estate.

Held, that, the Y estate not being specifically devised within clause 15 of the will, there was a "contrary intention" within the Real Estate Charges Act, 1867, *and that the mortgage on the Y estate must be borne rateably by the mixed residuary fund.*

Originating summons.

This was a summons to determine questions arising in connection with a will dated the 29th of November, 1894.

The testator died on the 18th of December, 1904.

By clause 9 of his will he devised an estate known as the Thorpe Estate, together with a freehold house No. 15, Finsbury-pavement, to Alicia Valpy for life or until she should marry again with remainder to Oliver Harris Valpy absolutely.

By clause 14 of his will he devised and bequeathed an estate known as the Enborne Lodge Estate and all other his real and personal estate not thereby or by any codicil otherwise disposed of to his trustees upon trust for sale and conversion.

By clause 15 of his will the testator directed that his trustees should, out of the money to arise from the sale and conversion of his said real and personal estate under the trust lastly thereinbefore contained and out of his ready money pay his funeral and testamentary expenses and debts "except charges and mortgage debts (if any) on property specifically devised, which debts are to be paid primarily out of the property charged therewith," and should also pay or provide for the legacies and annuities thereby or by any codicil bequeathed, and all death duties in respect of his estate or in respect of the devises and bequests in his will or any codicil contained, which devises and bequests should be taken by the devisees and legatees free of duty, and should divide, pay, and transfer the residue of the said money, and he bequeathed the same in the following manner—namely, such part thereof as consisted of the proceeds of sale of his residuary estate other than the Enborne Lodge Estate unto four children, Frederick Harris Valpy, Janet Valpy, Anna Margaret Valpy, and Constance Maitland Valpy, and a grandson Oliver Harris Valpy, in equal shares, and such part of the said money as consisted of the proceeds of sale of the Enborne Lodge Estate unto the said Frederick Harris Valpy, Janet Valpy, Anna Margaret Valpy, and Constance Maitland Valpy in equal shares.

One of the four children was an executor and trustee of the will.

At the date of the testator's will and at the time of his death the only mortgage or charge on his estate was a mortgage on the Enborne Lodge Estate dated the 25th of March, 1868.

At the date of his will and death the testator had no real property other than the Thorpe Estate and the Enborne Lodge Estate and the house in Finsbury-pavement. The object of this summons was (*inter alia*) to ascertain whether the mortgage debt was to be borne by the Enborne Lodge Estate alone or by the Enborne Lodge Estate and the general residue rateably.

J. M. Paterson, for the executors and trustees.

T. K. Crossfield, for the children interested in the Enborne Lodge Estate other than the trustee.—The only specific devise is that of the Thorpe Estate contained in clause 9 of the will, and the Enborne Lodge Estate is not specifically devised within the meaning of clause 15 of the will. In effect the testator has directed all his debts, except mortgage debts on the Thorpe Estate, to be paid out of the mixed residuary fund. There is, therefore, a sufficient contrary intention within the meaning of the Real Estate Charges Act, 1867, and the mortgage on the Enborne Lodge Estate must be paid out of the mixed residuary fund.

T. J. C. Tomlin, for the grandson.—There is not a sufficient contrary intention within the meaning of of the Real Estate Charges Act, 1867. The Enborne Lodge Estate is specifically devised within clause 15 of the will, and the mortgage debt must therefore be borne by that estate alone: see *Nelson* v. *Page*, 17 W. R. 27, 7 Eq. 25; *Elliott* v. *Dearsley*, 29 W. R 494, 16 Ch. D. 322.

SWINFEN EADY, J., held, in the first place, that the Enborne Lodge Estate was not specifically devised within the meaning of clause 15 of the will; and then continued: The true construction of clause 15 of the will is that it really amounts to a direction to pay the testator's debts, "except charges and mortgage debts (if any) on the Thorpe Estate," out of the mixed residuary fund. In my opinion that is a "contrary intention" within the meaning of the Real Estate Charges Act, 1867 s. 1. The section provides that on the construction of the will of any person who may die after the 31st of December, 1867, a general direction that the testator's debts shall be paid out of his personal estate shall not be deemed to be a declaration of an intention contrary to or other than

(*a.*) Reported by F. HARDINGE DALSTON, Esq., Barrister-at-Law.

the rule established by the Real Estate Charges Act, 1854, unless such contrary intention shall be further declared by words expressly or by necessary implication referring to all or some of the testator's debts or debt charged by way of mortgage on any part of his real estate. The will now in question refers to the mortgage debts (if any) on the Thorpe Estate, and directs all other debts to be paid out of the mixed residuary fund. That is a clear implication that the mortgage debts other than those (if any) on the Thorpe Estate are included in the general direction to pay the debts.

There is, therefore, a "contrary intention" within the Real Estate Charges Act, 1867, and the mortgage debt on the Enborne Lodge Estate must be borne rateably by the mixed residuary fund.

Solicitors, *Valpy, Peckham, & Chaplin*; *Dimond & Son.*

K. B. Div.
(Lord Alverstone, L.C.J., and Lawrance and Ridley, JJ.) Dec. 12.

REX *v.* SOMERS AND OTHERS. (*a.*)

Highways—Rights of way—Declaration of road to be a public highway—Consent of "occupier"—Construction—Certiorari—*Highways Act*, 1862 (25 & 26 *Vict.* c. 61), *s.* 36.

Section 36 *of the Highways Act*, 1862, *enacts*: "*Where the inhabitants of any parish are desirous of undertaking the repair of any driftway, or private carriage or occupation road, within their parish, in return for the use thereof, the district surveyor may, at the request of the inhabitants of such parish assembled in vestry duly convened for the purpose, and with the consent in writing of the owner and occupier of every part thereof, apply to the justices in petty sessions to declare such driftway or road to be a public highway to be repaired at the expense of the parish . . .*"

Held, the owner and occupier of the road, whose consent in writing must be obtained in writing, does not include persons who have mere rights of way or easements over the road.

Rule *nisi* calling upon certain justices of the peace for the county of Somerset to show cause why a writ of *certiorari* should not issue to remove into this court all and singular the orders under the hands and seals of the said justices, and bearing date on or about the 12th day of December, 1904, whereby, in pursuance of the provisions of the statute 25 and 26 Vict. c. 61, s. 36, it was ordered and declared that the private carriage and occupation road, as therein fully described, was a public highway to be repaired at the expense of the parish of Bleadon, upon the following grounds: (1) The said order was made without jurisdiction; (2) the General Estates Co. (Limited) are occupiers jointly with the Great Western Railway Co. of the said road, and their consent in writing was not obtained, and they at no time had notice of the application to the justices at petty sessions to declare the said road a public highway to be repaired at the expense of the parish; (3) The provisions of section 36 of the Highway Act, 1862, were not complied with in that no consent in writing as required by the section was obtained from the owners and occupiers of every part of the said road.

The rule was moved on behalf of the General Estates Co. (Limited). The road in question was a portion of a driftway set out under the Bleadon Enclosure Award made under the Act 28 Geo. 3, c. 14.

The Bristol and Exeter Railway Co., whose successors in title are the Great Western Railway Co., had acquired the freehold. By a deed of covenant dated the 7th of January, 1863, the Bristol and Exeter Railway Co. granted to one Henry Davies, a predecessor in title of the General Estates Co. (Limited), his heirs and assigns, a right of way for all purposes over the road in question for ever in consideration of the sum of £50, and a covenant by him, his heirs, executors, and administrators, to keep and preserve the said road in good and substantial repair at all times for ever thereafter.

Subject to the payment of certain charges to the General Estates Co. (Limited), for traffic other than foot passengers the public have for upward of forty years used the said road, which has been regularly kept in repair by the said company. The order of the justices was made on the 12th of December, 1904, with the consent in writing of the Great Western Railway Co., but the General Estates Co. (Limited) did not receive any notice of the application to the justices, nor did the said company give their consent in writing. The justices did not show cause by counsel, but filed an affidavit, paragraph 10 of which was as follows: "It was proved to our satisfaction on the reading of the said consent (*i.e.*, the consent of the Great Western Railway Co.) that the only right which the General Estates Co. (Limited) had over the said road was a right of way which had been granted by the Bristol and Exeter Railway Co., the predecessors in title of the Great Western Railway Co., to the General Estates Co. (Limited) or their predecessors in title, and further, that there were numerous other owners and occupiers of land on the western side of the Great Western Railway Co.'s main line from Bristol to Exeter who from time immemorial had had and exercised rights of way and passage for agricultural purposes over the said private carriage or occupation road, and we were of opinion that parties having a mere right of passage over the said roadway are not occupiers or owners of any part of the said road within the meaning of the said Act."

The case is only reported on the question of the meaning of the word "occupier" within section 36.

Macmorran, K.C. (*Bonsey* with him), for the Axbridge Rural District Council.—The words owner and occupier refer to the owners of the servient tenement, not of the dominant tenement. It is the owners of the land over which the road passes whose consent is necessary, because they are giving up their private use of the road to the public, the compensation being that the road is to be henceforth repaired at the expense of the public. Persons with mere rights of way over the road do not require to be protected; they can use the road after it becomes a public highway and suffer no loss.

Russell, K.C. (*Mackenzie* with him).—The word "occupier" has reference to those who have rights over the land, not to persons who grant the rights. The persons with rights over the land are an ascertainable number, whether great or small, and the fact that in this case there are a large number of persons with various rights is only a difficulty in the way of obtaining the requisite consent. The word occupier occurs in section 68 of the Railway Clauses Act, 1845, and was construed to mean, in favour of my present argument, a person lawfully upon the highway: *Manchester, Sheffield, and Lincolnshire Railway Co.* v. *Wallis*, 14 C. B. 213, at pp. 223, 224. This case has been approved constantly: see *Charman* v. *South-Eastern Railway Co.*, 37 W. R. 8, 21 Q. B. D. 524, at p. 527, Lord

(*a.*) Reported by MAURICE N. DRUCQUER, Esq., Barrister-at-Law.

Esher, M.R.: "The decision in *Manchester, Sheffield, and Lincolnshire Railway Co.* v. *Wallis* was, I think, a strong decision, but it was the decision of a very strong court. It amounts to this, that if a man is driving his cattle along a road which runs alongside a railway, or even allowing them to be upon it, he is entitled to protection under section 68 as an 'occupier' of land adjoining the railway."

They referred also to *Selby* v. *Crystal Palace District Gas Co.*, 10 W. R. 636, 31 L. J. Ch. 595.

Lord ALVERSTONE, L.C.J.—This case raises a difficult point. It must be decided upon general principles of law. I do not think the mere reading of the section enables one to say definitely which side is right. The view I take is that the rule must be discharged. But I can quite understand that persons could come to a different conclusion if they did not follow the force of the views which I am about to express as to the construction of the section. [His lordship read the section set out above.] It is contended that the consent of people who have special rights in respect of any "drift way or any private carriage or occupation road" must be obtained even though the rights be those of a licensee or owner of an easement, not an occupier or owner of the road in the legal sense of ownership of the land over which the road passes. My view of the section is that it deals with certain limited rights over property which is, under nearly all circumstances, in the occupation of somebody else than the owner. It deals with a "drift way," which is, I think I am correct, a right of driving cattle; with a "private carriage road" which is obviously through private property, with an "occupation road," a road through fields which persons have the right of using, the fields still remaining in the occupation of the persons who farm the land. It is contemplated that the road is going to become a public highway, and, in exchange for the use of the road by the inhabitants they are going to bear the expense of the repair and maintenance of the road. It seems to me that persons only entitled to rights of using the road ought to have nothing to say in the matter. There could be no right of compensation in such a case, as suggested by counsel. They still have the right of way, but now in common with others, and they could not be compensated for refraining from adopting a dog-in-the-manger attitude, although, of course, if a man says, "I have a short cut to the railway station, and rival traders have to go round a longer way," I can understand it being urged he would be placed in a worse position than he was before. I do not think the section is dealing with persons who had a mere right of way. I think the section is dealing only with servient owners, who, in consideration of permitting all the inhabitants of the parish to use the road, instead of as formerly some few persons, are to be relieved of the burden, if any, of maintaining the road. These rights of way over these roads are not the rights of the "owner or occupier" within the meaning of that section. The people to be protected, and whose consent therefore is necessary, seem to be the owners of the property, not the persons with mere rights of way. With regard to the *Chalmers case* and *Manchester, Sheffield, and Lincolnshire Railway case*, cited by Mr. Russell, they are cases referring to an entirely different branch of law. Whatever may be the liabilities of railways to protect cattle from straying on to their lines, it can afford no help to us to discover who are the occupiers contemplated by section 36. I quite agree that for many purposes the word "occupier" may be used for people using the road, as in the illustration I referred to in the course of the argument—namely, a driver of a carriage, as the carriage passes along the road. But to say that the expression is used in other branches of the law does not render assistance. I come to the conclusion that in this case there was the consent of all persons who properly came within the term "occupier" of the road. The rule must be dismissed.

LAWRANCE and RIDLEY, JJ., concurred.

Rule dismissed.

Solicitors for the Axbridge Rural District Council, *Mead & Co.*, for *F. Wood*, Wrington.

Solicitor for the appellant, *G. M. Percy.*

K. B. Div. (Walton, J.) — Dec. 8.

LONDON COUNTY COUNCIL *v.* COOK. (*a.*)

Inland Revenue—Inhabited house duty—Separate dwellings—Revenue Act, 1903 (3 *Ed.* 7, *c.* 46), *s.* 11, *sub-section* 1 (a).

A house was divided into separate sleeping "cubicles" to accomodate 343 working men, each man having a separate cubicle, arranged on three landings round a central hall, with reading and dining-rooms, &c., on the ground floor which were used in common by the inmates.

Held, that these cubicles were sleeping places, and could not properly be said to be places in which anybody dwelt, and were in consequence not separate dwellings within the meaning of section 11 *of the Revenue Act*, 1903.

Case stated by Commissioners of Income Tax upon an appeal against two assessments to inhabited house duty, of which the following sections of the statutes and facts are material:

By section 11 of the Inland Revenue Act, 1903, it is enacted (so far as it has a bearing on this case) that "(1) Where a house, so far as it is used as a separate dwelling-place, is used for the sole purpose of providing separate dwellings (*a*) the value of any dwelling in the house which is of an annual value below £20 shall be excluded from the annual value of the house for the purpose of inhabited house duty; (2) the provisions of this section, as respects dwellings of an annual value not exceeding forty pounds shall not take effect with regard to any such dwelling unless such a certificate as to accommodation and sanitary condition is produced . . . as is mentioned in section 26, sub section 2, of the Customs and Inland Revenue Act, 1890."

Section 26, sub-section 2, of the Customs and Inland Revenue Act, 1890 (which was repealed by section 17 of the above-mentioned Act), provided: "The assessment to inhabited house duty of any house originally built or adapted by additions or alterations, and used for the sole purpose of providing separate dwellings for persons at rents not exceeding for each dwelling the rate of seven shillings and sixpence a week and occupied only by persons paying such rents, shall be discharged by the said commissioners, provided that a certificate of the medical officer of health . . . shall be produced to them to the effect that the house is so constructed as to afford suitable accommodation for each of the families or persons inhabiting it, and that due provision is made for their sanitary requirements."

By section 4, sub-section 1, of the Customs and Revenue Act, 1891, the words "where the annual value of each dwelling shall not amount to twenty pounds" are substituted for the words "for persons

(*a.*) Reported by MAURICE N. DRUCQUER, Esq., Barrister-at-Law.

at rents not exceeding for each dwelling the rate of seven shillings and sixpence a week and occupied only by persons paying such rents" in the above-recited section.

The premises forming the subject of appeal were buildings erected by the appellants under the powers conferred by Part III. of the Housing of the Working Classes Act, 1890, for the purpose of providing accommodation for men of the working classes. They contained accommodation for 343 men, and consisted of separate dwelling-rooms or cubicles arranged on three landings round a central hall or covered yard, reading and dining-rooms, scullery, lavatories, baths and washhouse, catering department, office and quarters for superintendent and staff. The walls of the sleeping-rooms or cubicles extended up to the ceiling, except upon the side nearest the landing, on which side there was an opening about eighteen inches high between the wall and the ceiling for light and ventilation. The door of every sleeping-room or cubicle was fitted with a bolt in the inside, and each sleeping-room or cubicle provided separate and private sleeping accommodation for one man, not more than one man being allowed to occupy each. The occupant was allowed to use the other apartments and offices, except the quarters for superintendent and staff. A charge of 6d. a night was made for each sleeping-room or cubicle and for use of the other departments and offices, but many of the occupants had occupied the same sleeping-room or cubicle for years continuously. The sleeping-rooms or cubicles were furnished, were cleaned, and the beds therein made by the staff, and the halls (of which there were three) were used in common by the occupants of the sleeping-rooms or cubicles by way of access thereto. The other rooms used in common were on the ground floor, and communicated internally with the entrance-hall. A separate locker for the use of each occupant was provided in a common room on the ground floor. The dining-room was used in common by the occupants for taking their meals, which might be obtained at a shop on the premises or otherwise, and in the lodgers' kitchen, which was used by the occupants for the preparation of their food and for washing up, was a hot plate, on which they were at liberty to cook their own food. Crockery, spoons, knives and forks were provided by the appellants for the use of such occupants as did not provide their own. The lavatories were used by the occupants in common for their personal ablutions. The bath rooms, which were separated and enclosed, were used separately by any occupant on payment of one penny. The washhouse was used in common by the occupants for cleansing their clothes.

There was a catering department, consisting of a kitchen and scullery (other than the lodgers' kitchen and scullery), in which food was prepared and cooked, a larder and storeroom, in which it was stored, and a shop; but the occupants of the sleeping-rooms or cubicles were not allowed access to this department, except to the shop window, which opened into the dining-room. Cooked and uncooked food was sold at the shop to the occupants between 6 a.m. and 10 p.m., the catering arrangements being in the hands of the superintendent of the house.

The greater number of the occupants of the sleeping-rooms or cubicles paid their rent each night, but many paid it weekly, and a large number had occupied sleeping-rooms or cubicles for periods varying from thirteen years to three months.

The rules provided (*inter alia*) that single night tickets might be obtained and also periodical tickets for a period not exceeding seven nights; that lodgers should be admitted to the dormitories at intervals of a quarter of an hour from 7 p.m; that cubicles must be vacated before 8.30 a.m. on week days and 9 a.m. on Sundays. Smoking or the use of lights in the cubicles or dormitories was strictly prohibited. A certificate as to the accommodation and sanitary condition of the buildings had been given by the medical officer of health.

The commissioners held that the premises were not a house used for the sole purpose of providing separate dwellings, and confirmed the assessment.

Macmorran, K.C. (*Ryde* with him), for the appellants.—It is submitted that the principle laid down in the case of *Seaman* v. *Lee*, 68 L. J. Q. B. 593, 47 W. R. Dig. 77, governs this case; there the separate dwellings were not structurally completely severed from each other, and certain parts of the house were used in common.

Sir E. H. Carson, S.G. (*Rowlatt* with him), for the respondents.—That case was quite different on the facts; there the tenant had complete control of his own dwelling. Here the cubicles are not separate dwellings at all, and more like the rooms of a hotel.

WALTON, J.—I think this is a reasonably clear case. It may be that houses of this character ought to have the benefit of some exemption either total or partial. I have only to determine whether this particular house is exempt under the existing legislation. In order to bring the case within the statute it seems to me that it is plainly necessary to make out that the cubicles in question are dwellings, *i.e.*, separate dwellings; if they are not, the case does not fall within it. [His lordship here stated the facts substantially as set out in the case.] It seems plain to me that what is provided on the three upper floors of the house is sleeping accommodation only, while on the ground floor there is accommodation of a different kind, that is to say, reading and dining-rooms, sculleries, lavatories, baths, washhouse, catering department, and servants' quarters. In my opinion the cubicles are merely sleeping places and cannot be properly styled separate dwellings. It has been contended for the appellants that a house is not an inhabited dwelling-house unless somebody sleeps in it, or at any rate that sleeping accommodation is the test to apply, in the sense that there must be accommodation for sleeping, whether anyone actually slept there or not; that a dwelling-house is not a dwelling-house within the meaning of the Act of Parliament unless there is sleeping accommodation provided. But it does not necessarily follow that that which is a bedroom and nothing but a bedroom is a dwelling. As I am of opinion that these cubicles were sleeping places, and could not be properly said to be places in which anybody dwelt, it follows that they were not separate dwellings within the meaning of the section and that this appeal must be dismissed.

Appeal dismissed.

Solicitor for applicant, *Seager Berry.*

Solicitor for respondent, *Solicitor of Inland Revenue.*

K. B. Div. (Walton, J.) — Dec. 8.

NICHOLLS v. MALINS. (a.)

Inland Revenue—Inhabited house duty—Office for professional purpose—48 *Geo.* 3. *c.* 55. *Schedule B, r.* 2—57 *Geo.* 3, *c* 25, *s.* 1—*House Tax Act*, 1851 (14 & 15 *Vict. c.* 36), *Schedule—Customs and Inland*

(a.) Reported by MAURICE N. DRUCQUER, Esq., Barrister-at-Law.

Revenue Act, 1878 (41 & 42 *Vict. c.* 15) *s.* 13, *sub-section* 2.

The respondent occupied premises consisting of a dwelling-house and an office; the latter he used for professional purposes, the former as a residence. Both buildings were within the same curtilage, and there was only one entrance from the street, which was common to the office and dwelling-house. The building of the office was not physically joined to the house, nor was there any covered passage between the two, though they were within the same curtilage; persons passing from one to the other had not to go outside the curtilage.

Held, that this office was not so separate and so distinct as to be a tenement within the meaning of sub-section 2 *of section* 13 *of the Customs and Inland Revenue Act*, 1878, *and that it was therefore not entitled to the exemption given by that sub-section.*

Case stated by commissioners of income-tax upon appeal against an assessment to inhabited house duty. The following are the material facts found in the case:

The premises consisted of a dwelling-house fronting the public street, with the usual domestic out-offices, yards and garden, &c., and also a building in the same curtilage, which was used by the respondent as an office only, for the purpose of his profession as a solicitor, and as holder of his public appointments, the respondent being the owner and occupier of the whole of the premises. On the south side of the dwelling-house, and under a portion of its upper storeys was a passage three feet wide, leading from the street to the yard; the yard was also on the south side of the dwelling, and at the west end of the yard was the building used as an office. The front door of the house was in the passage, and on its north side, and at the end of the passage nearest the street was an outer door, which remained open all day, but was locked about 11 p.m.; the locking of this door shut off all communication between the street and the whole of the premises, including the dwelling and the office. The outer door had to be opened in the morning by one of the domestic servants before the respondent's clerks could get to the office. There was also another door in and across the passage on the inner side of the front door to the house, which was kept open during the day, but was locked at night earlier than the outer door next the street, the key being taken into the dwelling.

Access to the whole premises was obtained by the outer door next the street, to the dwelling by the front door in the passage, and also by a back door leading out of the yard into the back part of the house, and reached by passing through the two doors in and across the passage, to the office by a door opening in to it from the yard, and also reached by passing through the same two doors in the passage. There was no internal communication whatever between the office and the dwelling, and the former could only be reached from the latter by going out of either the front door or back door and crossing the yard and entering the entrance-door of the office.

The premises used as the dwelling were old, and the office was built long afterwards by the respondent, in what was then the yard of the house, for use as an office only; the office had never been used as a dwelling, and no one slept in it. The respondent could, if he chose, let off the dwelling to a tenant, retaining the office for his own purposes, or he could let the office and retain the dwelling. When the entrance-door to the office from the yard was closed no one from the dwelling could enter it. The respondent interviewed clients and officials on business matters in the house only on occasions when the office was closed. Letters, notices, and documents relating to business and official matters were, when the office was closed, delivered at the dwelling.

The commissioners were of opinion that no liability to inhabited house duty existed in respect of the office, and restricted the assessment to the duty on £45, the annual value of the remainder of the premises.

The surveyor of taxes appealed.

Sir E. H. Carson, S.G. (*Rowlatt* with him), for the appellant.—This case falls within the provisions of rule 2 of Schedule B of the House Tax Act, 1808, and the schedule to the House Tax Act, 1851. There is only one house. Both office and residence is within the same curtilage. To come within the purview of section 13, sub-section 2, of the Customs and Inland Revenue Act, 1878, the office in question must be separately occupied.

Grant v. *Langston*, [1900] A. C. 383; *Browne* v. *Furtado*, [1903], 1 K. B. 723, 51 W. R. Dig. 66; *London and Westminster Bank* v. *Smith*, [1902] 87 L. T. 244; and *Russell* v. *Coutts*, [1881] 9 R. 261, were referred to.

The respondent did not appear.

WALTON, J.—The question which I have to decide is whether the respondent's office is to be included in the valuation of the dwelling-house; in other words, whether in point of fact the office constitutes a part of the dwelling house, which is the subject-matter of assessment.

In order to fall within the statute the property must come within the description in the schedule of the House Tax Act, 1851, "an inhabited dwelling-house, with household and other office, yards and gardens therewith occupied," and consideration must also be given to the rules for Schedule B of the House Tax Act, 1808 (which are still applicable), rule 2 of which says that "every coachhouse, stable, brewhouse, washhouse, laundry, woodhouse, bakehouse, dairy, and all other offices, and all yards, courts, and curtilages, and gardens, and pleasure-grounds, belonging to and occupied with any dwelling-house, shall, in charging the said duties, be be valued together with such dwelling-house."

In the present case the office was within the same curtilage as the dwelling-house. I need not describe the premises in detail. There was only one entrance from the street, and it was common to the office and dwelling-house. The office and the dwelling-house were used together for the purpose of residence, and also for professional purposes; the house was at times used partly as an office, and the office was no doubt used exclusively for professional purposes. In a sense there was no structural communication between the house and the office; that is, the building of the office was not physically joined to the house, nor was there any covered passage between the two, though they were within the same curtilage. Persons going to either had to pass through the same external door, and to pass from one to the other had not to go outside the curtilage. I have come to the conclusion that unless the office falls within some exemption it must be included in the valuation of the dwelling-house.

That being so, the only exemption under which it is suggested that is it capable of being brought is that created by section 14, sub-section 2 of the Customs and Inland Revenue Act, 1878, which provides that "every house or tenement which is occupied solely for the purposes of any trade or business, or of any profession or calling by which the occupier seeks a livelihood or profit, shall be exempted from the duties by the said commissioners upon proof of the facts to their

satisfaction." In that sub-section "tenement" included part of a house. There is no doubt that the office was occupied solely for the purpose of a profession; the question therefore arises whether it was a "tenement" which was occupied solely for that purpose. The question of what kind of a tenement or what kind of a part of a house comes within sub-section 2 has been considered in several cases, and amongst others in a Scotch case of *Russell* v. *Coutts*, and the view expressed by the Lord President on this point has been adopted by the House of Lords; it was in these words: "The meaning of the word 'tenement' in this statute is a part of a house so divided and separated as to be capable of being a distinct property or a distinct subject of lease." In the same case Lord Shand said: "I think the line must simply be drawn by looking at the particular premises, and ascertaining whether they are so structurally shut off from the rest of the building occupied as to form an entirely separate tenement of themselves." Obviously that means having regard to the existing conditions under which the premises are used and with such access as they now have to the street. I have come to the conclusion that this office is not so separate and so distinct as to be a tenement within the meaning of sub-section 2, and that it is not entitled to the exemption given by that sub-section; this appeal must therefore be allowed.

Solicitor for the appellant, *Solicitor of Inland Revenue.*

K. B. Div. (Channell, J.) } Nov. 3, 6, 23.

COMPANIA NAVIERA VASCONGADA *v.* CHURCHILL & SIM.

COMPANIA NAVIERA VASCONGADA *v.* BURTON & CO. (*a.*)

Bill of lading — Goods shipped in apparent damaged condition — Misstatement — "Shipped in good order and condition" — "Quality and measure unknown" — Estoppel — Harter Act, 1893 (*U.S.*)

A master of a vessel signed bills of lading in reference to goods shipped on his vessel as "shipped in good order and condition" and "quality and measure unknown." The charter-party provided a form of the bill of lading to be used, in which was inserted both these terms. The goods were in apparent damaged condition when shipped, and were delivered in a damaged condition. The indorsees of the bills of lading, to whom the property passed, acting on the statement in the bills of lading, acted to their prejudice by taking the bills of lading as a good delivery under their contract with the shippers. The indorsees, in an arbitration with the shippers — a foreign firm, who were not insolvent — obtained an award, but had not sued upon it. Owing to the damaged condition of the goods, expense and delay were incurred in allotting the parcels to the indorsees.

Held, that the master by so signing the bills of lading bound his owners; that it was the duty of the master to notice the apparent condition of the goods; that "condition" referred to external and apparent condition; and "quality" referred to that which was not usually apparent, at all events to an unskilled person; that the words "quality and measure unknown" did not strike out the words "good order and condition"; that the master was not bound by the charter-party to make an untrue statement; that the words "shipped in good order and condition" could not be sued on directly as a breach of contract, they were words not of promise but in the nature of an affirmation of fact; that the owners were estopped from denying the condition of the goods as stated; and that the indorsees were not bound to sue upon their award against the shippers before suing the owners of the ship.

Actions tried in the Commercial Court.

The plaintiffs' claims were for amounts due for freight and dock dues.

The plaintiffs were the owners of the vessel *Virgen de Lourdes;* the defendants were indorsees of bills of lading in reference to certain timber carried on board the said vessel.

By a contract dated the 26th of November, 1904, Messrs. Reeves, Powell, & Co. (Limited), agreed to sell to Messrs. Churchill & Sim certain timber for shipment January and February, 1905. ". . . sellers guarantee that the wood shall be shipped fresh and merchantable and equal to the average of the season's shipments from Port Arthur, Texas, where the shipment is to be made. Payment of amount of invoice (after deducting . . .) to be by cash less 2 per cent. discount on presenting the invoice, bill of lading, and policy of insurance. . . ."

By a charter-party dated New Orleans, the 9th of November, 1904, it was agreed between the owners of *The Virgen de Lourdes* and Reeves, Powell, & Co. (Limited) that the vessel should take a cargo of sawn pitch pine to Holland, completing at one port on the east or west coast of the United Kingdom. By clause 6 it was provided that: "The bills of lading shall be prepared by the shippers of the cargo in the form indorsed on this charter, and shall be signed by the master, quality and measure unknown, freight and all conditions, clauses, and exceptions as per this charter." Clause 19 provided that: "The master shall sign for the number of pieces shipped, and the owner shall be responsible for the number of pieces so signed for by the master or his duly authorized agent, fraud, clerical, and other obvious errors excepted. . . ."

Indorsed on the charter-party was a printed form of a bill of lading which contained the following clauses: "Shipped in good order and condition"; "to be delivered in like good order and condition"; "quality and measure unknown."

The timber prior to and at the time of shipment was in apparent damaged condition, being saturated with petroleum.

The defendants were indorsees of two bills which were as follows: "Shipped in good order and condition by Reeves, Powell, & Co. (Limited) in and upon the . . . steamship . . . *Virgin de Lourdes* . . . now lying in Port Arthur, and bound for London, England, *viâ* other loading ports, as per charter dated New Orleans, La., Nov. 9, 1904 . . . pieces of sawn pitch pine timber . . . (branded R. P., marked Y. with red paint) . . . and to be delivered in like good order and condition at the aforesaid Port of London, Eng. . . unto order of shippers or their assigns, he or they paying freight for the same as per charter-party dated Nov. 9, 1904, all the terms and exceptions contained in which charter are herewith incorporated and form part hereof. . . . This bill of lading is subject to all the terms and provisions of and to the exemptions from liability contained in the Act of Congress of the United States . . . approved 13th day of February, 1893 . . . dated in Port Arthur, Texas, January 12th, 1905. Quality and measure unknown."

The Act of Congress of the United States (13th February, 1893) is known as the Harter Act. The Harter Act, 1893, section 4, provides: "That it shall be the duty of the owner or owners, masters, or agent of any vessel transporting merchandize or property

(*a.*) Reported by W. T. TURTON, Esq., Barrister-at-Law.

from or between ports of the United States and foreign ports to issue to shippers of any lawful merchandize a bill of lading, or shipping document, stating, among other things, the marks necessary for identification, number of packages, or quantity, stating whether it be carrier's or shipper's weight, and apparent order and condition of such merchandize or property delivered to and received by the owner, master, or agent of the vessel for transportation, and such document shall be *primâ facie* evidence of the receipt of the merchandize therein described."

The property in the bills of lading passed respectively to the defendants.

On arrival the timber was found to be stained and saturated with petroleum. Its marks were indistinguishable.

The defendants, acting on the statement in the bills of lading that the timber was shipped in "good order and condition," accepted the bills of lading and took delivery, and paid the vendors the contract price. Owing to the obliteration of the marks and the condition of the timber delay and expense was caused in allotting the parcels, and warehouse rent was incurred. The timber not being in accordance with the contract the defendants and the shippers went to arbitration and an award was made in favour of the defendants. That award was not proceeded with, though the shippers, a foreign firm, were not insolvent.

The defendants counterclaimed for the depreciation in the value of the goods; for the cost of sorting; for the warehouse rent, and for interest on the money paid to the vendors during the time the timber was lying unsorted and unsaleable.

The defendants admitted the claim for freight.

J. A. Hamilton, K.C., and *Chaytor*, for the defendants.—By virtue of the Bills of Lading Act the defendants could sue. They were entitled to damages because the contract in the bills of lading was to deliver the timber in good order and condition (excepting perils of the sea) and of that contract there had been a breach: *Leduc* v. *Ward*, 36 W. R. 537, 20 Q. B. D. 475. Having signed the bills of lading "shipped in good order and condition" the shipowner, by the master, is estopped from denying that condition. Persons who received such bills of lading were intended to act upon such a statement. In fact the defendants did so act, and acted to their prejudice, for they accepted the bills as a good delivery and paid the contract price to the vendors: *Grant* v. *Norway* 10 C. B. 665, 20 L. J. C. P. 93; *Howard* v. *Tucker*, 1 B. & Ad. 712; *Grafton Sear* v. *Wingate*, 85 Mass. Rep. 103, 3rd Allen; *Cox* v. *Bruce*, 35 W. R. 207, 18 Q. B. D. 147. There was an obligation on the master to state the apparent order and condition of the goods shipped, by virtue of the Harter Act, s. 4, which was incorporated into the bills of lading. Though the damaged condition was apparent, the master signed for the goods as in "good order and condition." The incorporation of that Act created a contractual duty on the owners to state correctly the apparent condition to the defendants. There was an incorrect statement and damage followed. There is no necessity for the defendants to get the award satisfied before suing the plaintiffs; the defendants have not been paid their loss.

Scrutton, K.C., and *Dawson Miller*, for the plaintiffs.—The plaintiffs delivered the timber in the same state as it was shipped. The words "good order and condition" were struck out by the words "quality and measure unknown": *Properino Palasso*, 2 Asp. M. C. 158; *The Ida*, 2 Asp. M. C. 551. The master considered that the oil did not cause damage—that was an honest mistake throwing no liability on the shipowner: *Craig & Rose* v. *Delargy*, 6 Ret. 4 Sess. Cas. 1269; *Cox* v. *Bruce*. Even if the statement as to the timber being in good order and condition was untrue, the shipper could not sue on the bill of lading as he caused the damage himself. As the indorsee had only the rights that the shipper had, the indorsee could not sue: *Cox* v. *Bruce*; *Craig & Rose* v. *Delargy*. There is no estoppel. There was no duty between the shipowner and indorsee other than contractual rights by indorsement. For estoppel there must be duty. Some documents, for instance a Lloyd's certificate, sometimes contain incorrect statements which are intended to be acted upon and are acted upon, yet do not amount to estoppels: *Thisdon* v. *Tindall*, 40 W. R. 141, 7 Asp. M. C. 76; *Braginton* v. *Chapman*, 7 Asp. M. C. 76 (note); *Le Lievre* v. *Gould*, 41 W. R. 468, [1893] 1 Q. B. 491. Section 4 of the Harter Act imposes a duty to state the apparent condition, but the words *primâ facie* evidence show that the statement can be contradicted. The defendants, having an award against a solvent firm, have suffered no damage. That award should be proceeded with before suing the plaintiffs. The defendants have no cause of action.

Cur. adv. vult.

Nov. 23.—CHANNELL, J.—The actions were brought to recover the freight on three parcels of timber carried under three bills of lading, the defendants Churchill & Sim being the indorsees of two bills of lading, and the defendants John Burton & Co. of the third. The facts as to all three parcels were the same. The actions were consolidated, and the freight being admitted subject to counterclaims, the only question in dispute arose on the counterclaims. The bills of lading stated in the common form that the timber was "shipped in good order and condition." It is alleged that it had been damaged prior to the shipment, and the question principally argued was as to what remedy, if any, the indorsee of the bill of lading had against the shipowner under such circumstances. It is surprising to find that a question so likely to arise has not been settled long ago, but it seems not to have been, and I therefore took time to consider the authorities. There are other questions in the case which it will be convenient to deal with first, as if they are decided in favour of the plaintiffs the main question does not arise. The timber on its arrival was found to be badly stained and saturated with petroleum, and there is no doubt that it became so stained whilst it was being brought alongside for shipment or when alongside ready for shipment, but before it was taken on board. The plaintiffs contended that, notwithstanding the staining, the timber could properly be described as shipped in good order and condition, because they said the petroleum would not necessarily damage it, and for some purposes, such as that of its being used for piles, it was as good as if not so stained and saturated. It was, however, clear on the evidence that the selling value of the timber was seriously depreciated, and it had not been intended for piles. In my opinion, not only was there damage in fact, but it was damage of such a character that it must have been apparent to any one. It was in fact noticed at the time of shipment. The mate made note of it in his log and says that he drew the captain's attention to it. The captain, whose evidence was taken some time after the mate had given his account and after it was admitted by every one that the damage could not have been done on board, denies the mate's statement and endeavours to make out that he formed the opinion at the time that there was no damage. In the face of the other evidence I cannot accept the

captain's account. In my opinion it was a misstatement to say that the timber was shipped in good order and condition, and, if necessary, I should be prepared to find that it was a negligent misstatement. It is next said that this statement was qualified or neutralized by the words coming lower down: "Quality and measure unknown." For this Mr. Scrutton quoted *The Ida*, 32 L. T. Rep. 541, and *Craig* v. *Delargy*, 16 Sc. L. R. 751, where somewhat similar words were held to qualify what would otherwise have been an admission. It seems to me that while in reference to some things and to some defects in them "condition" and "quality" may mean the same thing, yet that they do not either necessarily or even usually do so. I think that "condition" refers to external and apparent condition, and "quality" to something which is usually not apparent, at all events to an unskilled person. I think a captain is expected to notice the apparent condition of the goods, though not the quality. He may qualify or (except perhaps when the Harter Act applies) erase the words "good order and condition"; but if he leaves them in he does not, in my opinion, get rid of the admission as to condition (meaning thereby apparent condition) by saying that the quality is unknown It is probably unnecessary for him to protect himself as regards quality, which it is not his business to know anything about, except perhaps when the description of the goods set out in the bill of lading contains words importing a statement as to the quality. Next it was said that in this case the charter-party obliged the captain to sign bills of lading in the form indorsed, and that this form contained the words "good order and condition," and that, the terms of the charter-party being incorporated in the bill of lading, the indorsee of the bill of lading ought to have known that the captain was only signing that which he was bound by the charter-party to sign. I do not, however, think that the captain was bound by the charter-party to sign an untrue statement in the bill of lading. He was, in my opinion, at liberty to qualify the words according to the truth, without departing from the form. Moreover, the Harter Act was also incorporated, and by that he is bound to state in the bill of lading the apparent order and condition. The next question is whether the captain in making that statement as to good order and condition was acting within the scope of his authority so as to bind his owners, or whether his making an untrue statement on this point can be said to be outside his authority, as the signing of a bill of lading for things not on board has been held to be. On this I think that, even when the Harter Act does not apply, the statement is within his authority, and, whatever its effect may be, it binds the owner and not merely the master personally.

In *Cox* v. *Bruce*, 35 W. R. 207, 18 Q. B. D. 147, 56 L. J. Q. B. 121, one of the cases in which *Grant* v. *Norway*, 10 C. B. 665, was acted on, Lord Esher, M.R., says that the case itself shows that the captain had "authority to bind his owners with regard to the weight, condition, and value of the goods under certain circumstances," and he appears to draw the same distinction which I have drawn between quality and condition. Further, when the Harter Act applies, as it seems to do here from the manner in which the bill of lading is made subject to its terms and provisions, the liability of the owner appears to be concluded by the fourth section. As my view on all these preliminary points is in favour of the defendants, it becomes necessary to consider what remedy the defendants have against the shipowner arising from the misstatement as to the apparent condition of the goods at the time of shipment. The defendants put their case alternatively either as a claim on the contract contained in the bill of lading, or by way of estoppel. First, as to the suggested breach of contract. No doubt by the Bills of Lading Act the indorsee to whom the property has passed becomes a party to the contract made originally between the shipper and shipowner and evidenced by the bill of lading. But, as has been pointed out in more than one case, the contract must be construed in the same way between the original parties and the substituted parties; and it is necessary to see exactly what the original contract is. It seems to me that the contract is to deliver the goods in the same condition as that in which they are shipped, coupled with an acknowledgment that the condition at the time of shipment was good. The words "shipped in good order and condition" are not words of contract in the sense of a promise or undertaking. The words are an affirmation of fact, or perhaps rather in the nature of an assent by the captain to an affirmation of fact which the shipper may be supposed to make as to his own goods. So far, therefore, as the words of the bill of lading, apart from the incorporation of the Harter Act, are concerned, I see no contract that the condition of the goods is correctly described. Section 4 of the Harter Act makes it the duty of the captain to insert in the bill of lading a statement as to the condition of the goods, and I agree that this means that he is to make a true statement; but I have a difficulty in seeing that the clause that the bill of lading is to be "subject to all the terms and provisions and to the exemptions from liability contained in" the Harter Act imports a contract that the statement as to the condition of the goods is true. I think, therefore, though not without some doubt so far as the effect of the incorporation of the Harter Act is concerned, that the cause of action must be based on estoppel, and not on breach of contract. It seems to me, however, that the case does come within the recognized rules as to estoppel. The statement, as I have pointed out, is one of fact. If not exactly intended to be acted on, it must be known that it would probably be acted on. Bills of lading are transferable, and the object of the shipper in asking for the insertion of the statement that the goods are in good condition at the time of shipment is clearly rather to have evidence to offer to his transferee than for his own direct benefit. The advantage of what is known as a clean bill of lading is obvious, and I think it would be idle for a master of a ship to say that he did not contemplate a purchaser of the goods acting on the statement that the goods were shipped in good condition. In England there appears no direct authority, but I think there are passages in several judgments in accordance with my view and none to the contrary. In America this question has been considered in *Sear* v. *Wingate*, 85 Mass. 103, 3 Allen where there is what seems a well-reasoned judgment as to the estoppel between the indorsee of a bill of lading on the one hand and the master and the shipowner on the other, and the rule is laid that there is such an estoppel between the indorsee and the master as to statements in the bill of lading so far as they relate to matters which are, or ought to be, in the master's knowledge, and that the owners are estopped in the same way by such statements if they are within the scope of the master's authority. Passages to the above effect from that judgment are quoted with approval in Parsons on Shipping and in the Scotch case *Craig* v. *Delargy* (16 Sc. L. R.). Lord Shand quotes the passage from Parsons, and says: "That passage from a writer of eminence on this subject undoubtedly gives weight to the argument of the pursuers in this matter (that is, the argument that there was an estoppel), but I find that, with the

exception of a case which is referred to in support of the concluding words of the passage, all the authorities referred to are American." He goes on to say: "I do not think it is necessary here to decide the general question as to the effect of a representation in the bill of lading, though if it did arise, I must say that the American law seems to me to be rested on reasonable grounds." There is, therefore, the authority of Lord Shand's opinion on the question I am deciding. As the estoppel arises on a direct statement of fact which is incorrect, I do not consider that the question of negligence really arises, but, as I have already said, I should be prepared, if necessary, on the facts of this case to find the statement to be negligent, provided, of course, that there is a duty towards the indorsee to take care.

As to this duty, although in my view the incorrect statement cannot be sued on directly as a breach of contract, yet I think the transfer of the contract to the indorsee does create a privity between the indorsee and shipowner, and this gets rid of the doctrine of *Le Lievre* v. *Gould*, 41 W. R. 468, [1893] 1 Q. B. 491, and the other cases in which it has been held that the duty arising solely out of contract is only a duty towards parties to the contract. It was suggested that the words at the end of section 4 of the Harter Act prevent any estoppel, by saying that the statement is to *primâ facie* evidence. I think not, because it is not said that it is only to be *primâ facie* evidence, and it is consistent with the words of the section that, upon something further happening—viz., the acting upon it—it may become conclusive, and also because what is said in the section is that the statement is to be *primâ facie* evidence "of the receipt of the merchandize therein described." The object of these words, or, at all events, one object of them, appears to be to preserve the doctrine of *Grant* v. *Norway*, and Mr. Newton Crane, who was called before me as an expert in American law to prove the Harter Act, said that *Grant* v. *Norway* is still recognized as law in America since the Harter Act. In order to make the statement in the bill of lading binding as an estoppel, it is, of course, necessary that it should have been acted on to the prejudice of the person so acting. The defendants here allege that they are prejudiced because, on the faith of the statement that the timber was in good condition when shipped, they accepted the bills of lading as a good tender under a contract for clean timber, and paid their vendors the full contract price; and they further say that, although they have got an award of the umpire on an arbitration under the contract between them and their vendors for £572 12s. as the difference between the value of the damaged timber delivered and that which they ought to have had, yet that this sum has not been paid them.

The vendors have not become insolvent, but they are a foreign firm, and the defendants have not as yet thought fit to sue them on the award. It was suggested on the part of the plaintiffs that the defendants were really making this counterclaim in the interest of the shippers and by arrangement with them; but this is denied, and I cannot hold it to be proved. It is, however, pretty clear that the defendants have not been as active in pressing their claim against the shippers as they probably would have been if they had not got this claim against the shipowner, and they probably have been influenced by the fact that the recovery from the shippers of the amount of the award would embarrass them in recovering, even if it did not, on the correspondence which has taken place, preclude them from recovering, the warehouse rent and the expenses included in their claim in the present action but not included in the award. When money has been paid away to a person who becomes insolvent, as has generally happened in the reported cases as to estoppel, there is, of course, no difficulty as to the person claiming the estoppel proving that his position has been altered. Where, however, there is no insolvency and there is a legal right to get the money back, the damage by the payment is not so clear. In *Carr* v. *The London and North-Western Railway Co*, 23 W. R. 747, L. R. 10 C. P. 307, 44 L. J. C. P. 109, a leading case on estoppel, Lord Esher says: "Neither the payment of the warehouse rent nor of the invoice price can be relied upon as damage resulting from the conduct relied upon to support an estoppel to deny the possession of the goods, because either damage can be rectified without the intervention of such an estoppel; there is no consideration for either payment; both were made under a mistake of facts." I am not sure that I understand the exact meaning of the words "without the intervention of such an estoppel," but the passage appears to mean that in the opinion of that learned judge a payment which can be recovered back because it was made under a mistake is not such an alteration of the position of the person making it as would establish an estoppel. If that were so there would, I think, be few estoppels, practically none except where insolvency had intervened, for where there is a misstatement of a fact such as would possibly create an estoppel, the acting on it must always be under a mistake of fact. I think, however, that the learned judge must be considered to have been referring to the facts of the case before him, where apparently there would not have been the slightest difficulty in getting the money back, and that it cannot be truly said as a general proposition that a person cannot be prejudiced by having made a payment which he has a legal right to get back from the person to whom he paid it, unless it is shown that such person is insolvent. It appears to me that the parting with the money, and consequently the being without it for a certain period of time, coupled with the trouble and possible expense of establishing the legal right to get it back, may amount to an acting to the payer's prejudice sufficiently to establish an estoppel against the person in reliance upon whose statement he has made the payment. If, however, the pecuniary amount of the prejudice has to be ascertained for the purpose of assessing the damage, there is an obvious difficulty. In the present case I am prepared to hold that the defendant did act to their prejudice on the statement so as to create an estoppel, but, if the damage recoverable by the defendants against the plaintiffs is the damage they have sustained by paying the shippers, I should have the greatest difficulty on the evidence before me in assessing the amount. The doctrine of estoppel, however, is that the person estopped is precluded from denying in the same transaction as that in which the estoppel arises the truth of the statement acted on. I think, therefore, I have to say that the plaintiffs, not being able to deny that the goods were in good condition at the time of shipment, must pay the damage which was on delivery found to be done to the goods. This is the part of the case on which I have entertained most doubt. It hardly seems just that the plaintiffs should pay this damage when the defendants have a right to get it, and may even now get it, from the shippers, who are the persons who really ought to pay it, as the goods were at their risk when the damage was done. I do not, however, find any authority for the proposition that, when a person is estopped from denying a statement of fact by reason of another having suffered damage by acting on his statement, the only damage recoverable is the damage so arising; and, on the contrary, I do find that a decision apparently to that effect by Cave, J., was reversed in the Court of Appeal

in *Henderson* v. *Williams*, 43 W. R. 274, [1895] 1 Q. B. 521; see particularly the judgment of A. L. Smith, L.J., which appears to overrule the judgment of Denman, J., in *Carr* v. *London and North-Western Railway Co.* Assuming the doctrine of estoppel to apply, I see no logical answer to the defendants' contention that they can recover the damage to the goods, though I think it would be more satisfactory if the damages could in such a case be confined to those actually caused by acting on the erroneous statement. The assessment of the amount at £572 12s. is, of course, not binding as such between the plaintiffs and defendants, but the umpire was called as a witness before me, and I accept his assessment as correct and give the defendants the £572 12s. It may be that the plaintiffs, if they pay this sum, may be able to bring themselves within the doctrine that when two persons are each liable to a third in respect of the same matter, and the one on whom, as between the two, the burden ought not to rest has to pay, he may recover it against the other: see *Moule* v. *Garrett*, L. R. 5 Ex. 132, and in the Exchequer Chamber, 20 W. R. 416, L. R. 7 Ex. 101, and cases there quoted. I see, however, considerable difficulty about this, and no such question is before me. I refer to it only as a possible way in which an apparent injustice may be obviated. It remains to deal with the other heads of damage claimed in the counterclaims. The expenses of the award were not paid by the defendants, and therefore, of course, are not recoverable, and it was said they were ony claimed by inadvertence. The next claim, £8 8s., is a small one, but was the subject of considerable argument. The marks on the timber, though stated in the bills of lading (of course, from the information of the shipper), had in fact been obliterated by the petroleum. The captain in his evidence states that in consequence of this the lots of timber to which the separate bills of lading related were distinguished in the ship when loaded by ropes dividing them. They were, however, not delivered as separate parcels, but were delivered overboard in the Surrey Docks, leaving the dock company to separate them as best they could. This, of course, it was impossible to do accurately as the marks were gone. After a considerable delay it was agreed between the consignees that someone should apportion the cargo between them, using the specification of length and the dock company's measurement books, but, of course, allotting to one party or the other logs corresponding to the description without any certainty that they were really his logs. The expense of this was £8 8s., which is accordingly claimed as damage for not delivering to each consignee the lots of timber in his bill or bills of lading. The answer of the plaintiffs to this claim is that it is always the custom in the Surrey Docks so to deliver, and that the dock company for the consignees and at their expense always does the sorting. This sorting which the dock company so does is, however, sorting out according to marks, and the practice assumes that the timber, though delivered mixed, is in a state in which it can be identified.

It may be that consignees, by adopting the practice prevailing in the Surrey Docks do assent to their goods being delivered mixed, but they do not in my opinion assent to their being so mixed that they cannot be sorted. It seems to me, therefore, quite clear that the plaintiffs never made the delivery which they ought to the bill of lading holders of the timber in their bills. They had, according to the captain's evidence, at one time the means of doing so, but they themselves mixed the timber, knowing that there were no marks by which it could be separated again. I think, therefore, that the £8 8s. is recoverable. The next item is warehouse rent from the time of the arrival of the ship to the date when the timber was altimately divided by agreement as above mentioned, from the 1st of March to the 9th of June, over three months. This delay was, in my opinion, quite unnecessary. The defendants account for it by saying that they never had a cargo in such a condition, and really did not know what to do with it. They were during this time getting their claim against the shippers dealt with by the arbitrators. Some delay was, I think, necessarily caused by the state in which the timber was delivered, and by its being mixed, but it might have been viewed, valued, and appportioned much sooner than it was. I think it would be reasonable to allow warehouse rent for one month as damage resulting from the plaintiffs' failure to deliver the separate parcels. A point was made for the plaintiffs that the sums claimed were not really paid for rent, but that an inclusive charge was made by the dock company for various services, which included six months' warehousing free. It appeared, however, I think, that indirectly the warehousing was paid, and that the cost to the consignees must be taken to be increased by the breaches of contract to the extent of one month's warehouse rent. The defendants also claim interest for the sum paid on the money they paid for the timber, on the ground that they were prevented during this time from dealing with the timber by sale or otherwise, and so got no benefit from the money they had paid. I think this is a legitimate claim, but, of course, only for a month, which I have already said was, in my opinion, a sufficient time to have cleared up the difficulties for which I hold the plaintiffs responsible. These figures appear to give Churchill & Sim about £522 on their counterclaim and Burton & Co. about £150 on theirs. But the warehouse rent and the interest for a month must be calculated exactly by the parties. The defendants will, of course, have the costs of their counterclaim, and the plaintiffs, I suppose, will be entitled to the costs of the action to the time when the freight was formally admitted, which, I suppose, was in the defence.

Solicitors for the plaintiffs, *W. Crump & Son.*

Solicitors for the defendants, *Hollams, Sons, Coward, & Hawksley.*

K. B. Div.
(Lord Alverstone, L.C.J., and Wills and Darling, JJ.) — Nov. 8.

REX *v.* LLOYD.
Ex parte DAY. (*a.*)

County court—Judge—Power to appoint more than one deputy—County Courts Act, 1888 (51 & 52 *Vict. c.* 43), *s.* 18.

A county court judge may, with the approval of the Lord Chancellor, appoint more than one deputy to act for him within his district, provided that they are appointed to act for different courts.

Rule *nisi* for a prohibition to the deputy judge of the Brompton County Court.

Judge Stoner, the judge of the Brompton and Marylebone County Courts, appointed Mr. Clement Lloyd and Mr. Fitzroy Cowper to act as his deputies at the Brompton and Marylebone Courts respectively. Both appointments were approved by the Lord Chancellor.

On the 9th of February, 1905, the case of *Tolman* v. *Day* was in the list for hearing before the deputy judge at the Brompton County Court, but the case

(*a.*) Reported by ALAN HOGG, Esq., Barrister-at-Law.

was not reached and was adjourned to the 9th of March, and on that day, on the application of the defendant, was further adjourned to the 24th of March.

On the 24th of March it was found that the case could not be reached for want of time, and the deputy judge being pressed by the defendant's counsel to fix a day on which it could be heard, adjourned it to the 30th of March, on which day he disposed of the case, which resulted in a verdict for the plaintiff for a sum of £63 19s.

The 30th of March was one of the ordinary court days of the Marylebone Court, and was not one of the ordinary court days of the Brompton Court; on that day Mr. Fitzroy Cowper was sitting as deputy judge at the Marylebone Court trying cases at the same time as Mr. Clement Lloyd was trying the above case of *Tolman* v. *Day*.

The notice of motion set forth as the grounds of the application that the deputy-judge "was not a lawful judge, was no judge, and that the proceedings were *ultrà vires*.

A rule *nisi* for a *certiorari* was also obtained.

Both rules raised the same question.

Sir E. Carson, S.G. (*H. Sutton* with him), showed cause.—The appointment of two deputies was not *ultrà vires*, for they were appointed to different courts. That is shown by section 21, which provides: "That the . . . appointment of a deputy-judge . . . shall not be vacated by the death or resignation of a judge, but the acts of the deputy done after such death or resignation shall be as valid as if the judge had not died, and he shall continue to act in all the courts to which he was appointed." That shows that a deputy may be appointed to some of the courts to the exclusion of others. If a judge may appoint a deputy to one part of his district he can lawfully appoint another deputy to act concurrently for another part of his district.

Duke, K.C., and *Hodges*, in support of the rule.—A county court judge can appoint only one deputy. He has but one office and cannot split up his office into sections and appoint a deputy in each. The power given in section 18 of the County Courts Act to appoint a deputy clearly does not contemplate the appointment of more than one deputy.

Lord ALVERSTONE, L.C.J.—In this case the county court judge of the Brompton and Marylebone County Courts, purporting to act under section 18 of the County Courts Act, 1888, appointed upon the same day, and with the approval of the Lord Chancellor, two gentlemen to act as his deputies during the same period of two months, one at the Brompton County Court and the other at the Marylebone County Court, and we are invited upon the rule to say that those appointments were *ultrà vires*, and that the judge had no power to make, nor the Lord Chancellor to approve, the appointment of more than one deputy for the same judge at the same time. It seems to me that we ought not to come to that conclusion unless we are compelled to do so, because I cannot imagine a case in which it would be less right to give effect to a technical point than one in which, as here, a defendant has appeared before the court over and over again, has asked for the indulgence of the court, has agreed to the day on which the case should be heard, and then only takes the objection to the jurisdiction after judgment has been given against him. It was contended by the defendant that the appointment of the deputy judge was bad, that the county court judge had no power to sever his office and appoint different deputies for the same office. No doubt the judge may appoint a deputy for the whole county district to which he is himself appointed; but I can find nothing in the Act to prohibit him from appointing a deputy to act for one or more of the county courts within the larger area. On the contrary, section 21, to which we were referred by the Solicitor-General, expressly recognizes that he may do so. It provides that the deputy, upon the death of the judge who appointed him, shall continue in all of the courts to which he was appointed. These latter words necessarily import that he may be lawfully appointed to act for some of the courts in the district and not for others, for if he could only be lawfully appointed for the whole county court district they would be altogether superfluous.

Then, if one deputy can be appointed to act for a single court, as distinguished from the whole county court district, there is no objection to appointing another deputy at the same time to act for another court in the district.

I am of opinion that there is nothing in the defendant's objection to the appointments of these gentlemen, that they were within the powers given by the Act of Parliament, and that these rules must be discharged.

WILLS and DARLING, JJ., concurred.

Solicitor for the appellant, *R. W. Beckwith*.

Solicitor for the deputy judge, *Solicitor to the Treasury*.

K. B. Div.
(Lord Alverstone, L.C.J., and Lawrance and Ridley, JJ.) Aug. 10, 1905.

BULLEN v. WARD. (a.)

Sunday Observance Act—Exercising calling on Sunday—Exemption of cook-shop . . . for such as cannot otherwise be provided for—Sunday Observance Act, 1677 (29 *Car.* 2, *c.* 7), *ss.* 1, 3.

The premises of a chipped potato dealer who in the course of his business cut up and cooked potatoes, sometimes alone and sometimes with fish, and sold them to the working classes,

Held, to be a cook-shop within the meaning of section 3 *of the Sunday Observance Act,* 1677, *and that he was not, therefore, liable to the penalties in section* 1 *as carrying on his ordinary calling.*

Case stated by the justices of Blackburn.

The appellant Bullen, who was a chipped potato dealer, was charged with having in the course of his business cut up and cooked or fried potatoes, sometimes alone and sometimes with fish, and that these articles had become a popular food with the working classes. The fried potatoes and fish, together or separately, was served on the appellant's premises as well as off, and were always sold warm. The customers when supplied off the premises often brought their own receptacles for the provision of food, but were sometimes supplied in paper bags belonging to the appellant.

On Sunday, the 22nd of January, 1905, the appellant was carrying on his usual business, there being customers both upon his premises eating the chipped potatoes, others who purchased articles of food and took them away in bags or basins, and some who ate food in the street near to the appellant's shop.

The appellant's premises were not licensed as a refreshment house under the Refreshment Houses Act, 1860.

(a.) Reported by ALAN HOGG, Esq., Barrister-at-Law.

It was contended for the respondent that he had unlawfully carried on and exercised his business on Sunday, contrary to the provisions of the Sunday Observance Act, 1677, and that such business was not a work of necessity or charity.

For the appellant it was contended that the business so carried on by him came within the exception in section 3 of the Act, and that his customers were such as could not be otherwise provided for within the meaning of the section. The justices being of opinion that the appellant's premises was not a cook-shop, and that his business did not come within the exception in section 3 of the Act, convicted the appellant, but stated this case for the opinion of the court.

By the Sunday Observance Act, 1677, s. 1, it is provided (*inter alia*) that no tradesman shall do or exercise any worldly labour, business, or work of their callings upon the Lord's Day, or any part thereof (works of necessity and charity only excepted).

Section 3 provided that nothing in this Act contained shall extend to the prohibition of dressing of meat in families or dressing or selling of meat in inns, cook-shops, or victualling houses for such as otherwise cannot be provided for.

S. Joyce Thomas, for the appellant.—The justices were wrong. A cook-shop is a place where food is prepared, and this definition fits the appellant's premises. In *R.* v. *Younger*, 5 Term Rep. 449, Buller, J., pointed out that the words of the Act are not to be construed strictly. *Cripps* v. *Durden* has no bearing on this case.

He also cited *R.* v. *Cox*, 2 Burr. 75.

Randolph, for the respondents.—The justices were right. The question as to whether these premises were a cook-shop is one of fact, and that cannot be interfered with in this court. Meat in section 3 must be construed as confined to flesh. The courts are bound to give full effect to this statute, whatever view may be taken of its expediency.

Lord ALVERSTONE, L.C.J.—I quite agree with the observation of the respondent's counsel that we are bound to give full effect to the words of this statute. But the statute itself is couched in general terms, and I should require very strict words before I came to the conclusion that the present appellant was guilty of an offence within the Act having regard to the protection given by the words "cook-shops, &c.," in section 3. In my opinion there was no evidence on which the magistrates could come to any conclusion other than that the appellant's shop was a cook-shop as contemplated by section 3. I say that, because after the words "cook-shop or victualling shop" there are the words "for such as otherwise cannot be provided." In *R.* v. *Younger* it was pointed out by Buller, J., that these are loose words; they cannot possibly be said to be intended to give a definite and precise meaning beyond this, that they indicate what the class of cooking is that is permissible—namely, for people who cannot do it for themselves. While I do not think that the appellant's business can be strictly put as a work of necessity or charity, these words in section 1 of the Act cannot be overlooked in regarding the intention of the statute. The case finds that the appellant cooked for the poorest classes, who came and fetched the food in dishes, always warm. Some ate it in the place and some in the street. It cannot be said to be wrong because some ate it on their way home. It was laid down in *R.* v. *Cox* and *R.* v. *Younger* that this statute did not mean to prohibit the cooking of meat in the shop for poor people and that to do so is not an offence within the statute. We have been pressed to say that we must construe "meat" as meaning flesh. That is not so. It would be ridiculous to say that, although a man may cook mutton he must not cook an eel pie. I think that in this case the only evidence before the magistrates brought the appellant within the protection of section 3, and the conviction must therefore be quashed.

LAWRANCE and RIDLEY, JJ., agreed.

Solicitors for appellant, *Thairlwall & Co.*, for *Read & Johnston*, Blackburn.

Solicitors for respondent, *Rawle, Johnston, & Co.*, for *Carter & Crellin*, Blackburn.

K. B. Div. (Jelf, J.) May 29, 30.

MAYOR, &c., OF WEDNESBURY v. LODGE HOLES 1905 COLLIERY CO. (*a*.)

Local government — Urban sanitary authority — Subsidence of highway caused by mining operations—Measure of damages.

The proprietary right of an urban sanitary authority in a highway which is vested in them under section 149 *of the Public Health Act*, 1875, *is limited to what is necessary to maintain the road as a highway; and accordingly, where the highway has subsided owing to mining operations, the urban sanitary authority are only entitled to recover the cost of making it as commodious as before to the general public, and not the cost of restoring it to its original level.*

Further consideration of an action tried before Jelf, J., without a jury.

This was an action brought by the Corporation of Wednesbury to recover damages for injury caused by the mining operations of the defendants to a highway which was vested in them as highway authority under section 149 of the Public Health Act. The defendants admitted liability, but only to the extent of what it would cost to make the road as commodious for the public as it was before, and they paid into court a sum of £80 as sufficient to meet the claim. The plaintiff corporation claimed a sum of £405, the expense which they had actually incurred in restoring the road to its former level.

Hugo Young, K.C., and *Vachell*.—The corporation are entitled to recover the sum they have spent. They are in a position analogous to that of a private owner, and are therefore entitled, as he would be, to have the road restored to its original level.

Shearman, K.C., and *Disturnal*.—The right of the plaintiffs is only a limited right (*Tunbridge Wells Corporation* v. *Baird*, [1896] A. C. 434, 45 W. R. Dig. 92), and their rights are confined to what is necessary to protect the use of the road as a highway: *Coverdale* v. *Charlton*, 27 W. R. 257, 4 Q. B. D. 104; *Attorney-General* v. *Conduit Colliery Co.*, 43 W. R. 366, [1895] 1 Q. B. 307.

Cur. adv. vult.

May 30.—JELF, J.—This action is brought by the Corporation of Wednesbury against the defendants to recover damages for injury caused by their mining operations to a highway called Dangerfield-lane, which is vested in the plaintiffs as the highway authority under section 149 of the Public Health Act, 1875. At the trial the defendants admitted that their mining operations had caused the road and the surrounding land to sink to a substantial extent, and

(*a*.) Reported by ALAN HOGG, Esq., Barrister-at-Law.

that this gave the plaintiffs a cause of action against them; the question therefore resolved itself into one of damages. It is to be observed, though it hardly bears upon the particular issue in this case, that the Attorney-General is not a party to this action, and the plaintiffs, therefore, in my opinion, can only recover in respect of the damages they have themselves suffered without regard to any resultant disadvantage resulting to the public. The plaintiffs claimed £405 as the expenses which they had actually incurred in restoring the road in question as nearly as possible to its original level, including the consequential costs of retaining walls to raise the road above the adjoining lands which remained at their sunken level, and the cost of fences to protect the public from the danger of falling over the precipices so caused. The defendants did not deny that, if the plaintiffs were entitled on principle to claim damages on that basis, the figures were substantially correct, and I find as a fact, on that hypothesis, that £400 is a fair sum for the plaintiffs to recover. The defendants, however, deny that the measure of damages was what it would cost to restore the road nearly to its original level, and maintain that for a sum of £65 the highway could be made as commodious for the public as it was before, and they paid a sum of £80 into court as sufficient to satisfy the plaintiffs' claim. On the hypothesis that the principle adopted by the defendants was right, the plaintiffs gave evidence that about £95 would have been required to do the work which the defendants put at £65; but on this part of the case I think that the defendants' figures are more trustworthy than the plaintiffs, and I am satisfied that the sum of £80 paid into court by the defendants is sufficient if the principle for which they contend is correct. The important question at issue, therefore, is upon which basis the damage should be calculated—in other words, What are the plaintiffs entitled to charge for?

The contentions of the plaintiffs were two-fold—one of law and one of fact. In law they contended that their proprietary right in the highway in question entitled them to charge the defendants with the cost of restoring it to its old level was necessary in order to make the road as commodious for the public as before, especially as regards the method of dealing with the surface water. I am of opinion that the first contention is not well founded in law. The plaintiffs have, it is true, a proprietary right in the road by virtue of section 149 of the Public Health Act, 1875, for the purpose of protecting the public in their use of the road, but that right is a limited one, and from a comparison of the cases of *Coverdale* v. *Charlton*, *Tunbridge Wells Corporation* v. *Baird*, and *Attorney-General* v. *Conduit Colliery Co.*, I think it is to be gathered that that right is to be confined to what is necessary to maintain the road as a highway. Further, section 27 of the Highways and Locomotives Amendment Act, 1878 (41 & 42 Vict. c. 77), which was passed to remove doubts created by *Coverdale* v. *Charlton*, shows that mines under highways remain the property of the mine-owners, provided that in working them no damage is done to the road. It is not necessary for me to consider the question whether an injunction could be obtained in the case of apprehended subsidence of the road from its original level, because the cause of action is admitted, and the only question is one of damages, and so long as the road is made a good road, as commodious as it was before, I think that no further damage is recoverable by the plaintiffs. No case was cited in support of the plaintiff's contention, and the case of *Attorney-General* v. *Conduit Colliery Co.* seems to point to the conclusion that in such a case the damages would only be nominal even in the case of a private road, where, of course, the proprietary right is unlimited. I do not think that a right to recover the cost of restoring it to its original level can be maintained, although no doubt in addition to the cost of making it as commodious as before to the owner, something might be charged for any loss of amenities sustained *à fortiori*. I do not think that such a right could be successfully claimed by a road authority which has the limited proprietary right to which I have referred.

His lordship then dealt with the questions of fact, and held that the sum paid into court was sufficient.

Judgment for the defendants.

Solicitors for the plaintiffs, *Thomas Jones*, Town Clerk, Wednesbury.

Solicitors for the defendants, *Bower, Cotton, & Bower*, for *Thursfield & Messiter*, Wednesbury.

House of Lords.

From C.A. (England). Nov. 28.

ALIANZA CO. (LIMITED) v. BELL. (a.)

Inland revenue—Income tax—Profits—Trade carried on abroad—Mining—Exhaustion of nitrate grounds—Deduction—Income Tax Acts, 1842 (5 & 6 *Vict. c.* 35), *ss.* 100, 159, *Schedule D, case* 1, *rr.* 1, 3; *and* 1853 (16 & 17 *Vict. c.* 34), *s.* 2, *Schedule D.*

An English company acquired land abroad for commercial purposes, the upper surface of which was gradually exhausted in the production of nitrates and iodine, which were sold and large profits realized. The amount and value of the soil utilized could be ascertained.

Held, that in estimating the yearly profits of the company under Schedule D of the Income Tax Acts, no deduction could be allowed in respect of such exhaustion of capital.

Decision of the Court of Appeal (53 *W. R.* 257, [1905] 1 *K. B.* 184) *affirmed.*

Appeal from order of Court of Appeal (53 W. R. 257, [1905] 1 K. B. 184), affirming judgment of Channell, J. (53 W. R. 23, [1904] 2 K. B. 666).

The appellants were an English company who owned a large tract of nitrate grounds in Chile; the upper stratum of which grounds consisted of "caliche." This was dug up and utilized for the production of nitrates and iodine, by the sale of which the company realized large profits.

The company were assessed to the income tax under Schedule D and claimed, for the purpose of arriving at the balance of their profits, to deduct a sum representing the cost price of the "caliche" worked up by them in the course of each year.

The Court of Appeal held that such deduction was in the nature of a deduction for exhausted capital which is prohibited by the Act.

The case is set out at length in the court of first instance.

Danckwerts, K.C., and *Bremner*, for the appellants.

Sir R. B. Finlay, A.G., Sir E. Carson, S.G., and *Rowlatt*, for the respondents, were not heard.

Lord MACNAGHTEN.—I do not think it is necessary to say more than a very few words. I think your lordships are satisfied with the judgment of the Court of Appeal and the reasons by which that judgment is

(a.) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

enforced. It appears to me that this claim comes within the third rule, and that it is money wholly and exclusively laid out and expended as capital. For these reasons I ask your lordships that this appeal should be dismissed, and that the appellants should pay the costs.

Lord ROBERTSON.—I think it is undesirable that any doubt should be thrown upon a settled course of decisions on the income tax law, and it seems to me that, although Mr. Danckwerts has argued this case with a vigour and zest which did full justice to his case, the arguments he has advanced are of a most familiar character. The propositions required to be established in order to bring him within the provisions and decisions are these (I begin by stating that of course it is under Schedule D that the case is to be judged). First of all, is this capital which he proposes to obtain a reduction for? Now, that seems to me to be entirely concluded by the findings in the case. There is no doubt whatever that the scheme of the enterprize of this company was to invest their capital in the acquisition of this property, and then to proceed to work it as a mining concern. That being so, the Master of the Rolls seems to me to be abundantly justified in saying that this is merely another case where capital has been embarked in a wasting subject-matter. The whole of the argument of counsel for the appellants is really founded upon what I suppose no one would doubt—that as the output takes places there is a consumption of a certain proportionate amount of the capital; but that is concluded, as my noble and learned friend on the woolsack has said, by rule 3. Further, I agree with Stirling, L.J., that section 159 is never to be laid out of account in these instances, because in its express prohibition of an allowance being made for capital, it on the face of it refers to all the various cases under the various schedules. Accordingly, the argument that there is something peculiar in Schedule A in the principle which has been applied in *Addie's case*, 2 Rettie 431, and the other cases which have been mentioned, fails before the universal conspectus which in express terms is given by section 159 to this very principle.

Lord LINDLEY.—I am entirely of the same opinion. It appears to me it is quite impossible to get out of rule 3.

Appeal dismissed.

Solicitors for appellants, *Ashurst, Morris, Crisp, & Co.*

Solicitor for respondent, *Solicitor of Inland Revenue.*

High Court of Justice.

Chan. Div. Kekewich, J. } March 22.

In re VICKERSTAFF, DECEASED.
VICKERSTAFF *v.* CHADWICK. (*a.*)

Practice—Costs—Administration—Liability of real estate—Land Transfer Act, 1897 (60 & 61 *Vict.* c. 65), *s.* 2, *sub-section* 3—*R. S. C.*, 1883, *ord.* 65, *r.* 14 (d).

Where, in a probate action instituted in 1905, *the court ordered the plaintiff's costs "to come out of the estate of the deceased," there being no personal estate, it was*

Held, that, having regard to section 3 (2) *of the Land Transfer Act,* 1897, *the order operated to charge the deceased's real estate with the payment of the costs.*

Adjourned summons.

This was a summons taken out to determine whether the real estate of the deceased was liable for certain costs incurred in an action in the Probate Division of the High Court of Justice. The facts were as follows:

The deceased, by his will dated the 20th of January, 1905, appointed his mother, Mrs. Boydon, his sole executrix and universal legatee. The deceased died on the 21st of January, 1905.

Mrs. Boydon, by her will, dated the 21st of January, 1905, appointed the present defendants her executors. She died on the 26th of January, 1905.

In an action in the Probate Division, in which Mrr. Boydon's executors, as plaintiffs, propounded the testator's will, it was held that the deceased, at the time he made his will, was not of sound mind, and it was ordered that plaintiff's costs be paid "out of the estate."

Letters of administration were granted to the deceased's wife, the present plaintiff.

There was practically no personal estate, but there was considerable realty.

The summons asked whether, in the course of the administration of the real and personal estate of the deceased, the real estate of the said deceased was liable to be charged with the costs of the defendants incurred as plaintiffs in the action in the Probate Division of this court, which costs, by the judgment delivered in the said action on the 23rd of November, 1905, were ordered to come out of the estate of the said deceased.

Stewart Smith, K C, and *Whinney*, for the plaintiff.—The realty is not charged. The Land Transfer Act, 1897, does not make the realty liable, and before the Act there is no question but that the words of the order would have charged personalty only: *In re Jones*, 50 W. R. 215, [1902] 1 Ch. 92; *Charter* v. *Charter*, 24 W. R. 874, 3 Ch. D. 218; *In re Prince*, 47 W. R. 25, [1898] 2 Ch. 225.

Lawrence, K.C., and *Cartmell*, for the defendants.—The realty is now charged. The old words were given a limited meaning because the Probate Court had no jurisdiction over realty, but the Land Transfer Act, 1897, gives such jurisdiction: *In re Pawley and the London and Provincial Bank*, 48 W. R. 107, [1900] 1 Ch. 58.

Stewart Smith, K.C., replied.

KEKEWICH, J., in giving judgment, said: What I have to do is to construe an order of the Probate Division. In an action in that division the court ordered that the costs of the plaintiffs come out of the estate of the deceased. Does it mean out of the estate generally or out of personal estate only? If this question had arisen before the passing of the Land Transfer Act, 1897, it would have been unarguable that "estate" meant anything but personal estate, for the very plain reason that the court had no jurisdiction to deal with real estate, and it is necessary to give credit to the court of the intention to only do that which it could. Then the question arises if the words have the same meaning now, after the passing of the Act. That Act constitutes a real representative who is not a different person from the personal representative, but must necessarily be the same. He also has the realty vested in him, and it remains so vested until he conveys it away or until order of the court. Further, the Probate Division, by a grant of probate or of letters of administration, includes realty as well as personalty. There might even be under the Act a grant of probate of realty only, in cases where there was no personalty.

Reported by H. WOLCOTT WARNER, Esq., Barrister-at-Law.

That carries us a long way, because it gets rid of the obstacle on which the limitation of the jurisdiction of the court was founded. It seems to me that section 3, sub-section 2, of the Act sets the matter at rest. It provides that in the administration of the assets of a person dying after the commencement of the Act his real estate shall be administered in the same manner, subject to the same liabilities for debt, costs, and expenses, and with the same incidents as if it were personal estate. By this enactment the Legislature has expressly provided that "estate" shall mean realty as well as personalty. Then I have been referred to ord. 65, r. 14 (*d*), which says: "In any probate action in which it is ordered that any costs shall be paid out of the estate, the judge making such order may direct out of what portion or portions of the estate such costs shall be paid, and such costs shall be paid accordingly." It has been argued that the court would have to specify realty if it meant to include it. I think that argument is unsound. "The estate" means the whole estate, realty as well as personalty. The true view I take to be that the court need no longer say "out of the estate," but may say out of a particular part of the estate. No doubt the court could direct that costs should be paid out of that portion of the estate which is realty, but I do not think that order 65, r. 14 (*d*), which is one of procedure, affects the question before me. In my opinion, since the passing of the Act the word "estate" includes realty as well as personalty, and the deceased's real estate is accordingly charged with the payment of the costs.

Solicitors, *Swann, Bradley, & Co.*, for *Challinors & Shaw*, Leek; *Robbins, Billing, & Co.*, for *Hacker & Allen*, Leek.

Chan. Div. }
Buckley, J. } March 7.

WHITBY *v.* LUEDECKE. (*a*.)

Settlement—Perpetuity—Appointment—Construction—Cross remainders—Vested or contingent—Contingent remainders for life.

A lady having power under her marriage settlement to appoint the legal estates in certain real property to her children after her death, appointed by her will that the income and rents "shall be equally divided during their respective lives between my daughters A. and L. after my decease, and in the event of the death of either the survivor shall receive the whole income or rents," and after the death of the survivor she directed the property to be sold.

Held, that upon the construction of the instrument the remainders given on the death of either of the daughters to the survivor were contingent and not vested remainders, for that they could not be vested remainders because one of them must necessarily fail to fall into possession; and that consequently the gift of the entirety of the rents and profits upon the death of either daughter to the survivor was void for remoteness.

Action.

This was an action by the owner of a life estate in an undivided moiety of certain land claiming a life interest in the entirety of the land under an appointment made under a power in a marriage settlement, and it raised a question whether certain cross remainders were vested or contingent, and whether or not they were void for remoteness.

By the settlement, made in 1844, previous to the marriage of Ann Whitby and Alfred Whitby, a certain farm in the occupation of one W. Tyers was conveyed to the use during their joint lives of trustees upon certain trusts, and after the death of Ann Whitby to the use of the child or children of the marriage or their issue, for such estates and in such shares and in such manner as Ann Whitby (whether covert or sole) by her will should give or devise; and as to so much of the premises, or of the estate or interest therein, as should not be disposed of, if there should be more than one child, to the use of such children as tenants in common, and the respective heirs of their bodies.

The only children of the marriage were two daughters—Ann Jane Whitby, born in 1846; and the plaintiff Lucie Whitby, born in 1852.

Ann Whitby, the mother, died in 1877, having made her will in 1875, which, except for the appointment of her husband as trustee in a certain event, was as follows:

"I, Ann Whitby, being by the blessing of God in health of body and mind, having by my marriage settlement possession of the estate or farm called Tyers's Farm, in the parish of Thirlaston, in the county of Leicester, do will and devise that the yearly income or rent of the said Tyers's Farm shall be equally divided during their respective lives between my daughters Ann Jane and Lucie or Lucy Whitby after my decease, and in the event of the death of either the survivor shall receive the whole income or rents arising from the same, and at the death of my last daughter the above farm may be sold and the proceeds divided amongst the children of the above-named Ann Jane and Lucy or Lucie Whitby, supposing they or either of them shall have married."

Ann Jane Whitby and the plaintiff Lucie Whitby were in possession or in receipt of the rents and profits of the property in equal moieties from the death of Ann Whitby until that of Ann Jane Whitby.

In 1891 Ann Jane Whitby and the plaintiff Lucie Whitby executed a disentailing deed by which they conveyed the hereditaments in the settlement of 1844 to themselves in fee simple as tenants in common.

Ann Jane Whitby died in 1903, a spinster, having by her will given all her real and personal estate to the defendant and appointed him her executor.

In 1904 the plaintiff joined the defendant in letting the property on a yearly tenancy.

The plaintiff alleged that she had acted in ignorance of her rights, and in the belief that the will of Ann Whitby did not operate because the formalities required for an appointment had not been complied with, and that the defendant was consequently entitled to an undivided moiety of the property in fee simple in possession; and she accordingly brought this action claiming a declaration that she was entitled under the settlement and the will of her mother to an estate for life in the entirety of the property, and for an account of the rents and profits received by the defendant since the death of her sister.

The defendant pleaded that Ann Jane Whitby had been advised that the will of their mother was of no effect by reason of the law as to remoteness, and that the plaintiff and her sister agreed to settle their rights by the deed of 1891 on the basis of a mutual admission that there had been no appointment, and that they had since acted on the faith of that arrangement.

At the trial the question of the application of the law against perpetuities to the appointment contained in the will of Ann Whitby was first argued and decided, and the decision rendered the other questions raised in the action unnecessary.

Buckmaster, K.C., and *E. P. Hewitt*, for the plaintiff.—The will of Ann Whitby in effect appoints to each

(*a*.) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

daughter a moiety of the property for her life, and gives her a vested remainder for life in the moiety of her sister. It is true that if she dies before her sister then the remainder never comes into possession. It is, however, not the less a vested remainder, as it is from its creation always ready to come into possession whenever the prior estate, namely, the life interest of the other sister comes to an end: Williams on Real Property (19th ed.), p. 335. In *Ashley* v. *Ashley*, 6 Sim. 358, a gift to the children of a living person for their lives with cross-remainders between them was treated as valid.

They also referred to *In re Hargreaves*, 38 W. R. 470, 43 Ch. D. 401; and as regards the force of the word "respective" to *Sutcliffe* v. *Howard*, 17 W. R. 819, 38 L. J. Ch. 472.

F. Vaughan Hawkins and *Martelli*, for the defendant.—The appointment is of a contingent remainder after the life of each of the daughters to the other of them. The event upon which the gift takes effect—namely the death of either daughter—might not happen within twenty-one years of the termination of the life in being—that is, the life of Ann Whitby. The gift was consequently void for remoteness. It is one of the fourth class mentioned by Fearne on Conting nt Remainders, chap. 1, s. 2 (10th ed.), p. 9 He says of this class: "So if an estate be limited to two for life, remainder to the survivor of them in fee, the re nainder is contingent, for it is uncertain who will be the survivor." The rule against perpetuities applies to legal as well as to equitable limitations (*In re Ashforth*, 53 W. R. 328, [1905] 1 Ch. 540); and to life estates as well as to limitations in fee: *In re Hargreaves*, and see the judgment of Knight-Bruce, L.J., in *Broughton* v. *James*, 1 Coll., p. 46. Even if vested remainders could have been given in the way suggested on behalf of the plaintiff, the will does not appoint them as such, but as contingent remainders. And the court must construe the will naturally and not so as to avoid the operation of the rule against perpetuities: *Pearks* v. *Moseley*, 29 W. R., p. 2, L. R. 5 App. Cas, p. 719.

They al o referred to *Dungannon* v. *Smith*, 12 Cl. & Fin. 526 574, and *In re Bence*, [1891] 3 Ch. 242.

WARRINGTON, J.—The question I have to decide is whether the words "in the event of the death of either, the survivor shall receive the whole income," create a vested interest or a contingent interest. If it is a vested interest it is good; if it is a contingent interest it is bad, because it would not, or might not, vest within the life or lives in being and twenty-one years afterwards. Of course nothing turns on the use of the words "in the event of"; that means, of course, "when" The con ingency, if there be a contingency, arises on the word "survivor." You cannot tell u til the event has happened which of the two ladies will survive. Now, in the first place it is plain that if the gift had been (reading the words "in the event" as "when") "when either of them dies the survivor shall be entitled to the fee simple," that would be plainly contingent, because the person to take could not be ascertained until the death of one of the two. But it is said that there is a difference here because the gift is not of the fee simple, but of the life estate. It is an estate which bears within itself the possibility of coming to an end by reason of the death of the life tenant. It is said that I ought to read those w rds as if they were "and when Ann Jane dies Lucy shall take a life interest in the entirety; and when Lucy dies Ann Jane shall take a life interest in the entirety," and that those would be two good vested int-rests, vested at the death of Ann Whitby, each of which might fail, of course, of being enjoyed in possession because the person to enjoy it would have died, and therefore the life interest would be over; but is said that there was a good vested interest given, although that estate might never ripen into enjoyment. Now, it seems to me—and of course the case must be dealt with strictly on the principles which are applicable to this branch of the law—that this is impossible. I think that it is a sound principle that every vested interest must be one which *may*—though not necessarily *must*—vest in possession. If that is true, it is obvious that the two estates of which I have spoken are of such a kind that one of them—though you cannot say which—certainly cannot vest in possession, and this instrument will be creating two vested estates, one of which never can vest in possession, although which of the two that one is, you cannot say. There is, as it seems to me, a difference between these two things, between a vested estate for life which may fail to fall into possession by reason of the life tenant dying before the event happens which gives possession, and the gift of a contingent estate for life. What I have here is a gift under which, as I understand the language of the will, only the survivor of the two ladies will be entitled to some estate under these words "in the event of the death of either the survivor shall receive the whole," and I cannot say now which of the two that survivor is, nor could I have said at the date of the death of Ann Whitby which the survivor was. It seems to me that that was a contingency, and the estate given was a contingent estate. I cannot read the gift as creating two vested estates, one of which must fail, and the other of which must take effect. I think they are contingent estates. That conclusion is upon the construction of the instrument; and for the purpose of arriving at it I shut my eyes to the consequences resulting from it, as by the decision in *Pearks* v. *Moseley* I think that I am bound to do. Having so construed the instrument, I find that these are contingent estates. And they are contingent estates which will not or may not become vested estates within any life which was in being in 1844 and twenty-one years afterwards. The consequence is that unfortunately the gift is void. In arriving at this conclusion I do not say that I am guaging what this lady would have wished to have done had she been aware of the rules of law. In this branch of law I cannot consider that, in construing the instrument. I must hold this to be a gift of contingent estates, and therefore to fail for infringing the rule against perpetuities.

Judgment for defendant.

Solicitors, *Stow, Preston, & Lyttelton*, for *R. B. Berridge & Sons*, Leicester; *Capron & Co.*

Chan. Div. }
Joyce, J. } Feb. 13, 14, 20.

PEAT v. CLAYTON. (*a.*)

Company—Shares—Equitable title—Notice—Right to registration—Negligence—R. S. C., 1883, *ord.* 46, *r.* 3.

A debtor, after assigning all his property by deed to trustees for his creditors, fraudulently sold certain shares through a broker and received the purchase-money from him. The companies concerned, having previously received notice of the assignment, refused to issue certificates to the purchasers, and the selling broker, under the rules of the

(*a.*) Reported by H. WOLCOTT WARNER, Esq., Barrister-at-Law.

London Stock Exchange, provided other shares in substitution.

Held, that the failure of the trustees to serve, under order 46, r. 3, notice in lieu of distringas on the companies did not amount to negligence so as to postpone their equitable title, having regard to the fact that the trustees had given the companies notice of the execution of the deed of assignment; and that the selling broker had no lien on the shares for the purchase-money, except possibly on the debtor's interest in them, which was subject to the deed of assignment.

Action.

This was an action by the trustees of a deed of assignment made in favour of creditors for a declaration that they were entitled to be registered as owners in respect of forty shares in the Randfontein Estates Gold Mining Co., Witwatersrand (Limited). and forty shares in the Oceana Minerals Co. (Limited). The facts were as follows:

On the 24th of October, 1904, the defendant Clayton executed a deed of assignment of all his property in favour of his creditors. The plaintiffs Peat and Moss were the trustees of the deed which was duly registered under the Deeds of Assignment Act, 1887, on the 7th of November, 1904.

After looking into his affairs the plaintiffs asked the debtor Clayton to hand over to them the certificates for the shares the subject of this action. The debtor refused to comply, giving as an excuse that the certificates were not in his possession.

On the following day, the 8th of November, 1904, the plaintiffs gave notice to both companies of the deed of assignment and asked them to note it on their respective registers.

On the 10th of November Clayton instructed Messrs. Cohen & Co., a firm of brokers, and members of the London Stock Exchange, to sell the said shares, which they did, and on the 16th of November Clayton handed Messrs. Cohen the certificates and executed blank transfers of the shares, Messrs. Cohen paying him £25 on account.

On the 30th of November Messrs. Cohen lodged the certificates with the respective companies and the transfers were certified—that is, it was noted on the transfers that a certificate for the shares purporting to be transferred had been lodged with the company.

On the 1st of December the purchasing brokers received the transfers from Messrs. Cohen and paid them the purchase-money. On the same day Messrs. Cohen paid Clayton the balance due to him.

In the case of the Randfontein shares the company refused to register the purchaser in consequence of the notice they had received from the trustees of the deed of assignment, the present plaintiffs. But the Oceana Co., in spite of the notice, registered the purchaser, a Mrs. Russell. They, however, refused to issue a certificate, and subsequently struck Mrs. Russell's name off the register, leaving the shares standing in the name of Clayton.

Messrs. Cohen, in accordance with the rules of the London Stock Exchange, provided other shares in substitution for Clayton's shares, and applied to Clayton for repayment, which was refused.

The plaintiffs thereupon brought this action against Clayton, Messrs. Cohen, and the two companies. Clayton died before the action came to trial, and the Oceana Co. did not appear.

Younger, K.C., and *Johnston*, for the plaintiffs.—The purchasers' title is only equitable. The plaintiffs' title must prevail unless it can be shown that at any moment of time the purchasers had an immediate and unconditional right to registration: *Ireland* v. *Hart*, 50 W. R. 315, [1902] 1 Ch. 522; *Moore* v. *The North-Western Bank*, 40 W. R. 93, [1891] 2 Ch. 599. The purchasers have never had such right, because of the notice given to the companies. There would be a good defence against a purchaser, and it is even stronger as against Messrs. Cohen, who are not purchasers, and never had any right to registration. Messrs. Cohen's remedy is against Clayton, who was bound to indemnify them against any liability incurred. The position regarding the Oceana shares is virtually the same. Mrs. Russell ought never to have been registered. She was never informed that she was registered, and no certificate was issued. She never had any better title than if she had not been registered.

Hughes, K.C., and *Clayton*, for Messrs. Cohen.—The equitable title of the plaintiffs must be postponed to that of the defendants, because they did not take the proper steps to secure their title. Notice in lieu of a *distringas* should have been given: R. S. C., ord. 46, r. 3: *National Provincial Bank of England* v. *Jackson*, 34 W. R. 597, 33 Ch. D. 1; *In re Castell & Brown*, 46 W. R. 248, [1893] 1 Ch. 315; *Farrand* v. *Yorkshire Banking Co.*, 37 W. R. 318, 40 Ch D. 182. The certification of the transfers does not in any way improve Messrs. Cohen's position: *Bishop* v. *Balkis Consolidated Co.*, 38 W. R. 750, 25 Q. B. D. 519. Messrs. Cohen were bound by the rules of the Stock Exchange to supply other shares in substitution for those sold by Clayton, they are therefore entitled to stand in the shoes of the purchaser in respect of Clayton's shares. As regards the Oceana shares, Mrs. Russell became the legal owner on registration.

Younger, K.C., in reply.—Mrs. Russell never was legal owner within the meaning of the cases, but even if she were, Messrs. Cohen are not entitled to stand in her position. The company had no right to strike her name off the register: *In re Poole Firebrick and Blue Clay Co.*, 23 W. R. 203, L. R. 10 Ch. App. 157. There has been no such negligence on the part of the plaintiffs as would in equity postpone their title.

Clauson appeared for the Randfontein Co.

Cur. adv. vult.

JOYCE, J., in giving judgment, said: This is an action to determine who is entitled to forty shares in the Randfontein Estates Co. and forty shares in the Oceana Minerals Co., all fully paid up. As I understand the law, where there are several claimants to shares registered in the name of a third person, the equitable title which is prior in time prevails, unless the claimant under a subsequent equitable title proves that, as between him and the company, he had acquired an absolute and unconditional right to be registered as the owner of the shares before the company received notice of the other claim. In my opinion, therefore, the plaintiffs are entitled to the forty shares in the Randfontein Co. Messrs Cohen, however, claim a lien upon them. If there is any lien it is clearly only equitable, and on Clayton's interest in the shares, which is subject to the rights of the plaintiffs under the deed of assignment.

In the next place it was argued that the plaintiffs had disentitled themselves by negligence. On the evidence before me I do not see any negligence on the part of the plaintiffs unless it were, as contended by Messrs. Cohen, in not adopting the procedure now substituted by ord. 46, r. 3, for the old procedure by *distringas*. I do not think that owing to the failure to adopt this course the plaintiffs must be postponed; if they had done so, the result would have been the same. It would only have prevented the company from registering the transfer to the purchaser, and in fact they were prevented from so doing by the notice they received. It was suggested, but not seriously contended, that a *distringas* would

have prevented certification of the transfers. As I understand, that only amounts to a representation that a document has been lodged with the company apparently in order, and showing *primâ facie* that the transferor is entitled to the shares. It is no warranty of the transferor's title to the shares or as to the validity of any of the documents. Messrs. Cohen never inquired of the company whether there was any *distringas* or other stop against the transference of the shares.

So much for the Randfontein shares. The case as to the Oceana shares is virtually the same. The only difference is that, on referring to the register of members of that company—and there is no further evidence on the subject—it appears that the transfer from Clayton, which was to a Mrs. Russell, was in fact, entered on the register, though under what circumstances, and whether by express authority of the board or not, does not appear. At all events, no such registration ought to have been made, having regard to the notice the company received on the 3rd of November, without previous communication with the giver of that notice. No certificate, however, was issued to Mrs. Russell, and her brokers applied to Messrs. Cohen for shares in substitution, which were at once provided. The transfer of Clayton's shares to Mrs. Russell was cancelled, so that in the result the shares are still in the name of Clayton. They were never in the name of Messrs. Cohen, who did not take a transfer from Mrs. Russell.

It was contended that the true view is that Mrs. Russell still remains on the register as owner of the forty shares sold to her brokers by Messrs. Cohen on behalf of Clayton, and that Messrs. Cohen have a lien on those shares. Mrs. Russell does not claim the shares and is not a party to this action. I do not think she had any such legal interest as was contended; at all events Messrs. Cohen's interest, if any, is equitable only. In my opinion Messrs. Cohen had no immediate and unconditional right to be registered as owners of those shares before the company had notice of the claim of the plaintiffs, or, indeed, at any time. In my opinion, in the case of the Oceana shares, as in the case of the Randfontein shares, Messrs. Cohen's interest, if any, was only on Clayton's interest in the shares.

In the case of the Oceana shares, as well as in the case of the Randfontein shares, a *distringas* would not have saved Messrs. Cohen from the loss they sustained in trusting Clayton, and, upon his instructions, proceeding to sell without first ascertaining that there was no stop or impediment to the registration of the transfer of the shares, although I must not be understood to say that it is usual to do that.

What I have already said with reference to the absence of negligence on the part of the plaintiffs applies to the case of the Oceana shares just as much as to that of the Randfontein shares. The result is that the plaintiffs are entitled to succeed in their action.

Solicitors, *Andrew Wood, Purves, & Sutton*, for *J. Hewitt*, Barnsley; *Cohen & Cohen; Addison, Brown, & Jones.*

Chan. Div.
Swinfen Eady, J. } March 2.

In re MISS DRAX'S WILL.

BARONESS DUNSANY *v.* SAWBRIDGE. (*a.*)

Will—Name and arms clause—Forfeiture clause—Construction.

E. D, the widow of a peer, on becoming entitled under the terms of a will to settled estate, was required by a clause in the will, within a year of becoming so entitled, to take certain surnames and arms, and to use such surnames in all deeds and writings to which she should be a party or which she should sign, and upon all other occasions. In the event of her refusing or neglecting to take or use such surnames or arms as aforesaid she was to forfeit her interest. E. D. took the surnames and arms in accordance with the will, but neglected to use the assumed surnames in social and ordinary correspondence.

Held, that the period of a year applied only to the taking of the names and arms, and that neglect to use the same after the expiration of that period would involve a forfeiture; but that the clause in the will only required the use of the assumed surnames on formal occasions on which the use of a surname was customary, and that forfeiture was not incurred by neglecting to use them in social and ordinary correspondence.

Originating summons.

The plaintiff in this action was Ernle Elizabeth Louisa Maria Grosvenor Plunkett Ernle Erle Drax, the widow of Baron Dunsany, and under the terms of the will of the testatrix, Miss Drax, she became, in the year 1905, tenant in tail in possession of certain real estate devised thereby. The defendant was entitled in remainder after the estate tail of the plaintiff. The testatrix had inserted in her will a clause which provided that every person becoming entitled to possession of the settled estate under the terms of the will should, within one year from the time when he or she should so become entitled, take upon himself or herself, and use in all deeds and writings to which he or she should be a party, or which he or she should sign, and upon all other occasions the surnames of Erle and Drax, either alone or in addition to and after his or her original surname, and also take, use, and bear the arms of Erle and Drax, either alone or quartered with his or her original arms, and should, within the said time, apply for a licence from the Crown to take, use, and bear the said surnames and arms. There was a further clause in the will providing that, in the event of such person refusing or neglecting to take or use such surnames and arms as aforesaid, the limitations in his or her favour should thenceforth absolutely cease and determine.

The plaintiff obtained the necessary licence within the prescribed time, and assumed the surnames and arms of Erle and Drax. In social and ordinary business correspondence, however, she continued to sign herself Ernle Dunsany, and her visiting cards still bore merely her Christian name and title—Ernle, Lady Dunsany.

The object of the present summons was to decide two questions—firstly, whether non-compliance with the provisions of the name and arms clause after the expiration of a year from the date on which she became entitled would work a forfeiture as against the plaintiff at all; and secondly, whether the fact that she was still in the habit of signing ordinary correspondence with the name and title Ernle Dunsany, and using visiting cards bearing the description Ernle, Lady Dunsany, without in either case making use of the assumed surnames, was a non-compliance sufficient to work a forfeiture.

J. F. Popham for the plaintiff.—The forfeiture clause appears to be a defective one. It can only operate in the event of non-compliance taking place within the year. The usual way in which a peeress signs an ordinary letter is by her first Christian name and her title. The plaintiff may still sign ordinary letters in that style without incurring a forfeiture under the terms of the will. There is no necessity for using a surname on all occasions. The assumed names need only be used in the case of deeds and

(*a.*) Reported by F. HARDINGE DALSTON, Esq., Barrister-at-Law

formal documents: *In re Eversley, Mildmay* v. *Mildmay*, 48 W. R. 249, [1900] 1 Ch. 96.

C. E. Bovill, for the defendant.—The forfeiture clause is a good one and the plaintiff has incurred forfeiture. The time-limit is only imposed for the purpose of actually taking the names and arms. The names must, however, be used after the expiration of the year. The forfeiture clause is perfectly clear in intention and must be upheld. The plaintiff has not complied with the provisions of the name and arms clause.

SWINFEN EADY, J.—As regards the first question to be decided, this directory clause must bear the ordinary construction. The words "shall within one year take upon herself and use" must mean "shall within one year take upon herself and thereafter use." I cannot agree with the suggestion that the neglect or refusal must occur within the year in order to bring about forfeiture. The true intention of the directory clause would not be fulfilled by taking the surnames and arms on the last day of the period of one year and never using them again. The period of a year applies to the taking, but not to the using, and the clause indicates that continuous use is required. The first question must be answered in the affirmative.

The second question is whether the fact that the plaintiff, who is the widow of a peer, signs herself Ernle Dunsany in her ordinary correspondence and uses visiting cards with Ernle, Lady Dunsany, and no more, inscribed thereon, is a non-compliance with the clause and works a forfeiture. By the will of the testatrix the plaintiff is required, within one year after becoming entitled, to take upon herself and use in all deeds and writings to which she shall be a party or which she shall sign, and upon all other occasions, the surnames of Erle and Drax, either alone or in addition to and after her original surname, and also take, use, and bear the arms of Erle and Drax, either alone or quartered with her original arms, and within the time aforesaid apply for and endeavour to obtain a licence from the Crown or take such other means as may be requisite to enable her to do so. In this case the form used does not contain any exception in favour of peers or the wives of peers, such as is to be found in many of the common forms. Now the ordinary way in which a peer is formally described is by his Christian name, with a prefix suitable to his rank, such as "Most noble" or "Most honourable," followed by his title, but without using a surname Now, although the plaintiff has procured the necessary licence, and has also in fact assumed the surnames of Erle and Drax, she continues in social and ordinary correspondence to sign herself Ernle Dunsany, as before, and her visiting cards still bear the inscription Ernle, Lady Dunsany. In my opinion, although she is required to make use of the assumed surnames "in all deeds and writings to which she shall be a party or which she shall sign," this cannot be taken to extend to the case of all her letters and her visiting cards. I consider that the expression "writings" is intended to include all writings of a formal character, not being deeds, which she shall sign. The clause continues: "and upon all other occasions," and I consider this to refer only to occasions upon which a surname would properly and commonly be used; such an occasion would be the making of an affidavit in these proceedings. The plaintiff would not be required to use the assumed names in family, private, or ordinary business correspondence, and I therefore answer the second question in the negative.

Solicitors, *Woodcock, Rylands, & Parker*, for *Preston & Francis*, Bournemouth; *Routh, Stacey, & Castle*.

K. B. Div.
(Lord Alverstone, L.C.J., and Ridley and Darling, JJ.) Feb. 27.

HOPKINS v. GUDGEON AND ANOTHER.
GUDGEON, *Claimant*. (a.)

Bill of sale—Registration—Execution creditor—Interpleader—Bills of Sale Act, 1878 (41 & 42 *Vict. c.* 31), *s.* 8.

Where a person sets up as against a judgment creditor a title for goods which have been throughout in the possession of the judgment debtor, the claimant must show either a registered title or something done with the goods which renders registration unnecessary.

A. sold his furniture to B., a company, retaining the possession of it for a weekly monetary consideration; the transaction was not registered under the Bills of Sale Acts. Subsequently B. sold this furniture to C., the mother of A., for £200, the furniture still remaining in the possession of A. A. then removed to another town, taking the said furniture with him. Upon seizure in execution of a judgment debt, C. claimed the furniture;

Held, that the furniture having remained throughout in the possession of A., C.'s claim was not protected, as she could not show a title by any registered bill of sale, or anything that rendered registration unnecessary.

Appeal from the county court of Hampshire holden at Portsmouth.

By an agreement dated the 31st of December, 1903, the defendant, Mr. T. W. Gudgeon, transferred his business and all his effects at Ryde, including his household furniture, to a limited company, one of the terms of the agreement being that he should retain the use of the furniture in consideration of a weekly monetary payment. The agreement referred to was not registered as a bill of sale.

In July, 1904, the company was in financial difficulties, and to assist it Mrs. Gudgeon, the mother of T. W. Gudgeon, purchased the furniture for £200, the furniture still remaining in the possession of T. W. Gudgeon.

In December, 1904, it was finally removed by him from Ryde to Southsea.

In April, 1905, judgment was recovered against T W Gudgeon for £53 10s., and execution was levied on the furniture. Mrs. Gudgeon having claimed the property as her's, the judgment creditor interpleaded, and the learned county court judge gave judgment against the claimant.

She now appealed.

Grimwood Mears, for the appellant.—These goods were not in the apparent possession of the grantor, and therefore, as they are admittedly the property of Mrs. Gudgeon, could not be seized in execution. T. W. Gudgeon, the judgment debtor, was not the grantor to Mrs. Gudgeon. He transferred the goods to the company by an agreement which, by section 8 of the Bills of Sale Act, 1878, would have been void as against a judgment creditor. But he was not the grantor to Mrs. Gudgeon; the company was the grantor, and she perfected her title by removing the goods from Ryde to Southsea; in other words, the goods must have been in the possession of the company to have enabled the judgment creditor to make out his claim. In *Morewood* v. *South Yorkshire Railway*, 28 L. J. Exch. 114, A. executed a fraudulent bill of sale to B., who assigned it to C., an innocent party, the goods remaining all the time in the possession of A. Held, that C.'s title was protected as against

(a.) Reported by MAURICE N. DRUCQUER, Esq., Barrister-at-Law.

B.'s creditors. The cases show that you need not prove title throughout. Again, in *Antoniadi* v. *Smith*, 49 W. R. 693, [1901] 2 K. B. 589, the goods remained all the time in the possession of the original grantor of the bill of sale. The claimant in that case held under a duly registered bill of sale although her grantor did not. In the present case the title of the claimant, instead of being by registration, is by removal of the goods from the possession of the grantor, the company.

English Harrison, K.C. (*Cababé* with him), for the respondent.—The distinction between the *Antoniadi case* and the present is that there there was registration, and here there is not. That is clearly pointed out by Stirling, L.J., at p. 595, in his comment upon Lord Selborne's judgment in *Cookson* v. *Swire*, 33 W. R. 181, 9 App. Cas. 653, at p 663 (and see *Karet* v. *Kisher*, 2 Q. B. D. 361. Where the goods remain all the time in the possession of the original grantor, then whether there be one or more transfers of the property, you must show upon the register that the goods in the apparent possession of the original grantor are not really his.

Lord ALVERSTONE, L.C.J.—Speaking for myself, these cases always present difficulties, and I am not very familiar with this branch of the law. It seems to me, on the broad principles which I have put to both counsel, that the decision of the learned county court judge is right. [His lordship stated the facts as set out above.] The goods have been throughout either in the actual or apparent possession of Mr. Gudgeon, the transferor to the company. In 1903 he sells the goods to the company by an absolute bill of sale, a document which, had the question then arisen between the claimant and the execution creditor, would require to have been registered. In July, 1904, the claimant pays £200 for the goods, in order that the debts of the company and her son may be paid, and that transaction is perfectly *bonâ fide*. Some time after that, in December, 1904, the goods are removed to Southsea, still remaining in the possession of the judgment debtor. The simple question is, when they are claimed by a *bonâ fide* purchaser from the company can she defeat the title of the judgment creditor if there be no registration of any part of the title. I say "any part" because from Lord Selborne's judgment in *Cookson* v. *Swire* it may possibly be that registration of the bill of sale by the company to her would have done. I do not say it would have done; the case may yet arise.

Section 8 provides that an unregistered title shall be void as against a person who claims to defeat an execution creditor. The point upon which I decide this case is this: It seems to me, where no part of the title has been registered at all and the goods have remained throughout in the possession of the judgment debtor, the title of the claimant cannot prevail. If the transaction is perfected by registration, or if possession is taken, so that you do not require to rely upon registration or any other reason that appears upon the face of the transaction, so that the transaction has become completed, the judgment creditor cannot impugn it, and *Cookson* v. *Swire* shows that where you have a title independent of registration, after the transaction has been perfected by seizure of the goods there is no necessity to register. The earlier case of *Karet* v. *Kosher* seems to me to be a case where the principle which I am considering was applied. It was there held by Field, J., to be necessary to an assignee claiming to prove a registered bill of sale. I do not refer to it as an authority, but as an instance where you cannot read the whole transaction as being independent of a bill of sale, and it may be necessary to set up a registered bill of sale. What would be the consequence of Mr. Mears' argument? The goods are in possession of the judgment debtor all the time; there is an unregistered bill of sale; there have been many transactions, some by document, some by payment of money, although there is no indication that the judgment debtor has ever parted with the goods—nothing has been done to get rid of the want of registration, and the mischief which the statute aims at is not met. The argument on the other side is, where you set up title in the goods of the debtor you must show either a registered bill of sale or that you do not rely upon a bill of sale from the original assignor. *Antoniadi* v. *Smith* rested solely upon the fact that the mother-in-law was in possession and it would not be necessary for her to re-register the bill of sale. *Cookson* v. *Swire* was a case in which the transaction had been perfected by possession and the old bill of sale was not necessary to establish the title of the claimant against the execution creditor.

Morewood v. *South Yorkshire Railway* is the nearest case in one sense to Mr. Mears' argument, but that was not a question of title at all, but an attempt to impeach an honest transaction by an antecedent transaction, and Bramwell, B., says in effect that fraud under the statute of Elizabeth could not be used against the claimant, she being no party to the fraud. I think, therefore, that, notwithstanding the argument of Mr. Mears, where a person sets up within five years as against a judgment creditor a title for goods which have been throughout in the possession of the judgment debtor the claimant must show either a registered title or something done with these goods which renders registration unnecessary. In my opinion the county court judge came to the right conclusion.

RIDLEY and DARLING, JJ., concurred.

Appeal dismissed.

Solicitors for appellant, *Geare & Miller*, for *Bowker & Sons*, Winchester.

Solicitor for respondent, *Beal*, for *J. Robinson*, Southsea.

K. B. Div. (Bigham, J.) — Feb. 16.

SOUTH BRITISH FIRE AND MARINE INSURANCE CO. OF NEW ZEALAND v. DE COSTA AND OTHERS. (a.)

Insurance (Marine)—Reinsurance—"£1,000 excess of £500"—Loss of barge-load—£298 paid by insurers—F.P.A. clause—"Each craft to be deemed a separate insurance."

A policy of reinsurance was effected by the plaintiffs (insurers) with the defendants for "£1,000 excess of £500." The policy contained these clauses: "including all risk of craft and/or raft and/or of any special lighterage, each craft, raft, or lighter to be deemed a separate insurance"; "warranted free from particular average unless the ship or craft or cargo be stranded, sunk . . ." The plaintiffs paid the assured £298, their proportion, in respect of the loss of a barge-load of wheat, which was being carried to the vessel, the barge sinking; the total amount of the plaintiffs' risk in that craft load was £400. The defendants refused to pay their proportion of the reinsured amount of £1,000 excess of £500.

Held, "£1,000 excess of £500" meant that if the plaintiffs were interested to an amount over £500, then

(a.) Reported by W. T. TURTON, Esq., Barrister-at-Law.

for that excess up to £1,000 the defendants relieve the plaintiffs. The plaintiffs had rightfully paid £298 to the assured, and the defendants were liable to pay their proportion—viz., £70 4s. 4d.—to the plaintiffs. The clause "each craft to be deemed a separate insurance" was put in solely with reference to a particular average claim, and meant that if a craft was lost with part of the whole insured interest, it was to be treated as if it were a separate insurance.

Action in the Commercial Court, before Bigham, J., sitting without a jury.

The plaintiffs claimed to recover the sum of £70 4s. 4d., being the defendants' proportion of the amount subscribed by them on a policy of reinsurance.

On the 5th of June, 1905, the plaintiffs by a provisional slip insured for £2,000 a cargo of wheat to be carried in the steamship *Whinfield* from Ghenitscheck in the Black Sea to the United Kingdom. As the value of the wheat had not then been ascertained the provisional slip was effected.

The plaintiffs reinsured with other underwriters a part of their risk to the extent of £500.

The plaintiffs reinsured with the defendants a part of their risk by an open slip which was for "£1,000 excess of £500: F.P.A. . . . Quay and craft risks."

When the value of the wheat was subsequently ascertained to be £1,914, the following policy for £1,914 was issued by the plaintiffs: "Lost or not lost, at and from Ghenitscheck to Barrow-in-Furness, including risk of craft to and from the ship. Upon any kind of goods . . . of and in the good ship . . . called *The Whinfield S.* . . . The said ship, &c. . . . goods and merchandizes . . . are and shall be rated and valued at £1,914 on . . . wheat, including £200 freight advances subject to clauses as attached."

". . . And it is . . . agreed that corn . . . and seed shall be and are warranted free from average, unless general, or the ship or craft be stranded, sunk, or burnt . . . and that all other goods, also the ship and freight, shall be and are warranted free from average under three pounds per centum, unless general, or the ship or craft be stranded, sunk, or burnt."

The following clauses were attached: "Including all risks of craft and/or raft and/or of any special lighterage (each craft, raft, package, or lighter to be deemed a separate insurance) . . ."; "warranted free from particular average under 3 per cent., unless the ship or craft or cargo be stranded, sunk . . ."

The policy was dated the 3rd of July, 1905, and was effected by Messrs. Capel Cure & Co., for the assured with the plaintiffs.

On the 10th of July, 1905, or thereabouts, shortly after this policy was issued, it was discovered that a barge going to the ship with about £3,000 worth of wheat on board of it had sunk, and in respect of that loss sustained by the cargo owners, the plaintiffs, under their policy for £1,914, paid their proportion, amounting to £298, the amount of their interest in that craft-load being about £400.

On the 25th of July, 1905, the policy of reinsurance was issued by the defendants, which was as follows: "£1,000 excess of £500 . . . lost or not lost, at and from Ghenitscheck to any port and/or ports, place, and/or places in the United Kingdom and on the Continent of Europe, as per original policy or policies. Warehouse to warehouse. Being a reinsurance of the South British Insurance Co. Upon any kind of goods . . . of and in the good ship . . . *The Whinfield*. . . . The said ship, &c., goods and merchandize, &c. . . . are and shall be valued at £1,000 on grain and/or cargo and/or advances valued as per original policy or policies. Warranted F.P.A., &c., as per clause attached . . . N.B.—Corn . . . and seed are warranted free from average, unless general, or the ship be stranded; sugar . . . and all other goods, also the ship and freight are warranted free from average under three pounds per cent., unless general, or the ship be stranded, sunk, or burnt."

The following clauses were attached to the policy: "Including all risks of craft and/or raft and/or of any special lighterage (each craft, raft, or lighter to be deemed a separate insurance). . . ." "Warranted free from particular average unless the ship or craft or cargo be stranded, sunk, . . ."

The plaintiffs on paying the £298 called upon the defendants to pay £70 4s. 4d., being the latter's proportion of the reinsured amount of £1,000 excess of £500; this the defendants refused to do, denying liability.

J. A. Hamilton, K.C., and *Mackinnon*, for the plaintiffs.—The clause in the policy that each craft was to be deemed a separate insurance was inserted in view of the p.a. warranty for the purpose of enabling the assured to recover for a total loss of one barge-load as a total loss of a thing separately insured. The insurers were interested to a greater extent than £500—viz., £1,914 in the whole cargo, and the defendants are liable for their proportion in excess of £500 up to £1,000. "£1,000 excess of £500" defines the interest.

Scrutton, K.C., and *Maurice Hill*, for the defendants.—The amount of the plaintiffs' risk on the barge was not £500. No risk was to attach under the defendants' policy unless the plaintiffs were interested to an amount in excess of £500, and as each craft was to be deemed a separate insurance the defendants are not liable because the plaintiffs were not interested in that craft-load to an amount exceeding £500.

BIGHAM, J.—It is a little difficult for me to state the facts in this case, but I have very little doubt as to the conclusion which I ought to arrive at. It appears that on the 5th of June, 1905, Mr. Capel Cure proposed to the plaintiffs an insurance of £2,000 on wheat to be carried from some place in the Black Sea to England in a steamer called *The Whinfield*, and the risk, as I understand, was from warehouse to warehouse, the cargo coming to the United Kingdom. It was not known at that time what the value of the cargo would be, but the proportion that the plaintiffs were to underwrite was estimated at £2,000. The actual sum that they were to be at risk for, was to be ascertained later on. On the 13th of June the plaintiffs desired to reinsure part of their risk, and they went to some brokers named Matthews, Wrightson, & Co., and they reinsured what is called "£1,000 excess of £500." Now, the question that I have had some trouble about was as to what that exactly meant, but I think I now understand what it does mean. It means this, that if on the original policy it should turn out that the plaintiffs were interested to an amount over £500 then for that excess up to £1,000 the reinsurers, the clients of Messrs. Matthews, Wrightson, & Co., should relieve the plaintiffs. That risk the plaintiffs took. The next thing that happened was that the owners of the cargo ascertained the value of the whole cargo and knew what each original underwriter was to make himself responsible for, and the proportion in respect of which the plaintiffs were to make themselves responsible was ascertained at £1,914, being less by £86 than the provisional amount which had been inserted in the original policy. That policy was issued on the 3rd of July, and the policy was then

drawn up with those words inserted in it. On the 10th of July, or thereabouts, shortly after this policy was issued, it was discovered that a barge going to the ship with about £3,000 worth of wheat on board it had sunk, and it seems to be agreed—I think rightly—that the loss sustained by the cargo owners by the loss of that barge was a loss falling upon the plaintiffs amongst others, and the plaintiffs have in fact paid their share of that loss, amounting, as I understand, to £298. As soon as this loss was ascertained the plaintiffs came upon the defendants, the reinsurers, and asked them to pay the proportion which they had undertaken to be responsible for—namely, the excess up to £1,000 beyond £500. The defendants refused to pay, and as I understand, they refused to pay because of a clause in their policy. I ought to have mentioned that their policy was issued and was dated the 25th of July, 1905. They refused to pay because of a clause attached to their policy which is headed "Special F.P.A. Clause," and which is in these words: "Including all risks of craft and/or raft and/or of any special lighterage (each craft, raft, or lighter to be deemed a separate insurance)." It is said by the defendants that the amount which the plaintiffs had at risk on this particular barge did not amount to £500; that is to say, their proportion which they would have to pay having regard to the other policies which were in existence on the whole of the cargo did not amount to £500 in this barge; and therefore, say the defendants, inasmuch as each craft, raft, or lighter is to be deemed a separate insurance, the defendants are not liable; there is no excess beyond £500. Now of course that depends upon whether these words which I have just read, being the first words upon this so-called F.P.A. clause, applied at all to the circumstances of this case. It is well known that insurance policies, like charter-parties and other documents of the kind, and bills of lading too—it is well known that documents used in shipping business are made to include all sorts of provisions which may or may not be applicable to the particular contract which is being made, and it is to be remembered that this was a contract of reinsurance—a contract primarily meant to indemnify the man who is already at risk against that risk. That is the primary object of this contract. And one must look to see whether these words which are relied upon by the defendants to excuse them from paying under their policy really do relieve them from their liability. Now I have always had a view about the meaning of these words, gathered from a very long experience—a view which I find is confirmed by the plaintiffs' evidence and by the evidence given to me by Mr. Capel Cure. These words, in my opinion, are put in with reference to, and solely with reference to, a particular average claim, and they have this and only this meaning, that if a craft is lost containing part of the whole insured interest that craft shall, although it only contains part of the whole, be treated as if it were a separate insurance, so that although it is only part yet it shall be paid for as if it were the whole. That is the object of this clause. There is very often another object—that is to say, where the clause is that only a particular loss exceeding 3 per cent. is to be paid. There may be a loss in a barge or craft which is not anything like 3 per cent. of the whole, but which is considerably in excess of 3 per cent. of what is in the barge The clause applies in those cases, and gives to the assured a right to ask the underwriter, notwithstanding the clause as to paying nothing under 3 per cent., to pay, and, in my opinion, this clause is inserted with reference to those considerations, and to those considerations alone, and ought not to be read, and would not be read in ordinary business by underwriters or by merchants as in any way affecting this contract of reinsurance—this promise by the defendants to stand in with the plaintiffs and to indemify them in respect of the risks which the plaintiffs have undertaken. I am satisfied that the defendants are liable. There must be judgment for the plaintiffs for the amount claimed.

Solicitors for the plaintiffs, *Waltons, Johnson, Bubb, & Whatton.*

Solicitors for the defendants, *Thomas Cooper & Co.*

K. B. Div. } Feb. 8.
Farwell, J. }

GUARDIANS OF WANDSWORTH UNION v. WORTHINGTON. (a.)

Poor law—Lunatic pauper—Maintenance—Recovery of arrears—Payments on account—Statute of Limitations (21 *Jac.* 1, *c.* 16).

A lunatic pauper was for many years before her death maintained at the expense of the Wandsworth Union. During this time the receiver in lunacy of her estate paid the whole of her income to the guardians in part payment of arrears of maintenance.

Held, that this was sufficient payment on account to enable the guardians to recover all such arrears from the lunatic's estate after her death.

In re Newbegin's Estate, 36 *W. R.* 69, 36 *Ch. D.* 477, *and* In re Watson, 47 *W. R.* 359, [1899] 1 *Ch.* 72, *applied.*

Mary Jane Worthington, a lunatic not so found by inquisition was maintained at the expense of the guardians of Wandsworth Union from 1876 until the date of her death in July, 1904, at an annual cost of £21. The lunatic was, together with her two sisters, also lunatics, entitled to a small amount of real and personal property.

In July, 1886, an order in lunacy was made "in the matter of Mary Jane Worthington, Caroline Amelia Worthington, and Agnes Louisa Worthington, persons of unsound mind not so found by inquisition," by which Thomas Worthington, their brother, was appointed receiver of their estates and was authorized to receive the income of the lunatics' estates and to apply such income for their maintenance and benefit.

T. Worthington died in 1897, and the defendant, a sister of the lunatic, was appointed receiver of the income in his place.

Under these orders the receiver for the time being had paid the whole income of the lunatic, some £10 per annum, to the guardians of Wandsworth Union down to 1903, and it had been applied in part discharge of arrears of maintenance.

On the death of the lunatic in July, 1904, there was a sum of £337 owing to the guardians.

The defendant took out letters of administration to the estate of the lunatic, which was sworn at £426, and the guardians now claimed to recover from the administratrix the whole sum due to them on account of part maintenance.

S. Mayer, for the plaintiffs.—The payments made by the receiver in lunacy were payments on account. The estate could not then be wholly administered, and the income available was obviously insufficient for the total expense of maintaining the lunatic. There was sufficient payment on account to prevent the operation of the Statute of Limitations, since the estate of a deceased lunatic was, so far as regarded

(a.) Reported by C. H. CARDEN NOAD, Esq., Barrister-at-Law.

its rights and liabilities, in the same position as any other estate.

R. C. Glen, for the defendant.—Only six years of maintenance can now be recovered. It was decided in *In re Newbegin's Estate*, 36 W. R. 69, 36 Ch. D. 477, that in the case of a pauper lunatic obtaining a bequest of money the Statute of Limitations applied, and only six years up to the date of the writ could be recovered. In this case the payments relied upon were made by the receiver in lunacy, who was an officer of the court, and not in a position to bind the lunatic's estate by his acts.

FARWELL, J.—The cases of *In re Newbegin's Estate*, and *In re Watson*, 47 W. R. 359, [1899] 1 Ch. 72, settle clearly that a lunatic pauper may plead the Statute of Limitations. But he is subject to the same rights and liabilities as the ordinary person who pleads the statute. The plaintiffs, therefore, may prove payments on account if they can. Then is there anything in the payments here to take the case out of the statute? It is said for the defence that the payments, being made by the receiver in lunacy, could not be held to be admissions binding the estate of the lunatic. The payments were made for the maintenance and benefit of the lunatic by the direction of the court. Now it is plain that the actual income was too small for the payments to be other than on account of maintenance, and to my mind it is also plain that the court must have known that the income was insufficient and that the payments were only payments on account. In my opinion the court must have authorized these payments of income with a view to preventing litigation being begun by the guardians to enforce their claims, which otherwise they would assuredly have done. I think that this is sufficient answer to the plea of the statute and there will accordingly be judgment for the amount claimed.

Solicitors, *W. W. Young, Son, & Ward; S. W. Johnson & Son*, for *Fisher, Jesson, & Co.*, Ashby-de-la-Zouch.

K. B. Div.
(Lord Alverstone, L.C.J., and Ridley and Darling, JJ.) Jan. 11.

COWLING *v.* TOPPING. (*a.*)

Insurance—Life—Industrial assurance company—Dispute—Claim for over £20 against a society which issues policies also for less amounts—Jurisdiction of justices as regards policy exceeding £20—Collecting Societies and Industrial Assurance Companies Act, 1896 (59 & 60 *Vict. c.* 26), *ss.* 1, 7.

Section 7 of the Collecting Societies and Industrial Assurance Companies Act, 1896, *only gives jurisdiction to a court of summary jurisdiction in cases where the dispute arises with reference to a life policy granted for a less sum than £20.*

Case stated by two justices of the Borough of St. Helen's, before whom a complaint, under the Collecting Societies and Industrial Assurance Companies Act, 1896, and the Friendly Societies Act, 1896, was brought by one Eliza Topping against the London, Edinburgh, and Glasgow Assurance Co. (for and on behalf of whom Cowling acted), whereby she claimed, as the executrix under the will of one John Topping, £22 19*s.* under a policy granted for that amount on the life of the testator.

Upon the hearing of the complaint it was *inter alia* contended on behalf of the company that, the claim being for over £20, the justices had no jurisdiction by virtue of section 1, read with section 7, of the Collecting Societies and Industrial Assurance Companies Act, 1896.

Section 1 is as follows: "This Act shall apply to every such (*a*) friendly society or branch, whether registered or unregistered (in this Act referred to as a collecting society); and (*b*) person or body of persons, whether corporate or unincorporate, granting assurances on any one life for a less sum than £20 (in this Act referred to an industrial assurance company)."

Section 7 is as follows: "In all disputes between a collecting society or industrial insurance company and any member or person insured, or any person claiming through a member or person insured, or under the rules, that member or person may, notwithstanding any provisions of the rules of the society or company to the contrary, apply to the county court, or to the court of summary jurisdiction for the place where that member or other person reside, and the court may settle that dispute according to the provisions of the Friendly Societies Act, 1896."

The justices were of opinion that the words of section 1 (*b*) of the Collecting Societies Act, 1896, "granting assurances on any one life for less than £20," had the effect of bringing the company (a society which granted such assurances) within the denotation of the term "industrial assurance companies" and so made the procedure in dispute between members and the company subject to section 7 of the same Act, and, therefore, that their jurisdiction was not limited to amounts under £20. They accordingly entertained the complaint and made an order in favour of Eliza Topping, but they stated this case for the opinion of the court as to whether they were right in so doing.

Cowling appealed.

S. T. Evans, K.C., and *Frank Dodd*, for the appellant.—It is submitted that in this case the justices had no jurisdiction because sub-section 6 of section 1 of the Act of 1896 is made to apply only to those persons or companies granting assurance on any one life for a sum less than £20. This company issues policies above that sum. To hold that the justices could entertain this claim would be at variance with the whole of the legislation on such subjects in which the jurisdiction of the justices is strictly limited. [Lord ALVERSTONE, L.C.J.—Do you say that the Act only applies to companies which confine themselves to issuing policies for sums under £20?] Yes, otherwise the jurisdiction of the justices would have no limit if the company issued some policies for £10 say and upwards. In Baden Fuller's Law of Friendly Societies (2nd ed.) p. 148, the opinion is expressed that the Act applies only to that class of industrial assurance companies assuring the payment of sums less than £20, the premiums on which are collected at less periodical intervals than two months. In Stone's Justices' Manual (37th ed.), p. 361, there is a footnote (*c*) which runs thus: "We consider justices have jurisdiction though the policy is for a sum greater than £20." That appears to have been followed in practice, and therefore this decision becomes the more important. [He was stopped.]

Ross Brown, for the respondent.—The note in Stone's Justices' Manual to shows that the practice has been that in cases where a company issues policies for less than £20 the justices have jurisdiction. The appellant's contention involves the reading into the statute words of limitation that are not there. It is submitted that the words of section 7 ought not to be read in the way contended for by

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

the appellant. It does not matter what sort of insurance company it is, once its business is for small sums under £20 disputes can be decided by justices. There is no direct decision on the question. The object of this legislation was to give special jurisdiction in respect of policies issued by a company doing business in small policies under £20. Such societies become for the purpose of the statute "collecting societies," and they must submit to the jurisdiction of a court of summary jurisdiction.

Lord ALVERSTONE, L.C.J.—I am clearly of opinion that this objection to the jurisdiction must prevail. I wish it to be understood that I express no opinion at all upon the other point—namely, as to the right of the executrix to recover in a proper proceeding. But this Act has conferred a special jurisdiction upon courts of summary jurisdiction, and I think it is quite plain from the long course of legislation of a similar kind, that it was intended to confer jurisdiction in regard to some policies only. The analogy of the other Acts show that there had been limits of amounts and limits of a different kinds imposed in cases of such disputes. Now, the language of this statute is this: "This Act shall apply to every such person or body of persons whether corporate or in orporate granting assurances on any one life for a less sum than £20." It is contended by Mr. Ross Brown, and I quite agree it is the only contention open to him, that the section means if the society or body of persons chooses to grant assurances on lives for less sums than £20, the justices have jurisdiction over all their policies for whatever amount. That it is possible to read the language in that way I do not deny; but it seems to me to be contrary to the spirit of the whole of this class of legislation and would be a strange way of depriving persons of a right which they certainly have according to the ordinary law of the land. I think the only construction that can be properly put upon this section is that it is to give the special jurisdiction in respect of the contracts which are granted by the insurance companies for a less sum than £20. A question may arise some day as to whether or not the society would be outside the Act because it granted insurances for a larger amount, but at any rate the limit must be put upon it that the amount which can be made the subject of the special jurisdiction under section 7 is a policy for an amount not exceeding £20.

I therefore think the magistrates had no jurisdiction to entertain this claim and that the appeal must succeed.

RIDLEY, J.—I am of the same opinion.

DARLING, J.—I agree.

Solicitors for the appellant, *Wynne-Baxter & Keeble.*

Solicitors for the respondent, *H. V. Baines*, for *Swift & Garner*, St. Helen's.

K. B. Div. (Channell, J.) Nov. 18; Dec. 2.

CARRINGTONS (LIMITED) *v.* SMITH. (*a.*)

Money-lender—Transaction harsh and unconsionable—Right to relief—Money-lenders Act, 1900 (63 & 64 *Vict. c* 51), *s.* 1.

The defendant borrowed from the plaintiffs, who were registered money-lenders, £150, giving promissory notes, one of £150 payable in twelve monthly instalments of £12 10s., and another for £72 payable in six monthly instalments of £12. The defendant at the date of the transaction owed £150 to other creditors. He had an income of £1,000 a year and property valued at £9,000. The defendant was a man of business and thoroughly understood the transaction, and there had been no misrepresentation by the money-lenders.

Held, that the defendant was not entitled to relief under the Money-lenders Act, 1900.

Action tried before Channell, J., without a jury.

The facts of the case and the arguments are sufficiently stated in the judgment.

Wallace Atkins, for the plaintiffs.

T. B. Napier, for the defendant.

Cur. adv. vult.

Dec. 2.—CHANNELL, J., read the following judgment: This action was brought to recover a balance of £62 10s. due on a promissory note. The note was admitted, and the defendant claimed relief under the Money-lenders Act. The facts are as follows: The defendant T. Johnston Smith is a director of a publishing company. He has as such director an income which he estimates at £1,000 per annum, derived, however, partly, at any rate, from commissions. He lives at Beckenham, and he estimates that the furniture in his house there, which, with the exception of a grand piano, is his own, is worth £3,000, and he has pictures which he estimates to be worth £6,000. He was called as a witness, and he appeared to be a quite reliable one. I accept his statements, except his opinion as to the exact value of his pictures and furniture, which he probably overestimates, as most owners of such property do. In December, 1904, he owed about £150, his creditors were said to be pressing for payment, but had not taken any steps to enforce it, and no execution was imminent or anything of that kind. Having no ready money to pay, and having seen an advertisement or received a circular from the plaintiffs, who are registered as money-lenders, he called at their office. The circular or advertisement which took him to the plaintiffs was not put in, and no complaint was made of its terms. He saw a manager and told him that he wanted a loan of £150, and stated the facts as to his position which I have mentioned above. The manager arranged to call at his house at Beckenham in order to judge of the correctness of those statements, and accordingly came on Saturday afternoon, the 31st of December. He was shown into the dining-room and into the drawing-room, and said that he was satisfied. The defendant says that pictures worth about £3,000 were in these two rooms. The plaintiffs' manager then said that he had £100 with him, which he could lend the defendant then, that he had no more with him, but would lend another £50 if the defendant would call at their office in the next week. A conversation then took place as to the terms. The defendant had previously refused to give a bill of sale, and no other security was suggested. The manager said that he should expect £50 for the loan of £100, taking a promissory note for £150, payable by twelve monthly instalments of £12 10s. each. The form of the note was produced, and it contained a clause that on default in payment of any instalment the whole was to become due. The defendant made no objection to the terms, or to the default clause, but asked whether if he was able to pay off the whole before the time a reduction would be made, and he was told that in that event a substantial reduction should be made. The defendant signed the note now sued on, and a few days afterwards went to the plaintiffs' office, got the other £50, and signed another similar promissory note for the repayment of £72 by

(*a.*) Reported by ALAN HOGG, Esq., Barrister-at-Law.

six monthly instalments. On the occasion of his signing the second promissory note he made a statutory declaration as to his property, and when he signed the first note he had given a receipt for the £100, in which he made similar statements. The defendant quite clearly understood all this. He is intelligent and a man of business, not one of those company directors who are sometimes seen in courts of justice, and who appear to have been selected for the office, not because of their knowledge of business, but because of their want of it. He was not in any great necessity: he merely wanted to pay off the few creditors he had to the amount of £150, and believed, and, as the event I think proved, was right in believing, that he could pay the monthly instalments, and he no doubt preferred to pay the £50 asked by the plaintiffs for the accommodation rather than disclose his temporary embarrassment to any friends who knew him by trying to borrow from them or through them on better terms. He paid the monthly instalments until the month of August, not exactly on the due dates, but never more than a day or two late, and he thus had paid off the whole of the £72 note, and had paid seven out of the twelve instalments on the £150 note. He did not, however, pay the instalment due on the 1st of September, and on the 7th of September he wrote excusing his non-payment on the ground of the holidays, and added: "As I have already paid more than the amount of the loans I shall be glad to know the net amount you would accept to settle the balance." The plaintiffs, or rather the liquidator of the plaintiffs' company, which appears then to have gone into liquidation, wrote back, asking for the cheque to be sent as soon as possible, and stated that they "were unable to make any reduction." The defendant took no notice of this letter, but upon getting another letter again asking for the cheque for £12 10s. he consulted a solicitor, who wrote on the 18th of September the following letter:

"355, Birkbeck Bank-chambers, Holborn, London, W.C., Sept. 18, 1905.

"Dear Sir,—My client, Mr. T. Johnson-Smith, has seen me in reference to your letter to him of the 8th inst., and has instructed me to offer you a sum of £10 10s. in full satisfaction of your claim against him for principal, interest and, costs.

"This, added to the £159 10s. he has repaid you, works out at more than 20 per cent. interest per annum for the period he has had the money.

"Having regard to the value of the security which you hold the interest you are charging is excessive.

"I shall be pleased to hear from you.

"Yours faithfully,

"(Signed) WALTER S. CROOKES.

"The Liquidator, C. & C. Carringtons (Limited), 9, Old Cavendish-street, W."

There was, of course, no security, and the solicitor seems to have been misinstructed or to have made a mistake about this, and it will be observed that the offer only gave the money-lender £20 for his loan of £150 cash, and that by reopening the transaction on the note which had been paid in full without demur, on the advance in respect of which the plaintiffs are now suing, they were to have no interest at all. This letter led to further correspondence, which, however, was without prejudice, and shortly afterwards the writ in this action was issued.

These facts appear to be consistent with the defendant's having agreed to the plaintiffs' terms without ever intending to comply with them, but intending all along to set up, as he is now doing, the Money-lenders Act, and to try and get off on paying some small rate of interest, knowing very well that the plaintiffs never would have made him the advance on such terms. Such conduct, however, would in my opinion be grossly dishonest, and the defendant being apparently quite a respectable man, I hesitate to come to the conclusion that his conduct is to be accounted for in that way, and prefer to assume that he had intended to pay, but that some time about September he changed his mind on what appears to me to be bad advice. It is, I think, necessary to consider very carefully whether the Money-lenders Act applies to such a case as this. There seems to me to be from first to last no misrepresentation by the money-lenders, and no taking advantage of the ignorance or of the necessity of the borrower. There is nothing but the taking of £50 for a loan of £100, repayable by instalments over twelve months. The rate of interest calculated at a rate per annum on the amount of principal remaining due from time to time works out, I believe, at about 75 per cent. per annum. I do not know whether the defendant by his letter of the 7th of September meant to call on the plaintiffs to fulfil their promise to make a reduction if he was able to pay before the money was due, but he does not remind them of it, and it will be observed that he was then in arrear. I cannot think that there is anything to complain of in the formal reply asking him to pay up his arrears, and except the solicitor's letter, which hardly assists the defendant's case, all the remaining correspondence is without prejudice. We are therefore unable to say what offers may subsequently have been made, nor can any subsequent refusal of the money-lender to make a reduction for present payment bring the case within the Act if it was not so before. It is said that the Money-lenders Act applies because there was no risk. On the facts, as I have found them, of course the plaintiffs did not really run any substantial risk of losing their money, because the defendant had ample goods on which to levy when judgment is obtained against him; but it by no means follows that the plaintiffs knew or ought to have known how safe the matter really was. They had no security, and were accepting the defendants' personal promise to repay and his own assertions of his ability to do so, uncorroborated otherwise than by his being in apparent possession of a good house of furniture and pictures; and any money-lender must know that there are always risks of the statements of borrowers proving incorrect. Under these circumstances I should suppose a high rate of interest would certainly be suggested, and the borrower's willingness to pay that high rate would tend to make the lender think the risk likely to prove greater than he had thought rather than less. So far as the risk is material, it seems to me that it is not what was the real risk as ascertained after the event which has to be looked at, but how the matter would present itself to the lender at the time, with the experience he certainly would have of borrowers. I do not, however, think that the risk is the only matter to be considered. The words of the Act, leaving out those which are immaterial, are "where proceedings are taken and there is evidence which satisfies the court that the interest charged in respect of the sum actually lent is excessive, or that the amounts charged for expenses, &c., are excessive, and that in either case the transaction is harsh and unconscionable or is otherwise such that a court of equity would give relief, the court may reopen the transaction, &c." Now it is not, of course, permissible to construe the words of the Act by any knowledge we may have of the circumstances under which the Bill was brought in, or of the intentions of those who promoted it, or as to what was introduced into the Bill by way of amendment. I think, however, that the words of the Act do of themselves show quite clearly

that an effort has been made (possibly without much success) to define the transactions which the court may reopen. There seem to me to be clear indications that it was not intended to give jurisdiction to a judge to reopen transactions merely if in his individual opinion too much interest had been charged. Further, I think any court ought to lean against any such construction of an Act of Parliament. The function of a judge in this country, and I should think in all civilized countries, is to ascertain and deduce the rules of law (or of equity when there is a distinct system of equity as distinguished from law), and to decide the rights of the parties before him according to those rules, and not according to his own idea of abstract right or justice. When, before the Judicature Act, a bill was dismissed for want of equity, what was meant was that the suitor had not brought the case within the rules according to which the court of equity gave relief, and not that there was no abstract equity or justice in his case. It would, in my opinion, be mischievous in the extreme if the Legislature were, even in a limited class of cases, such as those between money-lenders and borrowers, to give the judges jurisdiction to decide cases without some definite rule to go by, and I do not think they have done it, although in the Act now under consideration there is considerable difficulty to find the rule. No great while after the Act was passed Ridley, J., in *Wilton* v. *Osborne*, [1901] 2 K. B. 110, 49 W. R. Dig. 124, in a judgment in which he reviewed the equity cases, held that "harsh and unconscionable or otherwise such that a court of equity would give relief" meant so harsh and unconscionable as that a court of equity would give relief, or in some other way besides that recognized way such that a court of equity would give relief. I also held the same, but I think that my opinion may have been unduly influenced by the personal knowledge I had as to how the words in question got into the Act of Parliament. The Court of Appeal, however, in *In re A Debtor* 51 W. R. 370, [1903] 1 K. B. 705, held that this view was wrong, and that a transaction may be "harsh and unconscionable" within the meaning of the Money-lenders Act, though not so harsh and unconscionable as that a court of equity could have given relief before the Act. That decision is, of course, binding on me, and the rule laid down by Mr. Justice Ridley is therefore gone, and we must look somewhere else for the rule as to what transaction may be reopened. The difficulty is that the words remaining are so vague. Harsh and unconscionable are not easy words to construe when the rules of the court of equity have been put out of consideration, but they are at any rate used to describe some conduct of the money-lender, and it may be easy enough in many cases to say whether or not his conduct can be fairly described by those epithets. There is a much greater difficulty as it seems to me in the word "excessive." It is a relative word—exceeding what? Interest is nothing but the sum to be paid for the use of money for a certain time, and the value of a loan of money, as of everything else, is what it will fetch. The usury laws have been done away with, and the Legislature seems to have intentionally avoided re-enacting them and telling us what is to be the maximum of lawful interest. There are, however, some words further on in the section which I think are a guide to the meaning of the Legislature in the use of the word "excessive." If the transaction is re-opened the court may "relieve the person sued from payment of any sum in excess of the sum adjudged by the court to be fairly due in respect of such interest as the court, having regard to the risk and all the circumstances, may adjudge to be reasonable." It seems therefore that the court is to make an adjudication as to what interest, "having regard to the risk and all the circumstances," is reasonable, and then if the interest charged is in excess of that amount it seems that it is excessive within the meaning of that word as used earlier in the section. This task would often be a difficult one, but amongst "all the circumstances" which the court is to take into consideration, surely the fact the borrower has thoroughly understood the transaction and, knowing all the facts much better than the court can possibly do, has been quite willing to pay the interest asked, is one of the circumstances which the court must consider. Often the court will not have that circumstance to guide them. The borrower is frequently ignorant, sometimes imposed upon; frequently in such straits that he has no alternative, but must take the money on the only terms he can get it. In those cases the man's agreement to pay the interest asked can be of no real guide to the court. But in the case before me there is nothing, unless the Act of Parliament forbids it, to prevent my saying that the defendant knew much better than I do what it was reasonable for him to pay for the accommodation he wanted. I see nothing unreasonable in a man who has an income of £1 000 a year, and who may know that he can if he likes live on £750, preferring to pay £72 to a money-lender for the money which is to relieve him from a temporary embarrassment rather than tell his banker or his solicitor or any friend that he is in temporary embarrassment; a man cannot borrow otherwise than from a money-lender except from or with the assistance of people who know him. I do not, of course, know the exact nature of the debts which this defendant desired to pay off. He was not asked, and did not tell me. Even if the debts were only incurred by household expenses beyond his income, or by buying to an extent beyond his income pictures or bronzes, which he seems to collect, he might not desire to disclose that extravagance to his friends; but of course, if it happened that the liabilities were incurred in some other way, such, for instance, as in any form of gambling, of which he might be heartily ashamed, he would be even less likely to wish to disclose it, and be more willing to pay high interest to a money-lender. Why should I say that he was unreasonable in what he did, when he, an intelligent man, must know his affairs better than I do?

I now proceed to deal with the cases on this Act. In *In re A Debtor* the actual decision, as I have already pointed out, was merely that "harsh and unconscionable" was not limited to such cases as a court of equity before the Act would have held to be harsh and unconscionable. The Master of the Rolls, however, and Cozens-Hardy, L.J., each say that under this section the interest charged might be so excessive as of itself to render the bargain harsh and unconscionable. This is repeated and emphasised by Cozens-Hardy, L.J. in *Wells* v. *Allott*, 53 W. R. 176, [1904] 2 K. B. 842, a case in which the actual decision merely was that the fact of interest being high, and therefore *primâ facie* excessive, was sufficient ground for giving a defendant leave to defend under order 14. I hardly think the head-note of the last-mentioned case in the Law Reports is correct, as I do not find in the report that the Lords Justices committed themselves to the view that the question at the trial would be as stated in the head-note, "whether the interest was so excessive as to render the transaction harsh and unconscionable." It may be observed that these expressions of opinion as to the possible consequences of "so excessive" interest are at present *dicta* only. Further, they are *dicta* in cases where the question was whether there should be further investigation, and

not where the facts were ascertained and the question was what decision should be given on them. No judge, at any rate, in the High Court has yet held in any reported case that any particular rate of interest proved before him, say, even 500 per cent. or anything of the kind, is "so excessive" as to be in itself harsh and unconscionable. When, if ever, any judge does so, we shall have to read into the Act that which, as it seems to me, the Legislature intentionally avoided putting there—viz., a maximum rate of interest such as was enacted by the old usury laws. I cannot help thinking that it is owing to a complete misunderstanding of these *dicta* that an idea seems to prevail in some quarters that if only it is shown that a high rate of interest has been charged by a money-lender a judge has complete power at his discretion to make a new contract for the parties. I am sure that those two learned Lords Justices meant nothing of that kind. They may have meant that a very high rate of interest might raise a presumption that that rate had been extorted by conduct harsh and unconscionable, or they may have meant that the same circumstances which showed that the rate was excessive might and would show that the transaction was harsh and unconscionable. At the end of Cozens-Hardy, L.J.'s, judgment in *In re A Debtor*, at p. 711, [1903] 1 K. B., he expressly says that in considering whether the interest is excessive the court must have regard to all the circumstances of the case, which is the proposition upon which I think the whole matter turns. In *Saunders* v. *Newbolt*, 53 W. R. 162, [1905] 1 Ch. 260, the borrower was found by Kekewich, J., to have had his business capacity in fact impaired by habits of intemperance, although the judge thought that this had not gone to such an extent as to be apparent, so that the money-lenders were justified in dealing with him as a person of capacity. Under those circumstances the judge naturally did not consider that the fact that a man so incapacitated had agreed to pay the interest was a material circumstance to be considered on the question whether the interest was excessive under the circumstances. Nor should I consider it material in such a case; but here I am satisfied that the defendant is a man of good business ability. The grounds on which Kekewich, J., in that case held, and the Court of Appeal affirmed, that the transaction was harsh and unconscionable do not appear to apply to the present case, though no doubt the judgments support the argument of the learned counsel for the defendant in this case that the risk is very material to be considered. Then there is a case of *Ponclone* v. *Higgins*, 21 Times L. R. 11, also before the Court of Appeal. There Vaughan Williams, L.J., says as to the Money-lenders Act: "The intention of the Legislature was to deal with cases of persons in financial distress coming to money-lenders in order to get out of their financial distress, which was often urgent and pressing, and not to deal with the case of persons who were in a position to make their own bargain on terms of equality with the money-lender." That seems to me a very important expression of opinion. The facts of that case were so different to those before me that it is unnecessary to go into them. Romer, L.J., says that in every case the judge should go into the circumstances under which the loan was made, and points out that in that case the position of the plaintiff (the money-lender) cast on him duties towards the defendant (the lady borrower), that the plaintiff knew the defendant was relying on him, and that the defendant was a "foolish" woman. Under those circumstances the case was, of course, a plain one. Cozens-Hardy, L.J., repeats his proposition that the interest might be deemed so extravagantly excessive as alone to satisfy the court that the transaction was harsh and unconscionable, on which I have already commented. He says also that all the circumstances must be considered, and he enumerates various circumstances which he thinks have to be considered, and he does not amongst them mention that one which seems to me so very material when it is present—viz., the free and voluntary agreement of a competent and intelligent borrower to pay the interest asked; but then that point did not arise on the facts before him, nor, indeed, does it very often arise. Then there is a recent case before Joyce, J.: *Part* v. *Bond*, reported 93 L. T. 49. In that case an advance at a high rate had been made, secured by a second mortgage on some property of the borrower, Joyce, J., says: "The Act gives no indication what rate of interest is to be deemed excessive under it, nor what transactions are to be deemed harsh and unconscionable," and after commenting on the word harsh, says: "With regard to the rate of interest, I think that the rate of interest is excessive if it be extraordinary, such as much higher than 10 per cent., or even less on a reasonably safe security, and if an excessive rate of interest be obtained merely through the folly or weakness of the borrower or his urgent necessity, real or imaginary, with knowledge on the part of the lender such as he must possess, then in my opinion the transaction is harsh and unconscionable." Now with this statement as to what is harsh and unconscionable I entirely agree; but there is a doubt as to what the learned judge meant to say as to the interest. I think he meant the words "on a reasonably safe security" to apply to the words "much higher than 10 per cent.," as well as to the words, "or even less." That is to say, that he meant if there was a reasonably safe security 10 per cent. or even less would be excessive. In the case before him there was security. There is, perhaps, something like a market rate for loans on security, but I do not see how there can be any rate, ordinary or extraordinary, for loans on a promissory note without security, and I hardly think the judge would have referred to 10 per cent. in reference to such loans. One of the difficulties of dealing with the question of interest on the footing of what is ordinary or extraordinary is that the efforts of the Legislature to assist borrowers undoubtedly have the effect of raising the normal rate of interest. It is a notorious fact that the Bill of Sale Act, 1882, making void bills of sale not according to a form had the effect as soon as a few decisions had been given on it of raising the normal rate of interest on money-lenders' bills of sale from 25 per cent. or 30 per cent. which had been about the highest before, to 60 per cent., which became the regular rate. This was pointed out by Cave, J., and may easily be verified by a reference to the reported cases on bills of sale. Practically, I think any test as to interest being ordinary or extraordinary is, for the purpose of the Money-lenders Act, out of the question, except perhaps in cases of loans on security. There can be no standard rate on personal loans, and where the parties are reasonably on terms of equality a judge cannot, I think, do better than adopt what they themselves have agreed on, although, of course, when that is not the case he has to adjudge what is reasonable as best he can under all the circumstances. I next come to a decision of my own, *Levene* v. *Greenwood*, reported in 20 Times L. R. 389, which has been followed in Ireland by the Lord Chief Justice in a case of *Wells* v. *Joyce*, [1905] 2 Ir. Rep. 134. I there held that a default clause understood by the lender but not understood by the borrower made the transaction harsh and unconscionable. To that I quite adhere. There may be some difficulty about the word harsh, but unconscionable seems to me to quite hit that case. Amongst the very things that the Act does mean to

hit, and I think does effectually hit, are the money-lending traps for the unwary. I should not hold 60 per cent. per annum to be of itself necessarily excessive or harsh and unconscionable, though of course the circumstances might easily make it so, nor should I hold interest of 1s. in the pound per month (which of course is 60 per cent. per annum) to be necessarily so either; but if I found, as would most likely be the case, that the interest was put into the shape of 1s. in the pound per month in order to disguise it, and that in fact the borrower had not appreciated it, I should then hold that the interest was both excessive and harsh and unconscionable. In the present case there was a default clause, but I think the defendant quite understood and appreciated it. He was clearly confident in his ability to pay and that he would not make default, and when this clause was under discussion what he said was in substance that he was more likely to want to pay before it was due than to get into arrear, and wanted to know what reduction would be made in that case. This case does not seem to me to be at all the same as *Levene* v. *Greenwood*. I would also point out that the Money-lenders Act does not, as the Bill of Sale Act, 1882, did, require that the interest should be rateable interest. When a loan is to be for an indefinite time, of course the rate of interest is all-important, but where the loan is for a definite period, repayable by instalments or otherwise, I do not think the borrower generally cares very much what the rate of interest on the amount from time to time outstanding, as his instalments are paid, works out at. What he does want to know is how much he is to pay for getting the accommodation which he asks, and when a person of intelligence and business habits ascertains and understands that, I am not sure that it is very material whether he understands the real rate per annum of the interest or not. Assuming, however, that he is willing to pay the sum asked of him for the loan for a year, he probably will not be willing to pay that sum for the loan for a month only, and consequently a default clause not understood is in my opinion a trap.

I have now gone through all the cases, and the conclusion at which I arrive is that the judge is entitled to consider amongst "all the circumstances of the case" the fact that the borrower thoroughly understood the transaction, and, without any misrepresentation or any pressure other than the mere request to pay so much interest, voluntarily agreed to pay it, and I myself think that when the judge finds those to be the facts he ought to find that the interest which the man so agrees to pay is reasonable, and therefore not excessive within the meaning of the Act, and I do so find. I think I ought to add that this view of the Act in no way interferes with its operation in all the cases to which it was, as Vaughan Williams, L.J., pointed out, really meant to apply. Whenever the borrower is in such a state that his agreement cannot be taken as a test of what is reasonable—when he is ignorant, when advantage is taken of him, or when his necessities are such that he practically has no free will—there is no difficulty in applying the Act, and judges are not likely to hesitate to apply it. I ought further to say that if in this case I found that the defendant had from the first intended not to pay the interest contracted for, but meant to lay a trap for the money-lender and take his money, and then, when he had repaid by instalments the amount of actual money received, to set up the Money-lenders Act and claim to be relieved from payment of the interest contracted for, I should hold that that conduct also would be a circumstance which I ought to take into consideration, and that I ought to hold in that case that it was most reasonable that he should pay what he contracted to pay. He was, to use Vaughan Williams, L.J.'s, expression, in a position to bargain on terms of equality with the money-lender. The very able argument of the defendant's counsel, Mr. Napier, was based mainly on the absence of risk by reason of the defendant's ability to pay. If it were the case, which I am afraid often happens, of a borrower yielding to pressure put upon him by a money-lender taking advantage of his necessities, I should not say that the mere fact of his knowing of the Money-lenders Act and intending to try and get the benefit of it to relieve him of some part of what he had under pressure agreed to would disentitle him to that relief; but for a man in the position this defendant was to take the loan on the plaintiff's terms, apply the money for the purpose for which he wanted it, and then turn round and say that he would not pay the agreed price of the accommodation because it was excessive, is a very different case, and I should have no hesitation in saying that as against him it was not excessive. I have already said that I was not prepared to find that this was the true explanation of this defendant's conduct, but rather assume that he is, as he appeared to be, a respectable man who would not so act. I have based my judgment in this case on the ground that the interest must in the special circumstances of this case be adjudged to be reasonable, and therefore not excessive, but I must add that I am quite unable to see how on the facts the transaction can possibly be said to be harsh and unconscionable. Whatever may come within the true meaning of those words as used in the Act, they certainly do refer in some way to the conduct of the money-lender. Here all he did was to name his price for a loan without security to a man whom he did not know, depending only on his personal assurance that he had means to repay, with such corroboration as seeing the style in which he lived and the furniture and pictures which he claimed to be his, afforded. That price the borrower, without being in any really pressing necessity, immediately agreed to give without any bargaining or remonstrance, merely asking one question and getting a satisfactory answer. Even if the price asked was higher than would be expected to be agreed to between two parties bargaining on equal terms, why is the mere proposal of the terms harsh and unconscionable? I fail to see that it is. I therefore give judgment for the plaintiffs for the £62 10s. I do not give any interest, as the last instalment is only just due, but I do give High Court costs. If the defendant desires a stay he can have it on paying the money into court.

Solicitors for the plaintiff, *White & Co.*

Solicitor for the defendant, *W. S. Crookes.*

Lunacy.

(Collins, M.R., and Vaughan Williams, Romer, Stirling, Cozens-Hardy, and Moulton, L.JJ.) April 10.

In re S. S. B. (*a*.)

Lunatic—Lunatic not so found—Tenant for life of settled land—Person appointed to exercise powers of committee—Power of sale—Lands Clauses Act, 1845 (8 *&* 9 *Vict. c.* 18), *s.* 7—*Settled Land Act,* 1882 (45 *&* 46 *Vict. c.* 38), *ss.* 3, 53, 62—*Lunacy Act,* 1890 (53 *&* 54 *Vict. c.* 5), *ss.* 116, 120, 128.

The court has no power to authorize the person who has been appointed by the judge in lunacy, under section 116, *sub-section* 2, *of the Lunacy Act,* 1890, *to exercise, as regards the estate of a person of unsound mind not so found by inquisition, such of the powers of the Act as are made exercisable by the committee of the estate of a person of unsound mind so found by inquisition, to sell land, of which the person of unsound mind is tenant for life, either under the Lands Clauses Act,* 1845, *or under the Settled Land Act,* 1882.

In re Baggs, [1894] 2 *Ch.* 416n, *approved and followed.*

Appeal from an order of Master Ambrose, K.C., one of the masters in lunacy in chambers.

On the 25th of June, 1901, an order was made under section 116 of the Lunacy Act, 1890, which, after reciting that it had been established to the satisfaction of the master that S. S. B., though not lawfully detained as a lunatic nor so found by inquisition, was through mental infirmity arising from age incapable of managing his affairs, ordered that his wife and nephew should be and they were thereby authorized to exercise as regards the estate of S. S. B. the powers of a committee of the estate as in the case of a person of unsound mind so found by inquisition. These two persons are hereinafter called the "*quasi*-committee" or "receivers."

S. S. B. was tenant for life of certain land which was settled by the will of his grandfather in 1840. The Great Northern Railway Co., under the powers of a special Act which incorporated the Lands Clauses Act, 1845, gave notice to treat for a part of the land of which S. S. B. was tenant for life. The amount of compensation was duly assessed, and the question arose whether the *quasi*-committee could make a title to and sell the land. The *quasi*-committee accordingly applied to the master in lunacy for an order that they might be at liberty in the name and on behalf of S. S. B.—(1) to exercise with respect to the land comprised in the notice to treat the power of sale conferred on a tenant for life by section 7 of the Lands Clauses Act, 1845; and (2) with that view to nominate in his name and on his behalf an able practical surveyor pursuant to section 9 of the Act; or (3) that they (as the parties for the time being entitled to the receipt of rents and profits of the lands in question) might be at liberty in their own names to exercise the power of sale conferred by section 7, and to nominate an able practical surveyor.

The master held that he had no jurisdiction to make the order.

The *quasi*-committee appealed.

A. Adams, for the appellants.

The arguments and the relevant statutory enactments are fully dealt with in the judgments.

Cur. adv. vult.

(*a*.) Reported by W F. BARRY, Esq., Barrister-at-Law.

April 10.—COLLINS, M.R., read the following judgment: The question in this case is whether, where a tenant for life of settled lands is a lunatic not so found by inquisition, the court can authorize the *quasi*-committee to carry out a sale of the settled lands under the Lands Clauses Act, 1845. I will consider the case, first, apart from section 7 of the Lands Clauses Act, 1845, under the Settled Land Act, 1882, and the Lunacy Act, 1890. The method of legislation adopted as to the execution of powers vested in persons of unsound mind but not found by inquisition to be lunatics has had the effect of raising a number of puzzles for the decision of the courts which have had to deal with this branch of the law. The result is that legislation sufficiently difficult in itself of interpretation has become still more difficult by reason of the attempts from time to time made by the courts to solve the questions presented to them. By the Settled Land Act, 1882, powers were conferred on tenants for life as defined by that statute to sell (section 3) and to lease (section 6) the settled land. In the case of persons of unsound mind, however, no provision was made for the exercise of these powers except where the lunatic had been so found by inquisition, in which case these powers might be exercised by the committee of his estate under order of the court having jurisdiction in lunacy (section 62). The result, therefore, up to this point was that the Settled Land Act, 1882, provided for the case of lunatics so found by inquisition, but made no provision for persons not so found. The next step is the Lunacy Act, 1890—"An Act to consolidate certain of the enactments respecting lunatics." This Act, being, as its heading imports, a consolidating Act, repeals a vast number of prior enactments and forms a code in itself. The method by which it deals with the exercise of powers vested in lunatics not so found by inquisition is peculiar, and has been the source of much of the confusion which has crept into the decisions. Instead of enacting what powers might be exercised on behalf of persons of unsound mind not so found by inquisition, which would seem to have been the simpler course, it provides by section 116 that the management and administration provisions of the Act are to apply to persons in a number of different categories, including lunatics so found and others not so found. It then provides (sub-section 2) that, in case of any of the above-mentioned persons not being lunatics so found by inquisition, "such of the powers of this Act as are made exerciseable by the committee of the estate under order of the judge" shall be exercised by such person as the judge may direct. The judge's powers, therefore, to authorize the *quasi*-committee to act for a lunatic not so found by inquisition are measured by the powers conferred upon him by the Act itself to authorize action by the committee in the case of lunatics so found by inquisition. This compels us to ascertain what the Act empowers the judge to do in the case of a lunatic so found. This is dealt with, so far as is material to this case, in sections 120 and 128. Section 120 empowers the judge to authorize the committee to do a number of acts described under letters (*a*) to (*l*). These are all acts on behalf of the lunatic in his own right. Section 128 deals with powers vested in the lunatic in the character of trustee or guardian, and enables the judge to authorize the committee to exercise them. In order to invoke the judge's jurisdiction, therefore, to order the *quasi*-committee to exercise the power of sale as desired in this case, it must be brought under one of the heads comprised in sections 120 and 128. Headings (*a*) and (*l*) in section 120 are the only ones that seems to relate to this case, but (*a*) is inapplicable as it relates only to the property belonging to the lunatic, which is not true of the fee simple here, and (*l*) is inapplicable as the

power sought to be exercised cannot be said to be vested in the lunatic for his own benefit. Neither does section 128 cover the case, for unless *In re Baggs*, [1898] 2 Ch. 416*n*., was wrongly decided, the power in question is not vested in the lunatic in the character of trustee or guardian. The result is that, though the Settled Land Act confers a power of sale on the tenant for life, it cannot in this case be exercised—first, because the Act does not provide for the exercise of the power on behalf of a lunatic not so found by inquisition; secondly, because that gap has not been cured by anything in the later Act. It is not in the words of section 116, sub-section 2, one "of the powers of this Act made exercisable by the committee of the estate." This, in fact, is the decision in *In re Baggs*. There is, however, another decision of the same court in *In re X.*, 42 W. R. 657, [1894] 2 Ch. 415, which seems difficult to reconcile with that decision. In the latter case a person of unsound mind, for whom a *quasi*-committee had been appointed, was tenant for life of lands under a settlement containing a power enabling each successive tenant for life in possession to sell the settled lands, and it was held that the court had power under sections 120 and 128 of the Act of 1890 to authorize the sale. The only differing fact in the two cases is that in *In re Baggs* the power of sale was conferred by the Settled Land Act, in *In re X.* by the settlement itself. If the latter is right it involves two propositions—(1) that the sections relied on do enable the court to exercise a power of sale vested in a tenant for life, notwithstanding the reasons given in *In re Baggs* for the contrary conclusion; (2) that the reason why provisions thus held capable of applying to the case of a sale of the settled lands by the committee of a lunatic tenant for life were inapplicable in *In re Baggs* must be found, not in the nature of the provisions themselves, for they, of course, were identical in both cases, but in the fact that in *In re Baggs* the power itself was derived under the Settled Land Act, and not under settlement. Or, in other words, that the Settled Land Act inhibited the exercise by the judge of the power conferred upon him by sections 120 and 128 of the Act of 1890. This inhibition, if it exists, must be found in the words of section 62 of the Settled Land Act, 1882, construed on the principle *expressio unius exclusio alterius*, and the permission there given to the committee of a lunatic so found by inquisition must be construed as a statutory expression of intention that it shall be exercised by no other person. Read in the light of such a prohibition, sections 120 and 128 of the Act of 1890 would be limited to cases where the power of sale was derived otherwise than under the Settled Land Act. The later case of *In re X.* purported not to interfere with *In re Baggs*, and it seems to me that they cannot be reconciled except upon the line of reasoning above stated, although I confess it involves a somewhat constrained construction of section 62. There is, however, another case which must be considered before it can be decided that this method of reconciling the authorities can be adopted. That is the case of *In re Salt*, 44 W. R. 146, [1896] 1 Ch. 117. It was there held that the power of leasing conferred on a tenant for life by section 6 of the Settled Land Act, 1882, could by an order of the court under clause (*h*) of section 120 of the Lunacy Act, 1890, be exercised by the *quasi*-committee of a lunatic not so found by inquisition. This decision, if right, negatives the existence of any prohibition in section 62 of the Settled Land Act debarring any person other than the committee of a lunatic so found by inquisition from exercising the power of leasing conferred by that statute. As section 62 applies equally to all powers conferred by the Settled Land Act, no distinction can be made so far as that Act is concerned between the power to sell and the power to lease. If, therefore, the only hypothesis on which, as it seems to me, *In re Baggs* and *In re X.* can be reconciled be adopted, *In re Salt* cannot stand. On the other hand, if we are content to reject *In re X.*, then there is no inconsistency between *In re Baggs* and *In re Salt*, and both may stand. But on no hypothesis, as it seems to me, can all three stand together. Lindley, L.J., was a party to the decisions both in *In re Baggs* and in *In re X.*, and delivered the leading judgment in both cases, and there is a difficulty, therefore, in concluding that they are irreconcilable. On the other hand, A. L. Smith, L.J., was a party to the decisions both in *In re Baggs* and in *In re Salt*. On the whole I think that the difficulty in adopting the hypothesis which alone, as it seems to me, can reconcile *In re Baggs* and *In re X.* turns the scale, and that the former must be taken as deciding that the power could not be exercised in that case, not because it was derived under the Settled Land Act and was thereby differentiated from a power drawn from any other source, but because nothing could be found in sections 120 and 128 of the Act of 1890 letting in the power of the judge to authorize its exercise. If this is so, *In re Baggs* and *In re Salt* are harmonized, but there is an irreconcilable difference between them both and *In re X.*, and we must choose between them. There is some ground for thinking that the omission to empower the *quasi*-committee to exercise the power of sale conferred on tenants for life by the Settled Land Act was deliberate, as Moulton, L.J., points out in his judgment, which I have seen, and I am of opinion, on the whole, that the wiser course will be to follow *In re Baggs*. The position of the *quasi*-committee is certainly no better in relation to a sale under the Lands Clauses Act than under the Settled Land Act: see *In re Tugwell*, 33 W. R. 132, 27 Ch. D. 309. It follows that the court cannot authorize the *quasi*-committee to carry out the sale.

VAUGHAN WILLIAMS, L.J., read the following judgment: In my judgment the court in *In re Baggs* decided, first, that neither under section 62 of the Settled Land Act, 1882, nor under any other part of that Act, was any power given except to the committee of a lunatic so found to exercise the power of sale vested by the Settled Land Act, 1882, in a tenant for life, and therefore did not give this power in the case of a tenant for life coming to be a lunatic not so found, but for the protection of whose property an order had been made under the Lunacy Act, 1890, or whose person was lawfully detained as a lunatic not so found. The fact that this section 62, which was an enabling and not a prohibitive section, only gave such limited powers clearly did not prevent the Legislature by a Lunacy Act of later date from extending the right to exercise this power of sale of a tenant for life under the Settled Land Act, 1882, to persons other than the committee of a lunatic so found by inquisition. The court, therefore, in *In re Baggs* looked to see if the Lunacy Act, 1890, gave power in sections 120 and 128 or otherwise, in the case of lunatics not so found, to the court to order that some person other than such committee might exercise the power of sale vested in the lunatic tenant for life not so found, and came to the conclusion that the Act of 1890 gave no such power, and I think that the conclusion in *In re Baggs* was absolutely right. In the case of *In re X.*, the power of sale in the tenant for life was not derived from the Settled Land Act, 1882, but from a deed of settlement, and the court, without differing in any way from the judgment in *In re Baggs*, was able to make the necessary order for sale. Lastly, in the case of *In re Salt*, the power

sought to be exercised being simply a leasing power, the court found that in respect of such power section 120 (*h*) of the Act of 1890 gave power to the court to order someone to exercise this leasing power for the lunatic, and in respect of this power of leasing extended the limitation arising on the construction of section 62 of the Settled Land Act, 1882. But in the case of the power of sale vested by the Settled Land Act, 1882, in a lunatic tenant for life, section 120 did not give this power to the court to order someone to exercise the power of sale. I find no such inconsistency in these cases as would prevent them standing together.

ROMER, L.J.—I have had an opportunity of reading the judgment which has been delivered by the Master of the Rolls, and I concur in it.

STIRLING, L.J., read the following judgment: In this case the question is whether the judge in lunacy has power to authorize the receiver of the estate of a person of unsound mind not so found appointed under section 116 of the Lunacy Act, 1890, to exercise the power of sale of that estate of which that person is tenant for life, when it is conferred by section 7 of the Land Clauses Act, 1845. Section 7 authorizes (amongst other persons) tenants in tail or for life, married women seised in their own right, guardians, and committees of lunatics and idiots, to sell, convey, and release; and provides that the power so to sell, convey, and release may be exercised by all such parties, not only on behalf of themselves and their respective heirs, executors, administrators, and successors, but also for and on behalf of every person entitled in reversion, remainder, or expectancy after them, and as to such married women, whether of full age or not, as if they were sole and of full age, and as to such guardians on behalf of their wards, and as to such committees on behalf of the lunatics and idiots of whom they are committees respectively, and that to the same extent as such wives, wards, lunatics, and idiots respectively could have exercised the same power if they had respectively been under no disability. The effect of this enactment appears to me to be to confer the power of sale on tenants in tail and tenants for life when not under disability; but as regards persons under disability, whether of infancy or unsoundness of mind, to confer the power on the guardian of the infant or the committee of the person of unsound mind. The power so conferred on guardians and committees would be available when the infant or person of unsound mind is entitled, not merely as tenant in tail or for life, but in fee; in which last case, of course, the owner, if not under disability, does not require and has not conferred upon him any power under the Lands Clauses Consolidation Act, 1845. Now section 116, sub-section 2, of the Lunacy Act, 1890, confers on the judge in lunacy power to order that such of the powers of that Act as are made exercisable by the committee of the estate under order of the judge shall be exercised by the receiver. Section 120 empowers the judge by order to authorize the committee of the estate of the lunatic to do (amongst others) the following things: "(*l*) Exercise any power or give any consent required for the exercise of any power where the power is vested in the lunatic for his own benefit or the power of consent is in the nature of a beneficial interest in the lunatic." Section 128 confers a similar power on the judge "where a power is vested in a lunatic in the character of trustee or guardian or the consent of a lunatic to the exercise of a power is necessary in the like character or as a check upon the undue exercise of the power." If the application before the court is to be granted, the jurisdiction must be derived from one or other or both of these sections. In each section the power spoken of is one vested in the lunatic, and neither section confers on the court any authority with respect to powers which by statute are vested not in the lunatic but in his committee. In my judgment, therefore, the judge in lunacy has no jurisdiction under section 116, sub-section 2, to order that a power which would by statute be vested in the committee of a lunatic (if there were a committee) shall be exercised by the receiver of the estate of a person of unsound mind. For the reasons already given I think that the power conferred by section 7 of the Lands Clauses Consolidation Act, 1845, is not conferred on a person under disability; and in the absence of authority I should be of opinion that there is no jurisdiction to make the order asked for. The cases of *In re Baggs*, *In re X.*, and *In re Salt* were referred to. None of them governs the precise case before us, and the reasons given for the decisions do not seem to be altogether in accordance; but it is plain that the very eminent judges who decided the two later cases did not intend to depart from or overrule the first. In these circumstances I cannot say that those cases afford very clear guidance for the decision of the present case; but *In re Baggs*, although decided with reference to another statute, the Settled Land Act, 1882, is (unless overruled) an authority against the applicant; and I am not prepared to overrule it. I think, therefore, that the application must be refused.

COZENS-HARDY, L.J., read the following judgment: The question on this appeal is whether it is competent to authorize the receiver or *quasi*-committee of a person of unsound mind not so found, who is tenant for life of a settled estate, to sell a portion of the property to a railway company under the provisions of the Lands Clauses Consolidation Act, 1845. This depends upon the true construction of section 116 of the Lunacy Act, 1890, taken together with section 120 and section 128. There is no decision under the Lands Clauses Act, but there is a decision, *In re Baggs*, that the similar power conferred by the Settled Land Act, 1882, cannot be exercised by a *quasi*-committee, and if that decision is sound I think it must govern the present case. The Settled Land Act, 1882, gives a power of sale (section 3) and a power of leasing (section 6) to every tenant for life. See the definition of tenant for life, section 2 (5). If the tenant for life is an infant, the powers of a tenant for life may be exercised on his behalf in the manner prescribed in section 60. If the tenant for life is a lunatic so found by inquisition, the committee may in his name and on his behalf exercise the powers of a tenant for life under the Act (section 62). There is no provision in the Act dealing with the case of a tenant for life who is of unsound mind but not so found, and no provision is made for the exercise of the powers which are conferred upon him. And in 1882 there was no machinery available for the purpose. There are no negative words in section 62. That section did not create the powers. It only prescribed in a particular case how the powers of a tenant for life who is a lunatic so found are to be exercised. Then we come to the Lunacy Act, 1890. Section 116 enables the judge in lunacy to order "such of the powers of this Act as are made exercisable by the committee of the estate under order of the judge" to be exercised by the receiver. Section 120 is the material section. The judge may by order authorize and direct the committee of the estate of a lunatic to do all or any of the following things: Clause (*a*) does not help. It deals only with a sale of property belonging to the lunatic, and not with a sale of property of which he is only tenant for life. Clause (*h*),

the judge may authorize the committee to "execute any power of leasing vested in a lunatic having a limited estate only in the property over which the power extends." This exactly meets the case of section 6 of the Settled Land Act, 1882; and *In re Salt* rightly decided that by the combined operation of section 116 and section 120 (*h*) the receiver might be authorized to execute a power of leasing, whether a statutory power or a power conferred by the express terms of the deed or will creating the settlement. But clause (*h*) is limited to a power of leasing, and it seems to furnish a powerful argument against the contention that section 120 applies to all powers under the Settled Land Act. It is a plain case for the application of the *expressio unius* doctrine. Clause (*l*) cannot apply, for a power of sale given to a tenant for life is not a power "vested in the lunatic for his own benefit." See the observations of Rigby, L.J., in *In re Salt*, [1896] 1 Ch., at p. 121. Those words are addressed to common and well-known powers, such as the general power frequently given to or reserved by a tenant in tail in a resettlement which enables him to override all the limitations of the resettlement. I am therefore unable to find anything in section 120 which enables a committee of a lunatic tenant for life to exercise the power of sale conferred on the lunatic by the Settled Land Act, 1882. It is true that under section 62 of the Settled Land Act, 1882, he can sell, but that is not one of "the powers of this Act"—that is, the Lunacy Act, 1890, made exercisable by the committee. But then it is said that a power of sale given to a tenant for life is a power of sale vested in a lunatic "in the character of trustee," and that section 128 applies. I cannot accept this view. It is expressly repudiated by Lindley, L.J., in *In re Baggs*, and by Rigby, L.J., in *In re Salt*. The result is that in my opinion the decision in *In re Baggs* was sound, and ought to be followed. A difficulty has, however, arisen by reason of the subsequent decision in *In re X*. In that case it was suggested that the decision in *In re Baggs* depended upon the language used in section 62 of the Settled Land Act, 1882; but, with the utmost respect, I am unable to follow this suggestion. It is inconsistent with the whole judgment of Lindley, L.J. But the decision of the court in *In re X*. cannot, in my opinion, be reconciled with the decision in *In re Baggs*. I can see no ground for holding that a power of sale conferred upon a lunatic tenant for life by the settlement differs in any material respect from a similar power of sale conferred upon him by the Settled Land Act. In neither case is it one of "the powers of this Act." There are many powers which cannot fairly be brought within the language of either section 120 or section 128; *e.g.*, a power to jointure, a power to raise portions, and the various powers other than leasing powers conferred by the Settled Land Act upon limited owners. This distinction was recognized by the Court of Appeal in *In re Earl of Sefton*, 47 W. R. 49, [1898] 2 Ch. 378. It is, therefore, necessary to choose which of these two authorities ought to be accepted, and I feel bound to say that I think *In re Baggs* is the better decision and the one that ought to be followed. I am aware that the more convenient view would be to support *In re X*. But our function is limited to interpretation, as distinct from legislation. It will be for Parliament to enact, if it thinks fit, that every power, whether conferred by statute or not, which might be exercised by a lunatic if of sound mind may be exercised, with the authority of the judge in lunacy, by a committee, and also by a *quasi*-committee. I can find nothing in the present statutes to this effect. The result is that, in my opinion, the master was right in holding that there is no jurisdiction to authorize the *quasi*-committee to sell under the Lands Clauses Act.

MOULTON, L.J., read the following judgment: The point raised in this case is very simply stated. We have to decide whether the receiver or, as he may be termed, the *quasi*-committee of a person of unsound mind not so found by inquisition can sell settled lands, of which the lunatic is the life tenant, to a railway company which has compulsory powers of purchase of such lands under the provisions of its special Act, which incorporates, in the ordinary way, the necessary provisions of the Lands Clauses Consolidation Act, 1845, relating to such purchases.

A life tenant, if under no disability by reason of being of unsound mind, has a power of selling the settled land by virtue of two statutes—viz., (1) he has a general power of selling such lands under section 3 of the Settled Land Act, 1882; and (2) he has the special power of selling such lands to parties authorized to take them by a special Act which incorporates the provisions of the Lands Clauses Consolidation Act, 1845, with respect to the purchase of land by agreement. This special power of sale is given by section 7 of that Act.

In the case of a lunatic so found by inquisition no difficulty arises. Section 62 of the Settled Land Act enables his committee to exercise the power on his behalf, and section 7 of the Lands Clauses Consolidation Act, 1845, appears to me, on its true construction, to give the power of sale directly to the committee without even going through the process of conferring it in the first place on the lunatic and then empowering the committee to exercise it on his behalf. But both these statutes are of earlier date than the Lunacy Act, 1890, and thus make no reference to the *quasi*-committees of persons of unsound mind not so found by inquisition. It is, therefore, to the provisions of this last mentioned Act that we must look for any authorization for the exercise of either of these powers of sale by *quasi*-committees.

These *quasi*-committees are appointed under the provisions of section 116 of the Lunacy Act, 1890, which, after enumerating various classes of persons of unsound mind not so found by inquisition, provides with regard to them by sub-section 2 that "such of the powers of this Act as are made exercisable by the committee of the estate under order of the judge shall be exercised by such person in such manner and with or without security as the judge may direct." We have therefore to ascertain what powers of that Act are made exercisable by the committee of the estate of a lunatic. These powers are set out in sections 120 and 128. The latter concerns only those cases in which a power is vested in a lunatic in the character of trustee or guardian, or in which his consent is necessary in a like character. The section which deals directly with dealings with property that belongs to him or in which he is interested is section 120. The case of sale is dealt with first. Sub-section (*a*) empowers the committee to "sell any property belonging to the lunatic." These words are obviously too narrow to include land of which he is only the life tenant. Is the omission intentional and effective, or can we supply the missing powers from some of the other sub-sections? That the omission was intentional can hardly, I think, be doubted. The power of sale by a life tenant under section 3 of the Settled Land Act, 1882, was so well known and so constantly put into operation that it is impossible that the omission of words which would include it (such, for instance, as "or in which he is interested," or "of which he has the power of sale") could be *per incuriam*. Moreover, an examination of the subsequent sub-sections of section 120 shows that the drafts-

man had section 3 of the Settled Land Act, 1882, before him, and that he expressly gave to the committee other of the powers given to the tenant for life by that section. Thus sub-section (*b*) of section 120 of the Lunacy Act, 1890, is evidently taken from sub-sections (iii.) and (iv.) of section 3 of the Settled Land Act, 1882, the language being in its essentials identical. Here we find a power given to the committee extending not only to property "belonging to the lunatic," but also to property "in which he is interested." Sub-section (ii.) of section 3 of the Settled Land Act, 1882, however, which, like sub-section (i.) relates to the power of sale (in this instance mainly to copyholds), has no corresponding sub-section in section 120 of the Lunacy Act, 1890. Further, we find that by sub-section (*h*) of the last-mentioned section the whole of the powers of leasing property in which the lunatic has only a limited estate (*i.e.*, powers such as are given by Part IV. of the Settled Land Act, 1882) are transferred to the committee. There can hardly be a doubt, therefore, that in sub-section (*a*) the Legislature intentionally restricted the empowerment of the committee in the case of sale to property belonging to the lunatic to the exclusion of property in which he had only an interest which gave him a power of sale.

The next question is whether we can find in any of the other sub-sections something which supplies this omission. It is suggested that the language of sub-section (*l*) is broad enough to do this. If that sub-section stood alone there would be much to say for this view. But we have to construe section 120 as a whole, and it is difficult to accept a construction which would make sub-section (*h*) absolutely and even formally superfluous, and would render inexplicable the insertion of the important words "or in which he is interested" in sub-section (*b*), which place it in such marked contrast to sub-section (*a*). Even without the authority of any decisions of this court to guide me I should have come to the conclusion that in its present collocation sub-section (*l*) must receive a more limited construction, and that the powers therein referred to are of a different type to the powers over settled land given to the tenant for life by the Settled Land Act, 1882.

The other suggestion is that, so far as the property in the settled land is not in the lunatic, he is in the position of a trustee for those interested, and that therefore the committee has power to sell their interest under section 128 of the Lunacy Act, 1890. This contention is sought to be supported by section 53 of the Settled Land Act, 1882, which provides that in relation to the exercise by himself of any of the powers of that Act the tenant for life shall be deemed to be in the position of a trustee for the parties interested. The power of sale is, therefore, sought to be divided into two parts—viz., (1) the power of selling his life interest which is justified by section 120 (*a*), and (2) the power of sale of the remaining interests, which is sought to be justified by section 128. It seems to me most improbable that if the Legislature had intended to give to the committee this power of sale of property of which the lunatic is life tenant it would have done so in a way so roundabout and unnatural, or that it would have spoken of the power of sale of the settled land as a power "vested in a lunatic in the character of trustee." These ingenious attempts to supply what is, to my mind, so clearly an intentional omission do not, in my opinion, accord with the canons of sound construction of statutes, and even if I had no authority to guide me I should accept the interpretation that I consider the more natural one—viz., that those sections of the Lunacy Act, 1890, do not give the committee the power of selling settled land which is vested in the lunatic by the Settled Land Act, 1882.

But there is express authority on the point. The court in the case of *In re Baggs* had before it the precise question which is raised in the present case, so far as it relates to the powers given by the Settled Land Act, 1882. All the arguments pressed upon us were there urged, but the court unanimously came to the conclusion which, as I have said, appears to me to be the right one. That they did so is expressly recognized in the case of *In re Salt*, and Rigby, L.J., there states that he would have considered himself bound by and would have followed the decision of the court in *In re Baggs* had the point in that case been the same. I agree with him in thinking that this court would be so bound, so that the view which I hold to be correct as a matter of construction I also hold as having been decided to be the right view by a decision which is binding upon me.

The real difficulty in this case arises from the decision of the court in the case of *In re X*. There the court (two members of which were parties to the judgment in *In re Baggs*) had before them the case of a lunatic not so found by inquisition who was the life tenant under a settlement which gave to him as such life tenant the power to sell the settled land with the written consent of the trustees. They held that this differed from the case of *In re Baggs*, and that the Lunacy Act 1890, ss. 120 and 128, enabled the judge to permit the receiver to exercise the power of sale. I do not myself see the materiality of the distinction that the power of sale of the settled land was, in that case, vested in the lunatic by a settlement, whereas in *In re Baggs* it was vested in the lunatic by section 3 of the Settled Land Act, 1882, and if that point were before us it would, in my opinion, require careful consideration before we could come to the conclusion that the distinction was material. But it is clear that the court thought it was so, and it was on this ground, and on this ground alone, that they decided the case. They showed no intention to dissent from the decision in *In re Baggs*, but rather to affirm it. This decision, therefore, does not justify us in departing from the clear and unmistakable principle laid down by the court in that case. I may say that I cannot believe that the court in deciding *In re X*. gave to section 62 of the Settled Land Act, 1882, a prohibitive force limiting the power to committees to the exclusion of *quasi*-committees on the principle of *expressio unius*, &c. This principle can only apply to matters as existing at the date when the *expressio* takes place, and at that date the office of *quasi*-committee did not exist.

So far I have dealt with the power of sale given by the Settled Land Act, 1882. The case of section 7 of the Lands Clauses Consolidation Act, 1845, is still clearer. Even if we assume that the power of sale is vested by that section in the lunatic, the restriction of the powers of sale under section 120 to the case of property belonging to the lunatic applies equally, and there is still less ground for arguing that the power or any part of it comes under section 128.

I am of opinion, therefore, that the law as it at present stands does not authorize making an order that a *quasi*-committee shall sell lands of which the lunatic is life tenant.

Appeal dismissed.

Solicitors for the appellant, *Parson, Lee, & Co.*

Court of Appeal.

From Chan. Div. (Collins, M.R., and Romer and Cozens-Hardy, L.JJ.) — Feb. 5, 6.

In re JACKSON AND HADEN'S CONTRACT. (*a.*)

Vendor and purchaser—Condition of sale—Right of rescission—Misdescription—Right of compensation.

An arbitrary power to rescind a contract of sale is not given by a condition that gives a right to rescind in the event of the purchaser insisting on an objection or requisition as to title, with which the vendor is unable or unwilling to comply on the ground of expense. There must be a reasonable ground for the exercise of the power. So where a condition of sale provided that the sale shall not be annulled by reason of any error, misstatement, or omission in the particulars, but that they shall form the subject of compensation, the purchaser will be entitled to compensation should the particulars give a description of the land that would include the minerals and mines under it, the fact that the mines and minerals are excepted being well known to the vendor.

Bowman *v.* Hyland, (1878) 26 *W. R.* 877, 8 *Ch. D.* 588, *explained.*

Decision of Buckley, J. (53 *W. R.* 428, [1905] 1 *Ch.* 603), *affirmed.*

This was an appeal from a judgment of Buckley, J.

The facts were as follows:

The vendor contracted to sell to the purchaser certain house property, and gave such a description of the property that the mines and minerals under it would be included.

One clause of the contract provided that if the purchaser should "insist on any objection or requisition as to title or evidence of title which the vendor shall be unable, or, on the ground of expense, shall decline to remove or comply with, then . . . the vendor shall be at liberty by notice . . . to rescind the contract."

By another clause it was provided that no error, misstatement, or omission in the particulars should "annul the sale, but should form the subject of compensation."

The abstract of title showed that the mines and minerals were reserved to the grantor in a conveyance made to the vendor's predecessor in title in the year 1854, and the fact of the reservation was well known in the district wherein the property lay, but was not known to the purchaser.

The purchaser made requisition for an abstract of title to the mines and minerals which was not given, but the vendor gave notice to rescind under the above clause.

The purchaser then took out a summons under the Vendor and Purchaser Act, 1874, and Buckley, J., held that the vendor was not entitled to rescind and that the purchaser was entitled to compensation with regard to the mines and minerals (53 W. R. 428, [1905] 1 Ch. 603).

The vendor appealed.

Mark Romer, for the appellant, cited *Heppenstall* v. *Hose*, (1884) 33 W. R. 30, 51 L. T. 589; *In re Ramuz and Edwards' Contract*, (1893) 37 SOLICITORS' JOURNAL 701; *Mawson* v. *Fletcher*, (1870) 18 W. R. 798, L. R. 6 Ch. 91; *Ashburner* v. *Sewell*, 40 W. R. 169, [1891] 3 Ch. 405; *In re Deighton and Harris' Contract*, 46 W. R. 341, [1898] 1 Ch. 458; *Riddell* v. *Simpson*, L. R. 2 Ch. 102.

Astbury, K.C., and *Whitmore Richards*, for the respondent, cited *Greaves* v. *Wilson*, (1858) 6 W. R. 482, 25 Beav. 290; *Bowman* v. *Hyland*, 8 Ch. D. 588; *Nelthorpe* v. *Helgate*, (1844) 1 Coll 203; *Powell* v. *Powell*, (1875) L. R. 19 Eq. 422.

COLLINS, M.R.—The appeal must fail. Buckley, J., based his judgment on *Bowman* v. *Hyland*, which decided that a condition like this is not applicable where the vendor has really no title at all. It does not appear to me that *Bowman* v. *Hyland* is quite in point, because in this case the vendor has title to the greater part of the subject-matter. The case stands on a broader ground. Notwithstanding that the purchaser has raised an objection to title, it is not an objection that the vendor can avail himself of under the clause providing for rescission. The word denoting unwillingness in this condition of sale gives no arbitrary power to the vendor to annul the contract. When a vendor rescinds on the ground of unwillingness he must show some reasonable ground for unwillingness, and he may show that if he complies with a requisition he will incur expenses that he did not contemplate, and to avoid which he reserved a power of rescission. The misdescription in these particulars of sale seems to me within the clause providing for compensation. The decision of Buckley, J., must be affirmed.

ROMER, L.J.—This appeal fails. The vendor knew that he had no title to the minerals, but described the property so as to include them. He thought the purchaser would not be misled. The rescission clause cannot apply in this case.

COZENS-HARDY, L.J.—The vendor in this case knew that the minerals were reserved and not his to sell; he described the property in terms that included the minerals and chanced the purchaser's knowledge of the facts as to them. It is unreasonable that he should avail himself of the rescission clause and assert that the purchaser is not entitled to compensation in respect of the minerals under the clause providing for compensation for misdescription. The appeal must fail.

Solicitors, *Robbins, Billing, & Co.*, for *Waldron*, Brierley Hill; *Bale*, for *Harwards & Co.*, Stourbridge.

(*a.*) Reported by HENRY STEPHEN, Esq., Barrister-at-Law.

High Court of Justice.

Chan. Div. Swinfen Eady, J. — March 2.

In re MOORE.
MOORE *v.* BIGG. (*a.*)

Will—Settlement—Power of sale—Property not originally comprised in the settlement—Trustees for purposes of Settled Land Acts, 1882 to 1890—Settled Land Act, 1890 (53 & 54 Vict. c. 69), s. 16 (i).

A testator gave to the trustees of his will a power of sale in respect of part of certain lands devised by him. He also bequeathed his personal residue on trust to sell and convert the same and invest the proceeds in land, which was to be subject to the aforesaid power of sale. No trustees for the purposes of the Settled Land Acts, 1882 to 1890, had been expressly appointed. Upon the tenant for life contracting to sell the mansion-house and the land, as to which no power of sale had been given,

Held, that the land purchased with the proceeds of the residuary personalty was land comprised in the settle-

(*a.*) Reported by F. HARDINGE DALSTON, Esq., Barrister-at-Law.

ment within the meaning of section 16 (i) *of the Settled Land Act*, 1890, *and that the trustees of the will were trustees for the purposes of the Settled Land Acts*, 1882 *to* 1890, *of such mansion-house and land by virtue thereof.*

Summons.

This summons was taken out under section 44 of the Settled Land Act, 1882, for the purpose of determining a question arising in connection with the will, dated the 16th of July, 1880, of F. J. Moore.

The plaintiff was the tenant for life and also a trustee of the will, and the defendants were the remaining two trustees of the will.

The question to be decided was whether the trustees of the will were also trustees for the purposes of the Settled Land Acts.

By his will the testator devised certain lands to the trustees of his will upon trust for X. Y. for life, with remainder in trust for his eldest son for life, with remainders over in strict settlement.

The trustees were given a power of sale in respect of part of these lands, but not as to the mansion-house or certain land in the same parish and also in an adjoining parish.

The testator bequeathed the residue of his personal estate to his trustees upon trust to sell and invest the same, and invest the proceeds of such sale and conversion in land, which land was to be subject to the aforesaid power of sale.

No trustees of the settlement had ever been appointed for the purposes of the Settled Land Acts.

In 1885 the testator died.

Under the powers given to them by the will the trustees had purchased a considerable quantity of land with the proceeds of the personal estate; they also sold all the land devised in respect of which they had a power of sale.

In 1905 the tenant for life entered into a contract for the sale of the mansion-house and land not subject to the power of sale, but the objection arose that there were no trustees of the settlement for the purposes of the Settled Land Acts, which resulted in the issue of the present summons.

T. A. Nash, for the plaintiff.—It is admitted that the trustees of the will are not trustees of the settlement for the purposes of the Settled Land Acts, by virtue of the Act of 1882, but in this case section 16 (i) of the Act of 1890 applies. By that section the persons (if any) who are for the time being under the settlement trustees, with power of or upon trust for sale of any other land comprised in the settlement, and subject to the same limitations as the land to be sold, are declared to be trustees of the settlement for the purposes of the Acts 1882-1890, where there are for the time being no trustees within the meaning and for the purposes of the Act of 1882. The trustees of the will in question come within that section of the Act of 1890.

C. L. Coote, for the defendants.—In order to come within the meaning of section 16 (i) of the Act of 1890, several requirements must be satisfied. Someone must be found who answers to the description of trustee for the time being. The trustees must be trustees of land, and the land must be originally comprised in the settlement, and subject to the same limitations. There is a distinction observable in the Act. Sometimes the expression "subject to the settlement" is found, and sometimes the expression "comprised in the settlement." The expression "comprised in" means "which is found in," or "originally comprised in."

H. B. Vaisey held a watching brief for the purchaser.

SWINFEN EADY, J. (after summarizing the provisions of the will).—The question to be decided is whether the trustees of the will are also trustees of the mansion-house and certain lands not subject to the power of sale, for the purposes of the Settled Land Acts.

I am of opinion that they are, inasmuch as I consider that they come within the meaning of section 16 (i) of the Act of 1890. It has been contended that section 16 (i) does not apply, and that the trustees are not trustees for the purposes of the Acts, because, although they hold land subject to the limitations of the settlement, it is not land originally comprised in the settlement. I cannot uphold this construction of section 16 (i), as in my opinion it is too narrow. The land purchased with the residuary personalty is comprised in the settlement as much as land originally comprised in it. I therefore answer the question in the affirmative.

Solicitors, *Wood, Bigg, & Nash; Ernest Bevir*, for *A. W. Vaisey*, Tring.

Chan. Div.
Warrington, J. } Feb. 7, 8.

LEWIS & SOLOME v. CHARING CROSS, EUSTON, AND HAMPSTEAD RAILWAY CO. (*a.*)

Metropolis—Building—Party structure—Interference—Notice—Railway company—Demolition of building for purposes of station—London Building Act, 1894 (57 & 58 *Vict. c. ccxiii.*), *ss.* 5 (31), 90 (1)—*Railways Clauses Consolidation Act*, 1845 (8 *Vict. c.* 20), *ss.* 16, 45—*Charing Cross, Euston, and Hampstead Railway Act*, 1893 (56 & 57 *Vict. c. ccxiv.*), *ss.* 5, 31.

A railway company in the metropolis acquired land for "extraordinary purposes" under section 45 *of the Railway Clauses Act*, 1845, *and for the purposes of constructing a station proceeded to demolish the building standing thereon under the powers conferred upon them by their special Act, but without having given to the adjoining owner the notice required to be given by a "building owner" by section* 90, *sub-section* 1, *of the London Building Act*, 1894. *An action for an injunction having been brought by the adjoining owner to restrain interference with the party-wall,*

Held, that the railway company were not exempted either by the terms of their special Act or by section 201, *sub-section* 8, *of the London Building Act*, 1894, *from the provisions of section* 90, *sub-section* 1, *of the latter Act as to notice.*

Held, also, that no substantial interference with the party structure had in fact taken place, and that therefore the railway company was not a "building owner" within the meaning of section 5, *sub-section* 31, *of the London Building Act*, 1894.

Trial of action.

This was an action by the lessees of No. 22, Cranbourn-street, in the City of Westminster, for an injunction to restrain the defendant company from continuing the demolition of No. 21, Cranbourn-street in such a way as to interfere with the party-wall between Nos. 21 and 22, and the question of law turned upon whether the defendant company were liable to give the notice required by the London Building Act, 1894, to the adjoining owner before commencing to pull down No. 21.

Under the provisions of the Charing Cross, Euston, and Hampstead Railway Act, 1893, the defendant

(*a.*) Reported by E. WAVELL RIDGES, Esq., Barrister-at-Law.

company were authorized to construct a tube railway running up Charing Cross-road and crossing Cranbourn-street. At the corner of Charing Cross-road and Cranbourn-street the railway company were erecting a station, and for that purpose acquired No. 21, which was situated outside the line of deviation as delineated upon their deposited plan, by agreement for "extraordinary purposes" under section 45 of the Railways Clauses Consolidation Act, 1845.

The railway company proceeded to demolish No. 21 without having previously given the statutory notice required by section 90 (1) of the London Building Act, 1894, to be given by a "building owner" to the "adjoining owner," the "adjoining owner" being in this case the plaintiffs, who were in possession of No. 22, Cranbourn-street under a lease from Lord Salisbury.

On the 13th of January, 1906, the writ in the action was issued by the plaintiffs claiming an injunction to restrain the defendant company from interfering with the party-wall, and damages for interference and trespass.

The action came on for trial on the 7th of February, and at the hearing it was agreed that the question of interference should be taken for granted until the legal point with regard to notice had been disposed of.

By section 5 of the Charing Cross, Euston, and Hampstead Railway Act it was provided, *inter alia*, that the railway company might make "all necessary and proper stations, platforms, approaches, passages, bridges, stairs, subways, tunnels, sidings, shafts, lifts, building apparatus . . . depôts, . . . works, and conveniences" connected with the railway.

By section 31 of the same Act the company were empowered to take by agreement "for the extraordinary purposes mentioned in the Railway Clauses Consolidation Act, 1845, any quantity of land not exceeding in the whole five acres," but nothing was to "exonerate the company from any action, indictment, or other proceeding for nuisance in the event of any nuisance being caused or permitted by them upon any land" so taken. By the same section, "any buildings erected on any land acquired under the section (except such buildings or parts of buildings as might be used for the purposes of a station) were to be subject to the provisions of the Acts relating to buildings in the metropolis."

By section 45 of the Railway Clauses Act, 1845, it is provided that: "It shall be lawful for the company, in addition to the lands authorized to be compulsorily taken under the powers of this or the special Act, to contract with any party willing to sell the same for the purchase of any land adjoining or near the railway up to the prescribed amount, and for the 'extraordinary purposes' therein specified."

Section 16 of the same Act provides that: "Subject to the provisions and restrictions in this and the special Act, and any Act incorporated therewith, it shall be lawful for the company, for the purpose of constructing the railway or the accommodation works connected therewith hereinafter mentioned, to execute any of the following works. . . . They may do all other acts necessary for making, maintaining, altering or repairing, and using the railway."

By section 5 (31) of the London Building Act, 1894, "the expression 'building owner' means such one of the owners of adjoining land who is desirous of building, or such one of the owners of buildings . . . separated from one another by a party-wall or party structure as does or is desirous of doing a work affecting that party-wall or party structure."

By section 90 (1) of the same Act it is provided, *inter alia*, that a building owner shall not, except with the consent of the adjoining owners and occupiers, exercise any of his rights under the Act in relation to any party-wall or party structure without having two months previously served on the adjoining owner the party-wall or party structure notice required by the Act.

By section 201 (8) of the same Act the following buildings, *inter alia* are exempted from the operation of Parts VI. and VII. of the Act: "Any building or structure situate upon the railway or station premises, and used for the purposes of or in connection with the traffic of a railway company." And also: "The foundations and walls of buildings belonging to a railway company . . . immediately adjoining any railway or works of a railway company and upon land acquired under the powers of an Act of Parliament."

Rowden, K.C., Cunningham Glen, and *P. B. Morle*, for the plaintiffs.—The railway company are not exempted by their special Act from the provisions of the London Building Act, 1894, and should have given the party-wall or party structure notice required by section 90, sub-section 1. Even if they are in the position of a private individual purchasing by agreement, then *Standard Bank of America* v. *Stokes*, 26 W. R. 492, 9 Ch. D. 68, shows that the Metropolitan Building Acts form an exclusive code governing their rights and obligations with regard to adjoining owners.

Roskill, K.C., and *Austen Cartmell*, for the defendants.—The company are exempted from the provisions of the Metropolitan Building Acts by section 31 of their private Act, which expressly excludes "such buildings or parts of buildings as may be used for the purposes of a station" from the operation of the Acts. The land in question here, and the buildings upon it, are being used for the purposes of a station, and are therefore exempt, and no notice need be given to the adjoining owner under Part VIII. of the London Building Act, 1894. Even if the company are not exempted by section 31 of their private Act they have power under section 16 of that Act to demolish buildings, and they have also power under the terms of their special Act and section 45 of Railway Clauses Act, 1840, to acquire the land in question. That is sufficient to free them from the provisions of the London Building Act, 1894: *City and South London Railway Co.* v. *London County Council*, 40 W. R. 166, [1891] 2 Q. B. 513; *London County Council* v. *School Board for London*, 40 W. R. 604, [1892] 2 Q. B. 606. Even supposing we cannot succeed on either of these grounds, then we say that the proper remedy is compensation, and not by way of injunction and damages: *Kirby* v. *School Board for Harrogate*, [1896] 1 Ch. 437, 44 W. R. Dig. 144. We also deny the fact of substantial interference with the party structure, but we agree to postpone that point until the question of law as to notice has been determined.

Glen, in reply.—In all the cases the defendants have cited upon that part of their case the special Acts have conferred express powers to do something inconsistent with the terms of a general statute. What they would have to show to succeed upon that point is that they have express power not only to demolish buildings, but also not to give notice under the London Building Act, 1894. This is shown clearly in *Uckfield Rural Council* v. *Crowborough Water Co.*, 48 W. R. 63, [1899] 2 Q. B. 664, where it was said that in order to escape the operation of the general Act there must be some inconsistency between the powers conferred by the special Act and the provisions of the general Act. In the case I have just cited *City and South London Railway Co.* v. *London County Council* was distinguished upon that ground. That being so,

if in demolishing No. 21 they had not affected the party-wall, then that would have been within their powers, and no notice would have been required. But if they have affected the party-wall, then they are subject to Part VIII. of the London Building Act, 1894, and notice is required: *London County Council* v. *Wandsworth and Putney Gas Co.*, 82 L. T. 562, 48 W. R. Dig. 120. As to the point raised by the defendants that compensation is the proper remedy, and not injunction and damages, the only case they have cited in support of this contention is *Kirby* v. *School Board for Harrogate*; but the *City of Glasgow Union Railway Co.* v. *Caledonian Railway Co.*, L. R. 2 Sc. App. 160, shows conclusively that there is nothing to take a purchaser by agreement out of the obligations imposed upon an ordinary owner; and, therefore, being purchasers by agreement of land outside their limits of deviation, in this case the defendants are subject to those obligations, and to the provisions of the London Building Act, 1894.

WARRINGTON, J.—The question of law to be determined in this case is whether the defendants were justified in pulling down No. 21, Cranbourn-street without giving the notice to the adjoining owner required by Part VIII. of the London Building Act, 1894, which relates to the rights of building and adjoining owners. The plaintiffs are entitled under a lease to the possession of No. 22, which adjoins No. 21. The defendants, the Charing Cross, Euston, and Hampstead Railway Co., were incorporated by private Act in 1893, and are authorized by that Act to construct a tube railway running up the Charing Cross-road and crossing Cranbourn-street. At the corner of these roads the company are constructing a station, and for that purpose acquired No. 21 by agreement for "extraordinary purposes." They have pulled down No. 21, and in so doing the plaintiffs allege that damage has been done to the party-wall between Nos. 21 and 22, and that the defendant company were only entitled to pull down No. 21 after giving the notice required by the London Building Act, 1894. The question to be determined is whether, assuming that the defendants have in fact done something which would, under ordinary circumstances, require notice to be given, they were, having regard to the special enactments bearing upon the case, bound to give that notice or not. It is necessary first to consider what the provisions of the various enactments relating to the case are. [His lordship here stated the provisions of sections 5 and 31 of the Charing Cross, Euston, and Hampstead Railway Act, 1893, and of sections 16 and 45 of the Railway Clauses Consolidation Act, 1845, as set out above.] It is clear that the company were acting within their rights in acquiring the land for "extraordinary purposes" under section 45 of the Railway Clauses Act, and that they were also acting within their rights in pulling down No. 21. Now, the London Building Act, 1894, consists of a number of parts. Parts VI. and VII. relate to the "construction of buildings," Part VIII. relates to "rights of building and adjoining owners." It is said that the company are exempted by section 201 (8) of the London Building Act, but that section only exempts "station buildings" from the provisions of Parts VI. and VII., but not from the provisions of Part VIII. It is also said that the company are exempted by the terms of section 31 of their private Act, which exempts "such buildings or parts of buildings as might be used for the purposes of a station" from the provisions of the Acts relating to buildings in the metropolis. It seems to me that this provision has nothing to do with Part VIII. of the London Building Act, which relates to the "rights of building and adjoining owners," and it refers to buildings to be erected by the company, and not—to what is a totally different thing—to interference with a party structure consequent upon the demolition of an already existing building. There is therefore nothing in the special Act to exempt the company from the provisions of the Metropolitan Building Acts, and it becomes important to consider what the effect of those enactments is with regard to adjoining owners. Their effect was pointed out by Sir George Jessel in dealing with a provision of the Metropolitan Buildings Act, 1855, which is almost similar in terms to that contained in the London Building Act, 1894, in *Standard Bank of British South America* v. *Stokes*, 9 Ch. D., at p. 73. The result of that decision is, that whatever rights adjoining owners in the metropolis may have at common law, their rights depend now upon the Metropolitan Building Acts and nothing else. An adjoining owner has the rights conferred upon him by those enactments, but nothing more. The company say that they are entitled by statute to demolish the building, and that, if they are doing what a private owner could not do without notice, it does not matter in their case, because they have statutory authority, and the proper remedy is compensation and not injunction and damages. The fallacy of that argument lies in this: that the Act authorizes them to demolish buildings, but not to affect the party structure; it does not follow that in demolishing a building they need affect the party structure, in fact in this case the company say they have not done so. There is, therefore, nothing in the enactments to exempt the company, and they must be treated as an ordinary owner of land who is "desirous of doing a work affecting" a party-wall or structure within section 5 (31) of the London Building Act, 1894. The result is that the company are bound to give the notice required by the Act.

[The point as to notice having been disposed of, his lordship, after hearing the evidence, and after a private view of the premises on the morning of the 8th of February, held that the actual damage to the party structure was so slight as not to afford a good ground of complaint by the plaintiffs. His lordship therefore proceeded:] I held yesterday that if the company were "building owners" within the meaning of the London Building Act it was their duty to give notice. I now find as a fact that the company were not "building owners" within the meaning of the Act, because what they have done did not amount to interference with the party structure. This is in accordance with the views expressed by Sir George Jessel in *Standard Bank of British South America* v. *Stokes*. In fact, what the defendants have done is to pull down the adjoining building and not the party structure. In some trivial respects, perhaps, there may have been interference, but upon the principle *de minimis non curat lex* the court cannot regard it. Therefore nothing has been done "affecting" the party structure, and there can be no injunction or damages; but having regard to the fact that the defendants, by denying the obligation to give notice, intended to assert a special right under their Act which they were not entitled to, the action will be dismissed, without costs.

Judgment for the defendants accordingly.

Solicitor for the plaintiffs, *G. O. L. Fry.*

Solicitors for the defendants, *Bircham & Co.*

K. B. Div.
(Ridley and Darling, JJ.) March 8.

SUCKLING v. PARKER. (a.)

Adulteration — Food and drugs — Adulterated milk — Analysis — Condition precedent — Analysis impossible through no fault of applicant — Sale of Food and Drugs Acts, 1875 (38 & 39 *Vict. c.* 63), *ss.* 9, 14, 21, 22; *and* 1899 (62 & 63 *Vict. c.* 51), *s.* 21.

Section 21 *of the Sale of Food and Drugs Act,* 1899, *provides: "The justices or court referred to in section* 22 *of the Sale of Food and Drugs Act,* 1875, *shall on the request of either party under that section cause an article of food or drug to be sent to the Commissioners of Inland Revenue for analysis, and may, if they think fit, do so without any such request."*

If through no fault of the party sought to be burdened, the analysis by the Commissioners of Inland Revenue, contemplated by the above section, is a matter of impossibility, the court may convict for an offence under section 9 *of the Act of* 1875, *notwithstanding that the analysis has not been made. The Commissioners of Inland Revenue reported that an examination of the bottle of milk submitted for analysis showed that the cork was loose and portions of fat and dried milk were adhering to the outside of the bottle and the paper wrapper, and that under these circumstances a satisfactory examination of the milk was not possible.*

Held, that the court having come to the conclusion, upon proper evidence, that the milk was adulterated, the defendant was properly convicted.

Case stated by one of the magistrates of the police courts of the metropolis.

On the 14th of April, 1905, a complaint was preferred by Thomas Parker (hereinafter called the respondent) against Alfred Suckling (hereinafter called the appellant) under section 9 of the Sale of Food and Drugs Act, 1875, charging the appellant with having, on the 9th day of April, sold an article of food, to wit, milk, which was injuriously affected in its quality, substance, or nature by being altered by there being 12 per cent. less than the proper proportion of butter fat, without making disclosure of the alteration to the respondent.

The following facts set in the case are material: Between 10 and 11 o'clock on the said morning a pint of the said milk was purchased by a Mrs. Wilkin from a man in the appellant's employment. Such milk was then given to the respondent, who informed the said employee that he was an inspector under the Food and Drugs Act and that the said pint of milk had been purchased for analysis, and that it was his intention to have the same analyzed by the public analyst. The respondent thereupon, in accordance with the provisions of the Act, divided the said milk into three parts, each of which parts he poured out into a separate bottle. He then placed in each of the said bottles a cork, and upon each cork the respondent placed a seal and upon each of the said bottles he also placed a mark. The respondent delivered one of the said bottles to the employee and retained the other two bottles, one of which he subsequently sent for analysis, the other of which he retained.

At the hearing of the said complaint on the 21st of May, 1902, the certificate of the public analyst was produced to the magistrate by the respondent, and the said certificate showed that the sample submitted to the said analyst was deficient in butter fat to the extent of 12 per cent. The appellant did not require that the analyst should be called as a witness.

(a.) Reported by MAURICE N. DRUCQUER, Esq., Barrister-at-Law.

The appellant's solicitor called for the production of the third sample, which was not then in court, but was subsequently produced. Upon the said sample being produced it appeared that the cork had been partly forced out of the bottle owing to the fomentation of the milk and part of the contents of the bottle had escaped. The cork had not been secured in the bottle by string or other ligature. The appellant's solicitor thereupon contended that the said sample had not been sealed or fastened up or retained in accordance with the provision of section 14 of the Sale of Food and Drugs Act, 1875, and that no conviction could therefore follow. The objection was overruled, and at the request of the appellant the said bottle was duly sent to the Commissioners of Inland Revenue for analysis, and the case was adjourned for their report.

At the adjourned hearing of the said complaint on the 9th of June, 1905, a letter from the said commissioners was produced in which it was stated that an examination of the bottle showed that the cork was loose and portions of dried fat and milk were adhering to the outside of the bottle and the paper wrapper, and that under these circumstances a satisfactory examination of the milk was not possible, and that the analysis could not therefore be carried out by the department.

The appellant's solicitor contended that when (as in this case) a request had been made for the analysis of the third sample such an analysis was a condition precedent that must be fulfilled before the court could convict.

The court found as facts that the said milk was milk from which a portion of the cream had been removed, and convicted the appellant, but stated this case.

Clarke Hall, for the respondent.—Section 14 of the Act of 1875 provides for the taking of the three samples, one of which he shall retain for future comparison, and section 21 of the Act of 1899 says that at the request of either party this third sample must be sent to the Commissioners of Inland Revenue for analysis, the words being imperative. [RIDLEY, J.—Section 21 does not say the third sample is to be sent, but shall cause "an article of food or drug."] That must refer to section 14 of the 1875 Act. The case is really covered by *Lowery* v. *Hallard*, 22 Times L. R. 186, where the court held that each of these samples must be of sufficient quantity to admit of an analysis. [DARLING, J.—That does not refer to an accident. Suppose the food was such as would not keep till the trial, would every prosecution fail in respect to such an article of food?] After thirty years of experience the Legislature has found that the Act need not provide for such an eventuality. All cases of fruit and like perishable commodities are provided for *aliunde*. This very case has arisen in Scotland, where the bottle of milk constituting the third sample became broken, and the court held that its existence was a condition precedent to a conviction: *Hutchinson* v. *Stevenson*, 4 Fr. 69.

Bethune, for the respondent.—This accident was not due to the fault of the respondent, but to that of the defendant, who should have applied earlier for it to be sent to Somerset House. The object of the section is to allow of a check, and if the defendant does not avail himself of it he must blame himself. Clearly section 21 of the 1899 Act does not necessarily refer to the third sample, but to any of the food in question.

Clarke Hall in reply.

RIDLEY, J.—In this case the appellant has been convicted under section 9 of the 1875 Act. The main point urged on behalf of the appellant is that

there was not produced the third sample which had been taken as required by section 14 of the 1875 Act [His lordship read the section.] This was complied with in the first instance as stated in the case. Before the magistrate it turned out that the third sample has been kept in such a condition that it could not be analyzed in Somerset House. [His lordship read the facts.] The magistrate convicted the appellant. The point taken is that the Act of Parliament required not only the production of the third sample, but also it should be sent to Somerset House and analyzed. In support of that contention the case of *Hutchinson* v. *Stevenson* has been cited, decided in 1902. In that case it appeared that on the sample being called for the respondent said that the bottle had burst some days before, and therefore could not be produced. The court said it was a condition precedent that that sample should be produced. That follows from section 21 of the Act of 1875; but in the present case a sample was produced but not in such a state as to furnish an analysis. Thus in the reasoning of the judgment in *Hutchinson* v. *Stevenson* it does not appear that the court took the distinction which commends itself to us, for the judgment of Lord Clerk says: "The statute further enacts that if the accused so desires it he is entitled to have the third sample sent to Somerset House for analysis by the Government analyst there so that his analysis may be produced at the trial." In that case it was of importance, because the third sample had ceased to exist. That is true; but here it had been produced and there it was not. That point was not present in the minds of the judges, but it does seem to me that, although section 21 of the 1875 Act says that this part of the article shall be produced, it is nowhere said that the analysis should be produced before the justices before conviction. There is in section 21 of the Act of 1899 this provision. [His lordship read the section.] But I do not find that that says it is to be the third sample. It seems to me an additional provision for the protection of the person who sold, but it does not say it must be the third sample. It is said it must be so because of the concluding part of section 14 of the 1875 Act. I do not find that. [He read the section.] It does not say there that the third portion is to be in anyway identified so that you can say that where section 21 of the 1899 Act refers to articles of food to be sent to the Commissioners of Inland Revenue, it necessarily refers to that third portion; but if it did, it does not appear to me to follow that the analysis must necessarily be produced. It would be a strong thing to say if all that had been done had been done properly, and it happens without fault, that the third portion has been spoiled, that therefore a person who ought to be convicted on the merits should escape. There ought to be some statutory provision to compel that. Mr. Clarke Hall also referred to *Lowery* v. *Hallard*. I was a party to the judgment. But in that case we were only dealing with the question of the taking of the samples, and we said that the samples taken should be taken in proportions to enable the analysis to be taken. I do not see how that case bears upon this question, which is to be solved in the events that have happened in this case. If that was the only point I should say that the conviction should stand. I think it may be necessary for the magistrate to go into the question whose fault it was. The fastening seems to be satisfactory so far as stated that the three samples were corked up. It may be that they were sufficiently corked; it may be they were not. I think we ought to know whether it was a fact that there was proper care taken by the respondent in corking up, by reason of the words in section 14, "Sealed or fastened up in such a manner as its nature will permit." If this has not been done, then it follows that what I have been saying before applies, because one of the conditions precedent has not been observed. It seems to me, as in the case of *Lowery* v. *Hallard*, we should know if the samples have been properly fastened up. If that is the case, I think that the result would follow that the conviction should be confirmed, but if it turned out otherwise I think the contrary would follow. The case should go back for the magistrate to state the facts on that point.

DARLING, J.—I agree.

Solicitor for appellant, *W. T. Ricketts.*

Solicitor for respondent, *Hortin.*

K. B. Div.
(Lord Alverstone, L.C.J., and Ridley and Darling, JJ.) Jan. 16.

REX v. LONDON COUNTY COUNCIL.
Ex parte NORRIS. (*a.*)

Education Act—Compensation—Transfer of powers of London School Board to London County Council—Officer of authority whose powers were not transferred—Direct pecuniary loss—Local Government Act, 1888 (51 & 52 *Vict. c.* 41), *s.* 120—*Education Act,* 1902 (2 *Ed.* 7, *c.* 42), *Schedule II., rr.* 16, 21.

Before the Education Act of 1902 *came into force in London, the London School Board directed its precept for a rate to be levied for public education expenses to the Corporation of London. N. was at that time a collector for the Commissioners of Sewers, the rating authority for that corporation, and as such collected the education rate, and received for so doing a certain poundage on the amount collected. When the powers of the school board were transferred to the London County Council the education rate was collected with the poor rate. N., having by the change lost the poundage which he formerly earned, claimed compensation under rule* 21 *of Schedule II. of the Education Act,* 1902, *and section* 120 *of the Local Government Act,* 1888, *from the London County Council.*

Held (*by* Lord Alverstone, L.C.J., *and* Ridley, J., Darling, J., *dissenting*), *that compensation could not be claimed, because N. was not in the employment of the authority whose powers had been transferred to the London County Council under the change brought about by the Education Act,* 1902, *nor under the Local Government Act,* 1888.

Rule calling upon the respondent county council to hear and determine an application for compensation by one Norris, a rate collector in the employment of the Corporation of the City of London.

The claim was made under rule 21 of Schedule II. of the Education Act, 1902, which provides that "Section 120 of the Local Government Act, 1888, which relates to compensation to existing officers, shall apply as respects officers transferred under the Act and also (with the necessary modifications) to any other officers who by virtue of this Act or anything done in pursuance or in consequence of this Act suffer direct pecuniary loss by abolition of office or by diminution or loss of fees or salary, in like manner as it applies to officers transferred under this Act."

By section 120 of the Local Government Act, 1888: "Every existing officer declared by this Act to be entitled to compensation and every existing officer . . . who by virtue of this Act or anything done in pursuance of or in consequence of this Act, suffers any direct pecuniary loss by abolition of office or by diminution or loss of fees or salary, shall be entitled

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

to have compensation paid to him for such pecuniary loss by the county council, to whom the powers of the authority, whose officer he was, are transferred under this Act."

The claim arose in this way: Before the Education Act of 1902 became applicable to London the London School Board had directed its precepts for a rate to be levied by the Commissioners of Sewers, the rating authority for the Corporation of London, and Norris as a collector of that corporation collected the rate and received certain poundage for so doing. When the powers of the school board were transferred to the London County Council the education rate was collected with the poor rate, and Norris therefore no longer collected it, and consequently lost the poundage he formerly received.

Macmorran, K.C., and *Ryde*, for the county council.—As Norris was neither an officer transferred under the Education Act, 1902, nor an officer of any authority whose powers were transferred to the county council, he is not entitled to compensation. Before the rule can be made absolute the court would have to hold that the words in section 120 "to whom the powers of the authority, whose officer he was, are transferred" have no bearing on this case. It is submitted that the whole right to compensation turns on that condition precedent being satisfied.

R. Cunningham Glen, for the applicant.—By reason of what was done under the Education, 1902, the applicant has suffered a direct loss. Certain rights to compensation in such circumstances are conferred by rule 21, and the court is bound to modify section 120 in order to carry them into effect. Rule 16 provides for the case of officers whose rights and liabilities are transferred, so that the second part of section 21 can only have reference to the officers of an authority whose powers have not been transferred to the county council.

DARLING, J.—In this case I have the misfortune not to have come to the same conclusion as the rest of the court, and I therefore must express my opinion first.

I think that the rule *nisi* should be made absolute, because if rule 21 does not apply to the present case then the words "and also shall apply (with the necessary modifications) to any other officers" are useless. The difficulty is that the powers of the authority whose officer he was are not transferred. I think that if those words must remain unqualified they would exclude the present applicant, but then I think that at the same time they would prevent any effect being given to all the latter part of rule 21. Therefore in my view it is necessary to make the modification which unless made would render the latter part of rule 21 incapable of application to any class of case at all. For this reason I think the rule should be made absolute.

RIDLEY, J.—I regret that I differ from the view taken by my brother Darling and that the applicant is not entitled to compensation. Here we have a case of a man who loses, not his office, but a portion of the fees which he used to gain in his office or employment. That is not a case, I think, within the scope of the Act at all. The words in section 120 of the Act of 1888, "whose officer he was," are a necessary part of this legislation. It is agreed that Norris does not come within the category of officers of any authority whose property, rights, and liabilities have been transferred. In my opinion we are being asked to apply the words of the Act to a state of things not contemplated by the draftsman, and I don't think that the words "with necessary modifications" in rule 21 authorize us to strike out the words "whose officer he was" in section 120. I think the rule must be discharged.

Lord ALVERSTONE, L.C.J.—The case certainly presents considerable difficulties. I agree with my brother Ridley that rule 21 in Schedule II. is not sufficient to give this particular officer compensation. I am not impressed very much by the suggestion that this result creates an injustice. Mr. Norris was appointed annually by the corporation, and he need not go on collecting for them unless he likes.

It is necessary to consider section 120 of the Act of 1888 and these rules having regard to the purview of the Education Act, 1902. In the first place it should not be overlooked that the objects of the Act of 1902 were the transfer of the source from which the fund was to come, the transfer of the authority, the school board, to the new authority, the county council, and the transfer of the property itself. Section 25 of the Education Act, 1902, shows that the schedules are framed with reference not only to the transfer of powers, but also to the transfer of property. That fact necessitated certain modifications which have to be made in section 120 of the Act of 1888. Section 18 provides for the different ways in which the fund is to be raised and expenses met, and the result is that the money was collected by some other officer representing another rating authority. Now, rule 16 in the schedule provides for the simple case where the officer of a school board goes over bodily; if his office is abolished he gets compensation under rule 21. Then we come to rule 21, which had to provide for a different set of people whose rights, powers, and property were being affected. This rule applies clearly to the officers of managers as well as to the officers of the school board, because when we look to the modification which is indicated in clause (c) we see this: "Any reference to powers transferred shall be construed as a reference to property transferred." As my brother Ridley has already pointed out, the words "direct pecuniary loss by abolition of office or by diminution or loss of fees or salary" were already in section 120 of the Act of 1888, but the only cases in which there could be compensation paid under that section were where the officer was the officer of the authority from whom the powers were taken away, and the compensation was to be paid by the authority to whom those powers were transferred. In the new state of matters that was not sufficient, for the Education Act contemplated the transfer of the property also. I cannot construe the words "with the necessary modifications" as enabling us to do more than modify section 120 of the Act of 1888 in order to give effect to the clear purpose and intention of the Act of 1902. It would be going too far to bring within the purview of the section persons who in the ordinary construction of the words would be outside it. I think, therefore, this rule should be discharged.

Rule discharged.

Solicitors for the applicant, *Rivington & Son.*

Solicitor for the county council, *Seager Berry.*

K. B. Div. (Walton, J.) — Dec. 4, 20.

YSTRADYFODWG AND PONTYPRIDD MAIN SEWERAGE BOARD v. BENSTED (SURVEYOR OF TAXES). (a.)

Inland Revenue—Income tax, Schedule A—Sewer or sewage carrier—"Hereditament capable of actual occupation"—Assessment—16 & 17 Vict. c. 34.

(a.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

The Income Tax Commissioners for a district affirmed an assessment made upon a sewerage board under Schedule A of 16 & 17 *Vict. c.* 34, *in respect of some* 2½ *miles of the length of a sewer or sewage carrier passing through or over land in a parish forming part of their district. The sewerage board appealed, on the ground that they had no land in the parish and that their interests in the realty were easements only acquired for the purpose of the sewer or sewage carrier.*

Held, that the appellants were liable to the assessment.

Taylor *v.* Oldham, 4 *Ch. D.* 39, *discussed.*

Appeal by the sewage board from a decision of the commissioners for the general purposes of Income Tax Acts for the district of Newport, Monmouthshire.

The commissioners had affirmed an assessment made upon the appellants in the parish of Rhymney for the year ending the 5th of April, 1905, of £800 (gross) under Schedule A of 16 & 17 Vict. c. 34, in respect of some 2½ miles of the length of a sewer or sewage carrier passing through or over land in that parish.

The appellants alleged that they had no land in the parish and that their interest in the realty were easements, only acquired for the purpose of the sewer or sewage carrier, and a case was stated by the commissioners for the opinion of the court on the question whether on the facts the appellants were liable to be rated in respect of this property.

The material paragraphs dealing with the facts as set out in the case are referred to at length in the judgment.

Upon the facts as stated the commissioners held (1) that the appellants' concern was not one which fell within 5 & 6 Vict. c. 35, s. 60, Schedule A, r. 3, and was not chargeable as a whole in respect of its profits in accordance with the rules prescribed by Schedule D; (2) that the appellants were chargeable in respect of the portion of their sewer and works in the parish of Rhymney under Schedule A in respect of the annual value thereof according to the general rule Schedule A, No. 1, and they accordingly confirmed the assessment made upon the appellant, subject to the opinion of the court.

The provisions of Schedule A, r. 1, and Schedule A, r. 3, of 5 & 6 Vict. c. 35, s. 60, are respectively as follows: Schedule A, r. 1, provides that "The annual value of lands, tenements, hereditaments, or heritages charged under Schedule A shall be understood to be rent by the year at which the same are let at rack-rent, if the amount of such rent shall have been fixed by agreement commencing within the period of seven years preceding the 5th day of April next before the time of making the assessment, but if the same are not so let at rack-rent, then at the rack-rent at which the same are worth to be let by the year, which rule shall be construed to extend to all lands, tenements, and hereditaments or heritages capable of actual occupation, of whatever nature, and for whatever purpose occupied or enjoyed and of whatever value, except the properties mentioned in No. II. and No. III. of this schedule." Schedule A, r. 3, provides that "the annual value of all the properties hereinafter described shall be understood to be the full amount for one year, or the average amount for one year of the profits received therefrom within the respective times limited." The properties mentioned in the third heading of the rule are as follows: "Iron works, gas works, salt springs or works, alum mines or works, water works, streams of water, canals, inland navigations, docks, drains and levels, fishings, rights of markets and fairs, tolls, railways and other ways, bridges, ferries and other concerns of a like nature, from or arising out of any lands, tenements, hereditaments or heritages, on the profits of the year preceding."

S. T. Evans, K.C. (*J. H. Redman* with him), for the appellants.—There is no authority for holding that a sewer belonging to a public authority is assessable in respect of income tax. If the appellants are assessable at all they are not liable under Schedule A, r. 1, but only on account of their profits on the part of the sewer affected under rule 3 (*d*). A sewer carrier does not come within the words in rule 1, "land, tenements, or hereditaments capable of actual occupation," because sections 13 and 16 of the Public Health Act show that the property the appellants have in the sewer is less than ownership. To hold otherwise would be to hold for the first time that the owners of a sewer were the owners of the land which had been displaced by the placing of the sewer pipes in the land: *Rolls* v. *St. George's Vestry*, 28 W. R. 867, 14 Ch. D. 785; *Tunbridge Wells Corporation* v. *Baird*, [1896] A. C. 434, 44 W. R. Dig. 96. If this sewer is assessable, then every sewer in the country is assessable also. If it be assessable, then it must come under Schedule A, r. 3, and to do that it must be *ejusdem generis* with the concerns therein mentioned, or they must derive some profit from it which at present they do not, as the money borrowed has not been repaid: *Paddington Cemetery Co.* v. *Commissioners of Inland Revenue*, 32 W. R. 551, 13 Q. B. D. 9; *Ystradyfodwg, &c., Main Sewerage Board* v. *Newport Union*, 49 W. R. 292, [1901] 1 Q. B. 406; and *Edinburgh South Cemetery Co.* v. *Kinmont*, 2 Tax. Cas. 516.

Sir R. B. Finlay, K.C., and *S. A. T. Rowlatt*, for the Crown.—Upon the principle applied in all these cases a sewer is a hereditament capable of being used and occupied in that sense that renders the local authority in whom the ownership is vested liable to assessment under Schedule A, r 1: *Taylor* v. *Corporation of Oldham*, 25 W. R. 178, 4 Ch. D. 395; *Holywell Union* v. *Halkyn Drainage Co.*, [1895] A. C. 117, 43 W. R. Dig. 131; *Bradford* v. *Mayor of Eastbourne*, [1896] 2 Q. B. 205, 44 W. R. Dig. 93; *Wandsworth Board of Works* v. *United Telephone Co.*, 32 W. R. 776, 13 Q. B. D. 904; *Metropolitan Railway Co.* v *Fowler*, 40 W. R. 306, [1892] 1 Q. B. 165, [1893] A. C. 416; *Westminster Corporation* v. *Johnson*, 52 W. R. 350. With regard to the question whether the appellants ought to be assessed under rule 1 or rule 3 of the schedule, it is clear that rule 3 is wholly inapplicable, for that rule deals only with commercial, and not with sanitary undertakings: *Dillon* v. *Haverfordwest*, 3 Tax. Cas. 31; *Dublin Corporation* v. *Macadam*, 2 Tax. Cas. 387.

S. T. Evans, K.C., in reply, cited *Attorney-General* v. *London County Council*, [1901] A. C. 26, and *Glasgow Corporation Waterworks* v. *Miller*, 2 Tax. Cas. 131.

Cur. adv. vult.

Dec. 20.—WALTON, J.—The first and main question in this case is whether the appellants are chargeable under the Income Tax Act, Schedule A, r. No. 1, in respect of the annual value of their sewer in the parish of Rhymney. The appellants are the governing body of a united drainage district consisting of the urban district of Rhondda (formerly known as Ystradyfodwg) and the urban district of Pontypridd, constituted by virtue of a Provisional Order of the Local Government Board dated the 4th of June, 1885, and duly confirmed by the Local Government Board's Provisional Orders Confirmation (No. 7) Act, 1885, for the purposes of carrying into effect a system of sewerage for the use of such urban districts, and it was provided by article 19 of the said Order that all sewers made by the appellants should vest in and be under the control of the appellants. Pursuant to the powers vested in them by the said Order the appellants designed and constructed, and have since always

maintained, a sewer or sewage carrier for the use of the said district, and have erected, maintained, and worked such works, machinery, and plant as were required for conveying the sewage of the said district to the sea. The total length of the said sewer or sewage carrier is about 17¼ miles, whereof nearly 2½ miles passes through or over land situate in the said parish of Rhymney, which land (excepting such part as forms part of the foreshore of the Bristol Channel) was previously to the construction of the said sewer or sewage carrier, and still is, rated and assessed for the relief of the poor The construction of the sewer or sewage carrier within the parish of Rhymney is as follows: 182 yards of iron pipes carried on concrete arches above the surface of the ground; 1,021 yards of pipes laid below the surface and ordinary level of the ground; 1,890 yards carried below the surface of the ground, but covered by an artificial embankment of varying height, which rises above the level of the adjacent land; and 1,246 yards of pipes (hereinafter called the outfall) passing partly over and partly beneath the surface of the foreshore of the Bristol Channel. Under the Local Government Board's Provisional Orders Confirmation (No. 8) Act, 1896, the appellants obtained powers enabling them with the consent of the Local Government Board to allow the sewers of the council of any county borough or district to communicate with the said sewer or sewage carrier vested in the appellants. In pursuance of these powers, and with the consent of the Local Government Board, agreements had previously to the date of the making of the assessment now appealed against been made with the Dinas Powis Urban District Council and the Caerphilly Urban District Council and the Cardiff Corporation whereby sewage of certain parts of the district under the control of the said local bodies was to be received in, and carried away by, the said sewer or sewage carrier of the appellants upon payment to the appellants by the said local bodies of certain sums levied upon the respective rateable values of the said districts. The assessment in question is for the year ending the 5th of April, 1905, and the amount of the assessment is £800. Although during the year in question the appellants received, in addition to what was levied in rates in their own districts, sums amounting to £943 19s. 7d. from the Cardiff Corporation and the three urban district councils which made use of the sewer under the Order of 1896, it seems clear, and was not disputed, that they derived no profit from the use or working of their sewer or of that part of it which is in the parish of Rhymney. The appellants appealed against the assessment to the commissioners for the general purposes of the Income Tax Acts for the district of Monmouth, who confirmed the assessment subject to the case upon which I have now to pronounce the opinion of the court.

The question which thus arises is of very general importance, and, so far as I know, entirely new. I believe I am right in saying this is the first time that the question has been raised, and perhaps the first time that a local authority has been assessed under the Income Tax Acts in respect of their interest in their sewers. However this may be, there seems to be, at all events, no direct authority upon the question. It is not contended by the appellants that a public authority such as a sewerage board is exempt from liability for income tax, or for income tax in respect of property used for public purposes. I have not to deal with any broad questions of policy. I have only to say whether, having regard to the language of the Acts, the assessment in question ought to be confirmed. The appellants contend, in the first place, that their interest in the sewer is an easement only, and as such is not a "hereditament capable of actual occupation" within Schedule A, r. 1. The rule is as follows: [His lordship read the rule, and continued:] The sewer in this case is vested in the appellants under art. 19 of the Order of 1885. But it is admitted that their interest in the sewer is precisely similar to the interest which is vested in a local authority in the sewers within its district under section 13 of the Public Health Act. And this again is similar to the interests in "streets" vested in the local authority under the same Act. I mention this because the numerous cases cited during the argument related mostly to streets or sewers vested in the local authorities under the Public Health Act. These authorities are, I think, applicable to the present case. Since the case of *Taylor* v. *Oldham*, which was decided in 1876 (4 Ch. D., p. 39), many questions have arisen as to the interest and duration of the estate vested in local authorities in their sewers or streets under the Public Health Act. But, subject to the later decisions upon these questions as to the extent in space and time of the estate of the local authorities, I think that what was said by Sir George Jessel in that case is a correct statement of the law. The passage to which I refer is as follows: "It was found under the old law, and it was sometimes held, that the sewer authorities had only an easement, and it was found to be very inconvenient, and consequently in the modern Acts the property in the sewers has been vested in the sewer authorities. That is to say, that instead of allowing the subsoil to remain in the owner of the soil, subject to an easement or right of sewerage or drainage, the absolute property in the sewer (which means not merely in the brick barrel, or whatever it may be, forming the sewer, but the whole interior of the sewer, that is, the whole of the space occupied by it) is now vested in the sewer authorities." Mr. Evans, for the appellants, contended that the later authorities are not consistent with this statement of the law. And I have carefully considered the cases to which he referred me. The authority which appeared to go the furthest in support of his contention was a passage from the judgment of Lord Russell of Killowen in *Bradford* v. *Mayor of Eastbourne*, [1896] 2 Q. B., p. 205. There the Lord Chief Justice had to consider the question as to whether a drain which connected two or more houses with a public sewer, and existed before the Public Health Act, 1890, came into operation, was a "private drain" within the meaning of section 19 of the Act. And he was dealing with the argument that as the drain in question was a sewer within the meaning of section 13 of the Public Health Act, 1875, and was vested in the local authority under that section, it could not be a "private drain" under section 19 of the Act of 1890. In dealing with this argument Lord Russell had to consider the effect of section 13 of the Act of 1875 and the decisions upon the section, and in doing so he used the language which is relied upon by Mr. Evans. The passage is as follows: "But what is the meaning of the word 'vest' in section 13 of the Act of 1875? It has been clearly held that the vesting is not a giving of the property in the sewer and in the soil surrounding it to the local authority, but giving such ownership and such rights only as are necessary for the purpose of carrying out the duties of a local authority with regard to the subject-matter." In this passage Lord Russell was not dealing with the question whether the interest of the local authority in a sewer is a mere easement or a property in the land. He was referring to the cases which have decided that the extent and duration of the property or estate acquired by the local authority are limited by reference to the purposes for which the property is vested in such authority. I do not think that the Lord Chief

Justice intended to decide or to say that the interest acquired by the local authority was an easement only. In 1904 the case of the *Westminster Corporation* v. *Johnson*, 52 W. R. 350, [1904] 1 K. B. 19, came before Wright J., and he accepted and acted upon the construction of Lord Russell's language which is relied upon by Mr. Evans. But his judgment was reversed by the Court of Appeal, [1904] 2 K. B., p. 737, where the present Master of the Rolls said as follows: "No doubt the tendency of modern decisions has been to limit the meaning of the word 'vest' in the Public Health Acts in connection with a street to vesting 'in the urban authority such property and such property only as is necessary for the control, protection, and maintenance of the street as a highway for public use,' as stated by Lord Herschell in the passage cited by Wright, J., from *Tunbridge Wells Corporation* v. *Baird*, [1896] App. Cas., p. 434, 44 W. R. Dig. 96. But no case has gone so far as to hold that actual property, as distinguished from an easement only, was not passed to the authority by that word." It is true that the question in *Westminster Corporation* v. *Johnson* arose, not under the Income Tax Act, but under the Land Tax Act, 1797, s. 4. The words in the section are: "All and every manors, messuages, lands, and tenements . . . and all hereditaments of what nature or kind soever they be." The Court of Appeal held that the interest in question was a hereditament within the meaning of the section. But the importance of the judgment of the Master of the Rolls for the purposes of the present case is in the expression of his opinion as to the meaning of the word "vest" in the Public Health Act in connection with streets and sewers, having regard to the language used by Lord Russell, which had been relied upon in the court below by Wright, J. As I have said, and as appears from these cases, the questions as to the vesting of streets and the vesting of sewers are, in principle, identical. In my opinion the interest of the appellants was not a mere easement, but was a property in the land and a "hereditament" which was "capable of actual occupation" (and, in fact, was occupied by the appellants) within the meaning of Schedule A, r. 1. I ought perhaps to mention an argument in the nature of a *reductio ad absurdum* that if sewers fall within rule No. 1, streets also must be chargeable. The answer to this is that streets are public highways, and unless the mines or subsoil under the highway is occupied or used for some profitable purpose, the land occupied by the highway is of no value to its owner or to any one except the public. But it is further contended for the appellants that even if their interest in the sewer is a "hereditament capable of actual occupation" it is within, and should be assessed under, Schedule A, rule No. 3, and not under rule No. 1. The material words of rule No. 3, paragraph No. 3, are as follows. The rule begins: "The annual value of all the properties hereinafter described shall be understood to be the full amount for one year or the average amount for one year of the profits received therefrom within the respective time herein limited." The first paragraph is as to quarries, the second as to mines, and the third one, which has been relied on, is in these words: "Of iron works, gas works, salt springs or works, alum mines or works, water works, streams of water, canals, inland navigations, docks, drains and levels, fishings, rights of markets and fairs, tolls, railways and other ways, bridges, ferries, and other concerns of the like nature, from or arising out of any lands, tenements, hereditaments, or heritages, on the profits of the year preceding." It is said that the sewer comes under the general words of this rule, "other concerns of a like nature"; that it is a concern of a nature like to that of a "stream of water," "dock, drain or level." But it must be remembered that to fall within this rule it is not sufficient that the "concern" should be like one or other of the hereditaments expressly mentioned; it is not indeed sufficient, in my opinion, that the hereditament should be one of those expressly mentioned, as, for example, "a stream of water" or a "bridge." It is necessary, in order to bring the "concern" or hereditament within this rule, that it should be used for the purpose of a business by which profits are earned; although, of course, every hereditament used for the purpose of such a business is not within this rule. Some light upon the interpetation of the rule may be obtained from what was said in the case of the *Edinburgh Southern Cemetery Co.* v. *Kinmont*, 2 Tax. Cas. 516, by Lord Shand at p. 528, and by Lord McLaren, at p. 530. As Lord Macnaghten said, in [1901] App. Cas., at p. 35, income tax is always a tax upon income, or at all events, upon a profit or gain in the nature of income. In the case of land, whether it is occupied by its owner or let, the annual profit or gain in the nature of income arising from the land is, in most cases, fairly and conveniently measured by the rack-rent at which the land could be let by the year; but in some cases where the land is used for the purposes of business and constitutes what may be described as the plant, or sometimes indeed the stock-in-trade, of the business, the actual thing sold or dealt in, rack-rent is not a convenient measure of the profit or gain arising out of the land; and I think it will be found that it is cases of this kind which are described and regulated by rule No. 3 of Schedule A. If the appellants were making any profit by allowing any other local authorities to use their sewer the case might be different and other questions might arise. But in fact the appellants make no profit whatever. They receive certain comparatively small payments which go *pro tanto* to reduce the very much larger costs of the maintenance and working of the sewer. The case falls within the words of Schedule A, rule No. 1. In my opinion it is not taken out of the rule by the fact that some payment is made to the appellants by the other authorities who make use of the sewer. There is another contention of the appellants with which I must deal. It is stated in the appellants points for argument, Nos. 10 and 11, "that if contrary to what the appellants contend they are chargeable under Schedule A in respect of the annual value of the land, then in the alternative they contend that such annual value for the year ended the 5th of April, 1905, is to be ascertained by reference to the adjoining land, which is purely agricultural land, and the rack-rent at which the same is worth to be let as agricultural land, and inasmuch as the acreage of the land covered by this assessment is one and a-half acres or thereabouts, and the rack-rent of the adjoining land does not exceed £2 per acre, the assessment should be upon that basis. That the poor rate assessment upon the subject-matter claimed to be chargeable has no application to the appellants' undertaking for the purposes of income tax." Upon the question of amount, it appears to me that the commissioners were at liberty to take the poor rate assessment into consideration as evidence of the gross annual value. They were not, and, as I understand their findings, did not, consider themselves bound by it. On the other hand, I do not think they were bound to ascertain the annual value by reference to the rent at which the adjoining agricultural land is let. I do not think that the amount of the assessment has been ascertained upon any wrong principle. In my judg-

ment, therefore, the assessment must be confirmed.

There will be judgment for the respondent with costs.

Solicitors for the appellants, *Wrentmore & Son*, for *Walter Morgan, Bruce, & Nicholas*, Pontypridd.

Solicitor for the Crown, *Solicitor of Inland Revenue.*

IN BANKRUPTCY.

K. B. Div.
(Bigham and Walton, JJ.) April 2.

In re MELLISON.
Ex parte DAY. (*a.*)

Bankruptcy—Practice—Disclaimer—Administration of estate of deceased insolvent—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *ss.* 55, 125, *sub-sections* 5, 6.

The provisions of section 55 *of the Bankruptcy Act,* 1883 (*disclaimer of onerous property*), *are applicable to administrations in bankruptcy under section* 125 *of the same Act, of the estates of persons dying insolvent.*

Dictum *of* Cave, J., *in* Ex parte The Official Receiver, In re Gould, 35 *W. R.* 569, 19 *Q. B. D.* 92, *followed.*

Appeal from a decision of the registrar of the county court at Brighton giving the trustee in the administration of the estate of J. B. Mellison, a person who had died insolvent, leave to disclaim the lease of a hotel at Brighton.

The lease in question had been granted by one Isaacs to the deceased Mellison, who had sub-let to a Mrs. Morse, who had in her turn assigned to the appellant, Francis Day.

Mellison having died insolvent, an order was made for the administration of his estate in bankruptcy in the county court at Brighton under section 125 of the Bankruptcy Act, 1883, and Mr. Oscar Berry was appointed trustee.

The trustee applied to the registrar at Brighton for leave to disclaim the lease from Isaacs to the deceased under section 55 of the Bankruptcy Act, 1883.

Day opposed the application on the ground that the court had no power to give leave to disclaim in administrations under section 125.

The registrar gave the trustee leave to disclaim.

Day appealed.

Reed, K.C., and *Hodges*, for the appellant.—The question in this case depends upon what parts of the Bankruptcy Act, 1883, are applicable to administrations under section 125 of that Act. By sub-sections 5 and 6 of section 125 it is laid down that the trustee shall realize and distribute the estate in accordance with the provisions of this Act, and that with certain modifications "all the provisions of Part III. of this Act, relating to the administration of the property of a bankrupt, shall, so far as the same are applicable, apply to the case of an administration order under this section." It is true that section 55 is one of the provisions of Part III., but there are many sections in that part which are not applicable to these administrations. The court of bankruptcy in cases under this section will, unless there is some provision to the contrary, follow the practice of the Chancery Division in the administration of insolvent estates: *Ex parte Ellis, In re Crowther*, 36 W. R. 189, 20 Q. B. D. 38. Section 10 of the Judicature Act, 1875, lays down what rules in bankruptcy are applicable to administrations in Chancery, and does not import disclaimer which is unknown in administrations in Chancery *In re Westbourne-grove Drapery Co.*, 25 W. R. 509, 5 Ch. D. 248. There is no direct authority as to whether section 55 applies in these cases. The registrar in his judgment relied upon a *dictum* of Cave, J., in *Ex parte The Official Receiver, In re Gould*, 35 W. R. 569, 19 Q. B. D. 92, where, referring to sections 50 to 57 and 58 to 65, he said, "Speaking generally, there can I think be no doubt that the last two portions apply to an administration under section 125, though even in those portions there are sections, such as 52 and 64, which would not be applicable." The registrar also relied on *Hasluck* v. *Clark*, 47 W. R. 471, [1899] 1 Q. B. 699. [WALTON, J.—Is there anything in section 55 which makes it inapplicable.] Sub-section 1 refers to "the property of the bankrupt," and sub-section 2 speaks of disclaimer operating "to determine the rights, interests, and liabilities of the bankrupt." In administration there is no bankrupt. Sub-section 6 makes the person who takes a vesting order subject to the liabilities of the bankrupt "at the date when the bankruptcy petition was filed." In administration there is no such date.

E. E. Humphreys, for the trustee.—The lease in question formed part of the property of the bankrupt. Under sub-section 5 of section 125 it vested in the trustee and he was entitled to deal with it in accordance with the provisions of the Act. As it was onerous property, he could deal with it under section 55 and disclaim it.

He referred *In re D'Epineuil*, 30 W. R. 423, 20 Ch. D. 217, cited by Cave, J., in *In re Gould.*

Clayton, for Isaacs, the lessee, did not argue.

BIGHAM, J.—The only point in this case is whether in administrations in bankruptcy of the estates of persons dying insolvent there is jurisdiction to allow the disclaimer of onerous property. I see no reason why there should not be, and I think that there is jurisdiction. This lease which had been granted to the deceased was undoubtedly part of the property of his estate, and vested in the trustee just as in an ordinary bankruptcy. Sub-section 6 of section 125 applies the provisions of Part III. of the Act, so far as they are applicable, to the administration of the property of a person dying insolvent. The administration order vested this lease in the trustee, and I do not see why he should not have the rights of an ordinary trustee in bankruptcy.

In the cases of *In re Gould* and *Hasluck* v. *Clark*, the courts refused to import sections 47 and 45 into these administrations because they would have then had to deal with the property of persons other than the bankrupt which would be outside the scope of section 125, but in the present case the property to be dealt with is the property of the insolvent estate, and I do not see why the trustee should not be entitled to disclaim it. I consider the judgment of Cave, J., in *In re Gould* an authority upon the point, though it was but an *obiter dictum.*

WALTON, J., concurred.

Appeal dismissed; leave to appeal granted.

Solicitor for the appellant, *R. W. Beckwith.*

Solicitors for the trustee, *Cushman & Clifton.*

Solicitors for the lessor, *Hyman, Isaacs, & Lewis.*

(*a.*) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

Court of Appeal.

From K. B. Div. (Vaughan Williams, Stirling, and Moulton, L.JJ.) March 24.

BROWN v. FEENEY. (a.)

Practice—Payment into court—Liability not denied—Death of defendant before trial—Jurisdiction to order payment out of money—Ord. 22, rr. 1, 5.

The defendant in an action of libel without denying liability paid a sum of money into court as sufficient to satisfy the plaintiff's claim. The plaintiff proceeded with the action and did not take the money out of court. Before trial the defendant died, and his executors applied for an order that the money in court should be paid out to them.

Held, that, though the action had abated owing to the death of the defendant, the court had power, under its, general jurisdiction over money in court, to order it to be paid out as it thought right, and that the plaintiff's right was superior to the executors', and the court would order it to be paid out to him.

Appeal from an order of Walton, J., in chambers.

The action was brought to recover damages for libel. The defendant, with his defence, which did not deny liability, paid a sum of money into court as sufficient to satisfy the plaintiff's claim. The plaintiff proceeded with the action and did not take the money out of court. Before the trial the defendant died. The action having thus abated, the defendant's executors took out a summons, headed in the action, for an order that the money should be paid out to them. The summons was referred by the master to the judge, who refused the application. The executors appealed.

In order to avoid any technical difficulty that the summons could not be taken out in an action which was dead, it was agreed between the parties with the consent of the court that the summons should be treated as an originating summons not taken out in the action, and that the court should say to whom the money should be paid.

Montague Lush, K.C., and *R. E. Vaughan Williams*, for the executors.—Where money is paid into court, even without a denial of liability, and is not accepted in satisfaction, it remains the property of the defendant. The plaintiff had merely a right, under ord. 22, r. 5, to take it out during the pendency of the action. The action having abated by the death of the defendant without the money having been taken out of court by the plaintiff, the executors are entitled to have their own money paid out to them. If the action had gone to trial, and the plaintiff had recovered less than the amount paid into court, the judge at the trial could have made an order under rule 5 for payment of the balance back to the defendant: *Gray* v. *Bartholomew*, 43 W. R. 177, [1895] 1 Q. B. 209. That showed that the money did not become the property of the plaintiff. *Gray* v. *Bartholomew* and *Best* v. *Osborne, Garrett, & Co.*, 12 Times L. R. 419, were both inconsistent with the money becoming the property of the plaintiff. The order ought therefore to have been made for payment of the money out to the executors.

They also referred to *Barnes* v. *Jeaffreson*, 6 Times L. R. 435.

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

Montague Shearman, K.C., and *P. B. Morle*, for the plaintiff.—Where money is paid into court under ord. 22, r. 1, as sufficient to satisfy the plaintiff's claim, without a denial of liability, it becomes the property of the plaintiff from the moment of payment in, and he can take it out at any time he pleases. He may accept it in satisfaction and take it out, or he may not accept it in satisfaction and may proceed with the action, in which case he may, if he likes, take the money out of court under ord. 22, r. 5, at any time. That power to take it out does not cease because the action has abated. The defendant ceased to have any interest in the money. Ord. 22, r. 5, merely preserved the old practice: *Knapton* v. *Drew*, Barnes N. of C. 279; *Crockay* v. *Martin*, Barnes N. of C. 281; Archbold's Practice (14th ed.), p. 347. The money became the plaintiff's money subject to be devested by an order of the judge under the last clause of rule 5, as was done in *Gray* v. *Bartholomew*. It was paid into court by way of amends to the plaintiff, and it remained in court for that purpose: *Berdan* v. *Greenwood*, 26 W. R. 902, 3 Ex. D. 251; *Emden* v. *Carte*, 30 W. R. 17, 19 Ch. D. 311; *Coughlan* v. *Morris*, 6 L. R. Ir. 403. Even if the money did not become the plaintiff's property when paid into court, it was paid in subject to the provisions of ord. 22, r. 5, which gave the court power to order it to be paid out as it thought right. The court had also inherent jurisdiction to make an order as to the payment out of money in court. In the exercise of its discretion the court would refuse to order the money to be paid to the executors as the plaintiff's right to it, the action being undefended and the defendant having assessed the damages at the sum paid into court, is better than that of the defendant.

R. E. Vaughan Williams replied.

Cur. adv. vult.

March 24.—VAUGHAN WILLIAMS, L.J.—This is an action for libel in which a sum of money has been paid into court by the defendant without a denial of liability. The plaintiff did not accept that sum in satisfaction and take it out. While the money was still in court, and before trial, the defendant died, and upon the principle *actio personalis moritur cum persona* the action is no longer alive. The question therefore arises as to what ought to be done with the money in court. The executors of the defendant have applied by what has been agreed shall be taken to be an originating summons for an order that the money be paid out to them. The judge in chambers refused that order, and the executors now appeal to this court. In my opinion that refusal is right.

The matter lies really in a small compass, though the point is a new one. I do not propose to go into the old law relating to the payment of money into court, nor to the law under the Common Law Procedure Act, 1852; I propose to deal solely with the rules made under the Judicature Acts and the present practice which now regulates the matter. Ord. 22, r. 1, provides that "where any action is brought to recover a debt or damages, any defendant may, before or at the time of delivering his defence, or at any later time by leave of the court or a judge, pay into court a sum of money by way of satisfaction, which shall be taken to admit the claim or cause of action in respect of which the payment is made; or he may with a defence denying liability (except in actions or counterclaims for libel or slander) pay money into court which shall be subject to the provisions of rule 6." I do not think that it was disputed, when the case was argued, that if the money is paid in without a denial of liability and the plaintiff takes it out, but not in satisfaction, he is entitled to go on

with the action and claim damages *ultra*. Rule 5 of order 22 made special provision as to what was to be done in the case of money paid into court without a denial of liability—namely, "the money paid into court shall be paid out to the plaintiff on his request, or to his solicitor on the plaintiff's written authority, unless the court or a judge shall otherwise order." Now I have no doubt myself but that, if this money had been taken out under that clause of rule 5, the plaintiff would have been entitled to say that the sum was not sufficient to satisfy his claim and to claim damages *ultra*. In these circumstances we have to consider whether, the defendant having died, the plaintiff is still entitled to take the money out under rule 5. So far as the rules are concerned, in my opinion the plaintiff is not entitled to take it out. It was argued that the moment the money was paid in without a denial of liability, inasmuch as that constituted an admission of the cause of action, and also an admission that the amount paid in was due in respect thereof, the money from that moment became the plaintiff's money, and that the rule which enabled him to take it out was only the necessary consequence of the money having become his money from the moment when it was paid in. There seems to me to be a good deal to be said for that contention, but in my opinion the case of *Gray* v. *Bartholomew* shows that it is wrong. That case shows that the money did not become the property of the plaintiff, that he merely got the right under the rule to take it out of court, and that he got nothing more. The head-note in that case states that "in an action for slander the defendant paid £5 into court. The plaintiff recovered a farthing damages, and judgment was entered for the defendant with costs. The judge directed that the money paid into court, less one farthing, should be paid to the defendant. On appeal, held, that the judge had power to make such an order." That decision was inconsistent with the money having become the property of the plaintiff; because it was inconceivable that any court should make an order taking away money from the plaintiff after it had become his property. Lord Esher, after reading the last clause of rule 5 of order 22, said: "The meaning of that is that the court or a judge may order that it shall not be paid to the plaintiff. To whom, then, is it to be paid? It must be paid either to the plaintiff or to the defendant, and if it is not paid to one, it must *ex necessitate rei* be paid to the other. It seems to me that ord. 22, r. 5, was passed for the express purpose of giving the judge, in certain cases, power to deal with money paid in by the defendant, and that it gave jurisdiction to the judge in this case to make the order appealed against." It seems to me that in the present case the court must take it that, if the case had been tried, the judge who tried it would have had power to order the money to be paid out. I do not think that that power is one which necessarily must be exercised under the rules. In my opinion when money is paid into court the judge has power to say what should be done with it, when the power given to him by the rules is exhausted. What, then, should the court now say should be done with the money? We must see whether there is any reason why one should get it more than the other. The plaintiff was entitled to say that his cause of action was admitted and the amount of damages. The defendant was entitled to say that the money was his money, and that the cause of action was now dead, and that therefore the money should be returned to him. In my opinion the latter is not a sufficient reason. *Primâ facie* the right thing to do is to order the money to be paid out to the plaintiff, his cause of action being admitted by the defendant, and the amount of the damages. The appeal must be dismissed.

STIRLING, L.J.—I am of the same opinion. It seems to me that the plaintiff is entitled to an order for payment of the money out of court to him under ord. 22, r. 5. This, to my mind, is plain from the observations of Thesiger, L.J., in *Berdan* v. *Greenwood*, and of all the judges in *Emden* v. *Carte*, upon the rules which were then in force, and which upon this point are similar to those now in force. The words at the end of rule 5 were doubtless inserted to prevent injustice while the action is pending. The defendant's personal representatives were no parties to the action, and could not have been made parties. Upon the death of the defendant, the action having thereby come to an end, they applied for an order that the money should be paid out of court to them. It is unnecessary to decide whether the plaintiff could take the money out of court without an order. It seems to me that the court has jurisdiction to order the money to be paid out. *Wright* v. *Mitchell*, 18 Ves. 293, is an authority that the court has such jurisdiction. There, after a bill had been dismissed for want of prosecution, an application was made for an order that the money which had been paid into court should be paid out, and the Lord Chancellor made the order. In *Wynne* v. *Jackson*, 2 Russ. 351, at p. 355, the Lord Chancellor said: "If a bill is dismissed where money has been brought into court by the plaintiff, the court must part with the money to some one or other." That reasoning appears to me to apply where the action is at an end by the death of the defendant In those circumstances we have, in my opinion, jurisdiction to make an order in favour of the executors. But they must show some reason why the plaintiff should be deprived of the money, and they have shown none, except that the action is at an end.

MOULTON, L.J., agreed.

*Appeal dismissed.**

Solicitors for the plaintiff, *Churchman & Winser*, for *G. H. Hindley*, Liverpool.

Solicitors for the executors, *Field, Roscoe, & Co.*, for *Pinsent & Co.*, Birmingham.

From Chan. Div. (Collins, M.R., and Romer and Cozens-Hardy, L.JJ.) — March 1.

In re EDWARDS. JONES *v.* JONES. (*a.*)

Will—Construction—Gift to class attaining twenty-one—Gift over in the event of death without leaving any children surviving—Death of surviving child in infancy—Vested or contingent gift—Intestacy.

A testatrix by her will gave all her property in trust for her children, who, being sons, should attain twenty-one, or, being daughters, should attain that age or marry under that age. In the event of her death "without

* An order was made by consent that the money should be paid out to the plaintiff.

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

leaving any children surviving" her, she gave the property to her brothers and sisters. The testatrix left one child surviving her who died an infant.

Held, that the infant child did not take a vested interest at birth, and that, there being no reason for construing the words "without leaving any children" as meaning "without leaving any such children," the gift over also failed, and there was an intestacy.

Kidman *v.* Kidman, 40 *L. J. Ch.* 359, 19 W. R. Dig. 125, *dissented from on the second point.*

This was an appeal from the decision of Buckley, J.

Elizabeth Edwards made her will dated the 20th of December, 1902, in numbered paragraphs.

Paragraph 3: "I give all my property, both real and personal, to my trustees in trust for my children or child who being sons shall attain the age of twenty-one years, or being daughters shall attain that age or marry, and if more than one in equal shares."

Paragraph 4: "In the event of my death without leaving any children surviving me, I give all my property equally between my brothers and sisters—namely, Peter Evan Jones, William Thomas Jones, Margaret Sarah Jones, and Agnes Ada Luff, in equal shares as tenants in common."

The testatrix left one child only surviving her, who died an infant.

She left both real and personal property.

Buckley, J., held that, having regard to the gift over in clause 4, the infant child who survived took a life interest.

The heir-at-law and next-of-kin of the testatrix appealed.

On the appeal two questions were argued: First, whether the decision of Buckley, J., was right in holding that the infant child took a vested interest at birth; and secondly, if not, whether the gift over to the brothers and sisters took effect in the events that had happened, or whether there was an intestacy.

Buckmaster, K.C., and *Cruickshank*, for the appellants.

Astbury, K.C., and *P. F. Wheeler*, for the husband of testatrix.

J. W. Greig, for the brothers and sisters.

The following cases were cited: *In re Bevan's Trusts*, 35 W. R. 400, 34 Ch. D. 716; *Ingram* v. *Suckling*, 7 W. R. 386; *Bree* v. *Perfect*, 1 Coll. 128; *In re Wrangham's Trust*, 9 W. R. 156, 1 Dr. & Sm. 358; *Kidman* v. *Kidman*, 40 L. J. Ch. 359, 19 W. R. Ch. Dig. 125; *Walker* v. *Mower*, 16 Beav. 365.

ROMER, L.J.—On the first point involved in this appeal—namely, whether the gift in clause 3 of the will is or is not contingent—speaking for myself, I cannot say that I feel any doubt whatever. The words are perfectly clear; there is no possible ambiguity about them. The very essence of the gift is that only those children shall take who being sons attain twenty-one, or being daughters attain that age or marry. No other gift is contemplated. Then, when I come to clause 4, how can that be said to throw any light on the preceding gift, or to make that ambiguous which was perfectly clear? Clause 4, in my opinion, casts no light on the preceding gift, which was clear; it did not make that ambiguous which was clear before, and the testatrix's words in both clauses are, as I have shown, perfectly clear, simple, and free from doubt. There have been cases, no doubt, where you have had, first, a gift in language which is not perfectly clear, or might not be held in certain cases to be perfectly clear, whether it intended to make a gift to a class contingent or not. A gift to children as and when they shall attain twenty-one, though *primâ facie* meaning a gift to children contingently upon their attaining twenty-one, may be said to be words of a character that may have light thrown upon them by the words of a gift over on the parent dying without leaving any children; though speaking for myself, I think at the present time the decision in *In re Wrangham's Trusts*, followed as it was—and I think rightly followed on this part of the case—in *Kidman* v. *Kidman* by Malins, V.C., accurately represents the law even as to those cases, though there are, no doubt, earlier authorities, and there may be one or two since which conflict with that view. Speaking for myself, I think that, even where you have words such as those I have referred to, which *primâ facie* import contingency, though they are somewhat ambiguous you will not turn them into non-contingent words and make gifts to the children vest at birth merely because you have a gift over on the parent dying without children or without issue. But whether those authorities are in doubt at the present day or not, they would not, to my mind, apply to the will before us. For the reasons which I have given, therefore, I think the decision of the learned judge in this case, on the main part of the will, was erroneous and should be reversed.

Then comes the second point, about which the authorities are not quite so clear—that is to say, whether, in the gift over in the will before us, in the event of the testatrix's death without leaving any children surviving her, we ought to read the words as meaning "without leaving any such children surviving her"—in other words, convert it into a gift over to the brothers and sisters in case there should be no child of the testatrix who attained a vested interest under the prior gift. As to that, speaking for myself, I am strongly of opinion that when you have clear words used by a testator, those words ought to be adhered to, unless there is something in the context which shows that a contrary effect ought to be given. I find here clear words. The words are "In the event of my death without leaving any children surviving me." Those words are free from ambiguity, and I see nothing in this will which would enable me to say that those words ought not to be adhered to. It is said that the court leans against an intestacy. I do not know whether that expression at the present day means anything more than this—that in cases of ambiguity the court may, at any rate in certain wills, gather an intention that the testator did not intend to die intestate; but it cannot be that, merely with a view to avoiding intestacy, the court is to do otherwise than construe plain words according to their plain meaning. A testator may well intend to die intestate. When he makes a will he intends to die testate only so far as he has expressed himself in his will. Therefore, unless I were forced by authority in the present case to hold otherwise, I should hold that the words "without leaving any children surviving me" mean what they say.

Now, do the authorities compel us to hold the contrary? I think not. I need only refer to a few. As far as I can find the only authority in support of the view that the words are not to have their literal meaning here is that of *Kidman* v. *Kidman*, a decision of Malins, V.C. In giving that decision the Vice-Chancellor based his decision on what he appears to have thought had been decided by Kindersley, V.C., in *In re Wrangham's Trust*. I turn to *In re Wrangham's Trust*, and when I look at it I find that Malins, V.C., has misinterpreted what Kindersley, V.C., said in *In re Wrangham's Trust*. What Kindersley, V.C., really said appears at p. 362 of the

report of the case in 1 Dr. & Sm., and he points out that the object of a similar gift in the will with which he had to deal was not what Malins, V.C., thought he meant, but quite the contrary. The words I refer to are these, on p. 362, where Kindersley, V.C., said: "The object of that clause" (that is, the gift over) "was to provide for the event of one or more children attaining twenty-one in the life of their mother, and all of them and all her issue predeceasing her." That is to say, he thought the gift over in that case, being a gift over on the lady dying without leaving any issue, meant what is said, without leaving any issue at her death, and therefore Malins, V.C., quite misunderstood what Kindersley, V.C., decided, and in fact erroneously interpreted Kindersley, V.C.'s, real meaning. Kindersley, V.C.'s, view was to the opposite effect. Then I find in *Walker* v. *Mower* a decision of Lord Romilly, where he decided the exact point. Incidentally I may say that he decided both the points which arise in this appeal. In that case there was a gift to A. for life with a provision that after A.'s death the property should be assured equally between A.'s children on their respectively attaining twenty-one, with a gift over on A.'s death without leaving any child. The Master of the Rolls first held that the gift to the children was contingent, and then, with regard to the gift over, he said this: "As to the gift over, I am of opinion that it did not take effect, because the tenant for life did not die without leaving any child, the deceased leaving a daughter. There is therefore an intestacy, and the moiety of the freeholds goes to the heir, and of the leasholds to the next-of-kin." Therefore, as the authorities stand on the point, we have the Master of the Rolls and Kindersley, V.C., on the one hand, and Malins, V.C., on the other, relying on a misinterpretation of Kindersley, V.C. The effect of the authorities is to support the view I am now expressing—namely, that in the present case the words on which the question turns, being plain in meaning, must have due effect given to them.

The only other authority I need refer to is one which has been supplied by my brother Cozens-Hardy, L.J., a case of *In re Hamlet, Stephen* v. *Cunningham*, 37 W. R. 245, 39 Ch. D. 426. There the gift over was in this form: There was a gift to a daughter for life, then to her children, like the gift here—that is to say, on sons attaining twenty-one or daughters on attaining that age or marrying. The gift over was this: "And in case my said daughter shall happen to die without leaving any child or children her surviving, or leaving such they shall all die without having attained a vested interest in the said trust moneys, and without leaving any issue them, him, or her surviving," then over. The Court of Appeal declined to give to that gift over anything but the effect that ought to be given to it according to its plain words. As Lopes, L.J., points out, in a form which summed up the matter, and which I may here cite: "If the intention of the testator was that every child of his daughter who attained twenty-one should take a vested interest, absolute and indefeasible, though such child should die in the daughter's lifetime, then to make the gift over consistent with that intention, it would be necessary to substitute the word 'having' for 'leaving' and to attach no meaning to the words 'her surviving.' This would be doing a violence to the language which nothing would warrant but a clear and unmistakeable intention collected from the other parts of the will, and such an intention to my mind is not apparent upon the face of this will." Likewise I say here the words of the gift over of this testatrix in the event of her death "without leaving any children surviving" her are clear, and to depart from them would be doing a violence to the language which nothing can warrant but a clear and unmistakable intention collected from the other parts of the will, and such an intention cannot be gathered from this will. For these reasons I am of opinion that the gift over did not take effect.

COZENS-HARDY, L.J.—I am of the same opinion I am quite unable to follow the view of Buckley, J., that the children took vested interests at birth. I cannot imagine a more clear contingent gift than that which is found in clause 3, and, for the reasons which have been stated by Romer, L.J., I can find nothing in the context which suffices to turn that which is a clear contingent gift into a gift which would vest in all the children who survived the testatrix, whatever their age might be. I think that a contrary view would not be without danger, having regard to the fact that the form of gift which you find in clause 3 is one of the commonest possible forms in all wills and settlements where parents are giving or settling money on their children—sons at twenty-one, and daughters at twenty-one or marriage. I think, therefore, that the infant who survived its mother for only a few hours did not take a vested interest at birth.

On the second point, whether there is an intestacy altogether, or whether the gift over which is found in clause 4 is operative, there is no doubt rather more difficulty; but I feel myself quite unable to get over the strength of the words "surviving me," and I think the only safe course is to read that clause literally and as it stands. That being so, the event has not happened on which, and on which alone, anything is given to the testatrix's brothers and sisters. The result is that the declaration of the learned judge should be reversed, and it must be declared that there is an intestacy; and, I suppose, the costs of all parties here and below will come out of the estate.

COLLINS, M.R.—I agree.

Appeal allowed.

Solicitors, *Schultz & Son*, for *Gwilym James, Charles, & Davies*, Merthyr Tydvil; *F. Kinch*, for *Lloyd & Pratt*, Newport, Mon.

High Court of Justice.

Chan. Div. Kekewich, J. March 27.

BARRY v. SMART. (a.)

Inland revenue—Husband and wife—Deed of separation—Alimony—Deduction of income tax—Income Tax Act, 1842 (5 & 6 *Vict. c.* 35), *s.* 102.

Where a wife is entitled under a deed of separation to an annuity by way of alimony, the husband may deduct income tax in respect of the annuity.

Warren *v.* Warren, 43 *W. R.* 490, *followed.*

Adjourned summons.

This case was commenced by originating summons taken out by the plaintiff, Mrs. Katherine Vincent Mayell Barry, on the 8th of July, 1905, for the determination (*inter alia*) of the following question: whether income tax could be deducted by her

(a.) Reported by P. JOHN BOLAND, Esq., Barrister-at-Law.

husband, James Hewitt Barry, from the payments made by him to the plaintiff under a deed of separation dated the 24th of March, 1903.

The defendants were the said J. H. Barry and Frederick Bertram Smart and Walter Samuel Simpson, the trustees of the said deed of separation.

The said F. B. Smart and W. S. Simpson appeared separately.

The facts were as follows:

On the 19th of July, 1900, the plaintiff presented a petition for the dissolution of her marriage with the defendant J. H. Barry, and for the custody of the seven children, issue of the marriage.

When this petition was in the paper for hearing, and was about to be heard, the plaintiff and the defendant J. H. Barry agreed upon a deed of separation dated the 26th of November, 1901, whereby the late Mr. F. A. Inderwick, K.C., was appointed arbitrator, and it was (*inter alia*) referred to him to decide what provision ought, under the circumstances of the case, to be made by the defendant J. H. Barry in respect of (*a*) the allowance to be paid by him to the plaintiff, and for what period or periods, by way of alimony or maintenance; (*b*) the allowance to be paid by him to the plaintiff, and for what period or periods, for the maintenance, education, and support of the children of the marriage.

After a long investigation, Mr. Inderwick made his award on the 10th of October, 1902. By this award the defendant J. H. Barry was to pay to the plaintiff for her life by way of alimony or maintenance the sum of £450 per annum payable quarterly in advance, in addition to a sum of £150 then already secured to her by an indenture dated the 12th of March, 1900, and he was also to pay to the plaintiff the sum of £40 per annum payable quarterly in advance in respect of each son until he should attain the age of twenty-one, and in respect of each daughter until she should attain the age of twenty-one or marry.

The deed necessary to carry out the terms of this award was afterwards settled by Mr. Inderwick, and was executed on the 24th of March, 1903, the defendants F. B. Smart and W. S. Simpson being appointed trustees.

Mr. Inderwick died on the 16th of August, 1904.

Until October, 1904, the defendant J. H. Barry paid to the plaintiff the various sums mentioned above in full without making any deduction for income tax, but by a letter dated the 5th of October, 1904, the defendant F. B. Smart intimated to the defendant W. S. Simpson that the annuity of £450 would not in future be paid in full, but that income tax would be deducted therefrom. There was some correspondence on the subject between the parties, and finally the plaintiff issued the summons as stated above.

There was nothing to show whether Mr. Inderwick had intended that this payment should be made in full or whether he had intended that income tax should be deducted therefrom.

Stewart Smith, K.C., and *Beddall*, for the plaintiff.—Where the Divorce Court orders alimony to be paid by a husband to his wife, it is the practice of that court in estimating the net income of the husband in order to arrive at the amount of alimony to be paid by him, to deduct income tax and outgoings. The alimony is, therefore, usually payable in full: *Frankfort* v. *Frankfort*, 4 Notes of Cases, 280.

P. O. Lawrence, K.C., and *E. Ford*, for the defendant J. H. Barry.—This case comes directly within the case of *Warren* v. *Warren*. It is the general practice that, where alimony is allowed, income tax can be deducted: *Pemberton* v. *Pemberton*, 2 Notes of Cases, 17. In *Frankfort* v. *Frankfort* it was proved that income tax had been deducted from the husband's income in order to arrive at the amount he should pay by way of alimony. There is nothing to show that the arbitrator had done so in this case. The husband is clearly entitled to deduct income tax under section 102 of the Income Tax Act, 1842.

Cozens-Hardy, for the defendant F. B. Smart.

Norman, for the defendant W. S. Simpson.

KEKEWICH, J., in giving judgment, said: By the deed of the 24th of March, 1903, Mr. Barry covenanted with the trustees that he should pay to them during the lifetime of the plaintiff the sum of £450 per annum in addition to the £150. There can be no question that the £150 was payable after deducting income tax. The £450 is directly covered by *Warren* v. *Warren*. In that case the judge regarded it as a contract apart from the practice of any court, and held that the payment was subject to the deduction of income tax. In *Pemberton* v. *Pemberton* Dr. Lushington held that income tax must be deducted. In *Frankfort* v. *Frankfort* the point was gone into very fully, but under entirely different circumstances. In that case the payments were made under an order of the court. In this case the payments are made by virtue of a contract, and section 102 of the Income Tax Act, 1842, provides that annual sums payable under a contract are liable to deduction for income tax. The £450 per annum must therefore be paid less income tax, so far as the payments not yet made.

The trustees, although they appear separately, can only be allowed one set of costs as between party and party.

Solicitors for the plaintiff and the defendant W. S. Simpson, *Booth & Smee*.

Solicitors for the defendant J. H. Barry, *Harcourt, Sons, & Rolt*.

Solicitors for the defendant F. B. Smart, *Cox & Lafone*.

Chan. Div.
Swinfen Eady, J. } March 30.

In re SMITH, DECEASED.
SMITH *v.* DODSWORTH (*a*.)

Will—Annuitant—Tenant for life and remainderman—Capital or income—Charges in respect of compensation fund—Licensing Act, 1904 (4 *Ed.* 7, *c.* 23), *s.* 3.

Where part of a trust estate under a will consists of freehold beerhouses with on-licences, on which annual charges are imposed in respect of the compensation fund under section 3 of the Licensing Act, 1904, *and by reason of the deduction by the tenants from their rents of the proper proportion of such charges, the income of the trust estate becomes insufficient to pay in full an annuitant under the will, such annuitant is not entitled to have any part of such charges paid out of capital, but they must be borne by the income of the estate.*

Adjourned summons.

By his will dated the 12th of March, 1892, the testator, John Francis Smith, thereby appointed the plaintiff Ann Smith and the defendants John Francis Cook and John William Harrison executors and trustees thereof, and made certain pecuniary and

(*a*.) Reported by P. W. PEGG, Esq., Barrister-at-Law.

specific bequests and devised and bequeathed all the rest of his personal estate and all his real estate to his trustees upon trust to permit his wife during widowhood to have the enjoyment of his household effects and to occupy rent free his then present residence, and upon trust to pay her out of the income of his trust estate, during her widowhood, an annuity of £200, and to accumulate any balance of such income for the purpose of reducing the incumbrances on his real estate, but with full power to resort to such accumulations for the purpose of repairs or insurance, or otherwise, incurred in connection with his estate or for making up the said annuity as his trustees should see fit, and upon the marriage again or death of his wife, upon trust as to all his trust estate for his three daughters in equal shares.

The will contained a direction that his wife during widowhood should have the management of his real estate, and the collection of the rents, and the payment of all interest, and the sole discretion as to the repair and insurance thereof. And he empowered his trustees to sell his real estate when it should, in his trustees' discretion, be to the advantage of his estate.

The testator died on the 11th of March, 1896.

The testator's real estate consisted of several small freeholds, including three beerhouses with on-licences, situate at Kingston-upon-Hull, known respectively as the Drum Inn, the Clarence Inn, and the South Myton Tavern.

The Drum Inn was in lease to a tenant for a term which at the date of the action had two years unexpired, at an annual rent of £35. The Clarence Inn was in lease to a tenant for a term which at the date of the action had three years unexpired, at an annual rent of £35. The South Myton Tavern was in lease to a tenant for a term which at the date of the action had three and a-half years unexpired, at an annual rent of £50.

The total rent received in respect of the said three beerhouses amounted, therefore, to £120 per annum.

In the year 1905 the justices in quarter sessions imposed charges towards the compensation fund under section 3, sub-section 1, of the Licensing Act, 1904, in respect of the said three beerhouses, as follows—namely, £4 8s. 4d. on the Drum Inn, £7 12s. on the Clarence Inn, and £11 8s. on the South Myton Tavern.

The total amount payable in respect of the said charges for the year 1905 amounted, therefore, to £23 8s. 4d., and the respective tenants thereupon deducted a proper proportion thereof from their rents in pursuance of section 3, sub-section 3, of the above Act, which provides that the licence-holders may deduct a certain percentage of the charge from their rent as set forth in the second schedule thereto.

The income of the trust estate not being sufficient to pay the widow's annuity of £200, she issued this summons against the other trustees of the said will, and her three daughters, who were entitled to the *corpus* in remainder on her death or remarriage, to have it determined: (1) Whether the amounts deducted by the respective lessees of the beerhouses respectively known as the Clarence Inn, the South Myton Tavern, and the Drum Inn, situate at Kingston-upon-Hull (forming part of the testator's residuary estate), on account of the charges payable under section 3 of the Licensing Act, 1904, in respect of the existing on-licences of the same premises, ought to be borne and raised wholly or in part by and out of the capital of the said estate by way of exoneration of the income thereof; (2) whether the annuity of £200 payable to the plaintiff under the said will is charged upon the *corpus* as well as the income of the testator's residuary estate.

Nash, for the plaintiff, did not contend that the widow's annuity was charged upon capital having regard to *Stelfox* v. *Sugden*, John. 234, and *Foster* v. *Smith*, 1 Ph. 629. The charges imposed on the premises under the Act of 1904 ought to be paid first out of the rent, and then the tenant for life is entitled to be recouped the whole or a proportionate part thereof out of the capital. The income not being sufficient to meet the annuity, the plaintiff is in the position of a tenant for life. The charge is analogous to an insurance against fire, and a tenant for life, whether legal or equitable, is not bound to insure freeholds. It is not an ordinary outgoing. The Act has thrown the charge upon the rent in the first instance, but that does not determine the ultimate incidence of the charge. The tenant for life could not receive any part of the compensation money—that is, capital. It is a payment for the preservation of the property: *Dent* v. *Dent*, 30 Beav. 363. It is analogous to the case of drainage expenses required to be done under some Act: *In re Barney*, 43 W. R. 105, [1894] 3 Ch. 562; *In re Farnham*, [1904] 2 Ch. 561.

Martelli, for the defendant trustees and two of the daughters entitled in remainder.—No part of the charges deducted under the Act ought to be paid out of capital. This is not strictly a case of tenant for life and remainderman. The plaintiff practically argues that the income should be not only the actual rent received from the tenants, but in addition a sum taken each year from capital. It is an annually recurring charge payable by the licence-holder, and not a capital charge. It is not an insurance for the benefit of this particular property.

Galbraith for a person entitled in remainder.—The capital will really get no benefit from the charges under the Act: *In re Crawley*, 28 Ch. D. 431.

Nash, in reply.—This case is analogous to a payment made by a tenant for life in keeping up a life policy: *In re Morley*, 44 W. R. 140, [1895] 2 Ch. 738.

SWINFEN EADY, J., after stating the facts, said: It is to be observed that the trustees were to pay the yearly sum "out of the income of the trust estate." I think it is clear, on the construction of the will, if the matter depended on that alone, that all the widow is entitled to is a yearly sum of £200 out of the income of the trust estate; the annuity is payable out of the income only, and is not charged upon capital. The will does not contain any provision for payment of a deficit out of capital, or for augmenting the income by any sum to be raised thereout. There is nothing within the four corners of the will to enable the widow to throw any part of the charge upon capital. So if the application is to succeed it must be by reason of something to be found in the Act, or in the ordinary rules applicable to such a case. The Act of 1904 rather contemplates that the charge will be borne by the persons entitled to the income, because, after providing by section 3, sub-section 1, that quarter sessions shall in each year impose those charges for the purposes of the Act, unless they certify that it is unnecessary to do so in any year, it enacts by sub-section 2 that they shall be levied and paid together with and as part of the duties on the corresponding excise licence; so the result is that the tenant has to pay them, together with the ordinary excise licence, and unless he pays the two amounts he does not often obtain the excise licence. Then sub-section 3 provides that such deductions from rent as are set out in the second schedule may be made by

any licence-holder who pays a charge under section 3, and also by any person from whose rent such a deduction is made.

The result is that a proportion of the charge, varying with the length of the tenancy, may be deducted by the licence-holder from his rent, and if his landlord is himself a lessee he also may make a deduction; so that the incidence of the sums deducted is to fall on the person ultimately receiving rent for the premises, and the sums charged form a fund out of which compensation is to be paid in cases where licences are not renewed.

The Act contains no provision under which any part of the charge may be thrown on capital. The nature of the charge seems more akin to income than capital. It is an annual charge, and not like one for improvements made once for all; it is to be made every year, unless certified to be unnecessary; and it is coupled with the excise duty, and is to be levied and paid as part of that duty. It bears no analogy to cases where money is paid by way of salvage, or an outlay is made for capital improvements. It is much more in the nature of an annual charge, and if the argument is well founded that it is to be regarded as a premium paid for insurance, then it is much more proper to be regarded as an annual outgoing than as a charge to be raised and paid out of capital.

None of the authorities which have been cited afford any assistance, except *In re Crawley*, and like that I think this is a case where the Legislature has provided the way in which the charge is to be borne. There is nothing in the will or in the statute or general law to relieve the widow from bearing it, or to entitle her to come and say that the income of the trust estate is to be notionally increased by treating as part of it those sums which have been deducted from the rents before they were paid. I decide, therefore, that the annuitant is not entitled to have all or any part of the annual charge raised and paid out of the capital of the trust estate.

Solicitors, *Rollit, Sons, & Burroughs*, for *Thompson, Cook, & Babington*, Hull; *H. Davey Turner*.

Chan. Div. Warrington, J. } May 7.

BLAIBERG *v.* KEEVES. (*a.*)

Vendor and purchaser—Particulars of sale—Misrepresentation—Conditions of sale—Title—Enlargement of long term into freehold—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 65 (1).

A vendor of property, where he has reasonable grounds for so stating, is entitled to describe in the particulars of sale the property as being held on a particular tenure, and in the conditions of sale to limit the proof of title which the purchaser might otherwise require.

Torrance *v.* Bolton, 21 *W. R.* 134, *L. R.* 14 *Eq.* 124, 8 *Ch.* 118, *distinguished.*

Action.

This was an action by a purchaser for the recovery of a deposit paid on the signature of the contract for the purchase of certain property, upon the grounds that the purchaser was induced to enter into the agreement by the misrepresentation of the defendant and was entitled to have the contract rescinded.

The property was originally held under a lease for 500 years granted in 1672 by the then lord of the manor of Stebunheath, alias Stepney, reserving the yearly rent of one shilling.

No rent had been paid for many years, and in 1902 a deed-poll was executed under section 65 of the Conveyancing and Law of Property Act, 1881, purporting to enlarge the leasehold interest into a fee simple.

The property was then offered for sale by auction, and Lot 3, which was the property in question, was described as "an eligible freehold investment comprising a capital house and shop situate and being No. 249, Whitechapel-road."

The fifth condition of sale was as follows: "The property comprised in Lot 3 was formerly held with other property under an indenture of lease dated the 31st of January, 1672, for the term of 500 years at the yearly rent of one shilling, but the property was assigned in the year 1828 free from the said rent, which has never been paid by the vendor, and the purchaser shall assume that the said rent has been released and is not now charged upon the property sold. By a deed-poll in 1902, under the provisions of the Conveyancing and Law of Property Act, 1881, the property was expressed to be enlarged by the beneficial owner into a fee simple. No objection or requisition shall be made on account of the lease dated the 31st of January, 1672, or a copy thereof not being forthcoming, or as to the contents thereof or the identity of the parcels or otherwise in relation thereto, and it shall be assumed that the said deed-poll operated as an effectual enlargement according to its tenor."

The plaintiff read the particulars of sale, but not the conditions, and, relying upon the statement in the particulars of sale, bought Lot 3, and paid a deposit of £242 10s.

Jenkins, K.C., and *W. M. Spence*, for the plaintiff.

Upjohn, K.C., and *T. T. Methold*, for the defendant.

WARRINGTON, J., after stating the facts, continued: The question whether the property was freehold would depend upon whether the deed-poll of 1902 was effectual under the statute to enlarge the term into freehold. Section 65, sub-section 1, of the Conveyancing and Law of Property Act, 1881, provides: "Where a residue unexpired of not less than 200 years of a term, which, as originally created, was for not less than 300 years, is subsisting in land, whether being the whole land originally comprised in the term, or part only thereof, without any trust or right of redemption affecting the term in favour of the freeholder or other person entitled in reversion expectant on the term and without any rent, or with merely a peppercorn rent or other rent having no money value incident to the reversion, or having had a rent not being merely a peppercorn rent or other rent having no money value, originally so incident, which subsequently has been released, or has become barred by lapse of time, or has in any other way ceased to be payable, then the term may be enlarged into a fee simple in the manner and subject to the restrictions in this section provided." I assume the rent of one shilling is a rent having a money value and is not barred by lapse of time As far as the effect of the deed of 1902 is concerned, the question resolves itself whether the rent had been released prior to this deed. The vendor being in the difficulty of having no evidence of actual release inserts in the contract certain provisions. Now were these particulars and conditions misleading? I think the plaintiff has not shown that the statement that the property was freehold was false, and it is at

(*a.*) Reported by L. T. FORD, Esq., Barrister-at-Law.

least an open question whether in fact there had been a release or not.

All that the defendant did was to describe the property as being held on a particular tenure, which he believed reasonably on sufficient grounds might be the true tenure; but having a difficulty in proving the freehold tenure, he then in the conditions of sale imposes on the purchaser the burden of assuming certain facts. Thus stated, the case comes within the principles of *In re Sandbach and Edmondson's Contract*, 39 W. R. 193, [1891] 1 Ch. 99. In *Torrance* v. *Bolton*, 21 W. R. 134, L. R. 14 Eq. 124, 8 Ch. App. 118, the particulars of sale described the property as an immediate absolute reversion. The conditions there pointed out that the reversion was subject to certain incumbrances, and the purchaser was to take a conveyance subject to these incumbrances. Both before Malins, V.C., and in the Court of Appeal it was held that the purchaser was entitled to recover the deposit paid. The Court of Appeal decided that the vendor was not entitled to correct by the conditions a false statement in the particulars of sale. The purchaser was not bound to look at the conditions to correct a statement in the particulars.

The present case is distinguishable from *Torrance* v. *Bolton*. Here the property was described as freehold, which may or may not be true. Whether it was or not was a question of title only. It was not the function of the particulars to deal with such a question, but it was the function of the conditions to state what evidence of title the purchaser was to have.

The defendant therefore was entitled to describe the property in the particulars as freehold, and in the conditions to state what facts the purchaser should accept as proved, and upon these facts should accept the statement made in the particulars as true. The action therefore fails and must be dismissed with costs.

Action dismissed with costs.

Solicitors for the plaintiff, *Pedley, May, & Fletcher.*

Solicitors for the defendant, *Bolton & Co.*

Chan. Div.
Warrington, J. } March 6, 7.

DAWSON *v.* ISLE. (*a.*)

Bill of exchange—Indorsement to bank for purpose of discount—Property in bill—Bill receivable whether a book debt—Debts omitted from books—Whether book debts.

The property in a bill of exchange, indorsed to a bank for the purpose of being discounted, does not pass to the bank before it has been actually discounted and the amount credited to the account of the customer.

Giles *v.* Perkins, 9 *East* 12, *followed;* Ex parte Schofield, In re Firth, 27 *W. R.* 925, 12 *Ch. D.* 337, *distinguished.*

Until this has been done it remains a "bill receivable" in the hands of the customer, and therefore a "book debt" of the customer.

In re Stevens, Stevens *v* Keilly, (1888) *W. N.* 110, *and correction at p.* 116, *followed.*

"Book debts" may include debts omitted from the books, but which should have been entered in the ordinary course of trade.

(*a.*) Reported by E. WAVELL RIDGES Esq., Barrister-at-Law.

Special case.

This was a special case stated by the referee appointed by the court in an action for specific performance of a contract for the sale of certain shares in a tannery company, and the questions to be determined were (*inter alia*): (1) Whether a bill of exchange indorsed to their bank by the company for the purpose of discounting, but not actually discounted until after the date of the contract, was to be regarded as a book debt of the company at the time when the contract was entered into? (2) Whether certain debts due to the company at the time when the contract was entered into, but not actually appearing in their books, were to be regarded as book debts of the company for the purposes of the contract?

By a contract in writing, dated the 27th of February, 1905, the plaintiff agreed to sell, and the defendant to buy, 15,000 preference shares and 1,000 ordinary shares in the Meersbrook Tannery (Limited) at the price to be fixed as therein mentioned. Clause 2 of the agreement provided that the price to be paid for the shares was to include (*inter alia*) "the amount of the book debts due to the company (less the discounts), such debts to be taken as good at the amounts standing in the company's books," with the exception of certain specified debts.

On the 3rd of May, 1905, the plaintiff issued a writ claiming specific performance of the agreement of the 27th of February, 1905, and all necessary accounts and inquiries.

The action came on for trial on the 31st of July, 1905, and an order was made by consent declaring that "the book debts in the pleadings mentioned which are to be valued do not include the bank balance (if any) or the cash in hand."

By the same order it was directed that the whole action should be referred to some person as therein described "to determine the amount to be paid by the defendant to the plaintiff under the agreement of the 27th of February, 1905."

In ascertaining the amount to be paid under the agreement before the referee, the plaintiff sought to bring into account as part of the book debts due to the company a bill of exchange for £600, which the company had received in the ordinary way of trade for goods sold and delivered. This bill was indorsed by the company and handed to their bank on the 22nd of February, 1905, it being the custom of the bank to discount bills handed to them by the company in the ordinary course of business. The bank subsequently discounted the bill, and on the 28th of February, 1905, credited the amount of the bill to the company's account in their bank pass book, and debited the account on the same date with the discounting charges.

The plaintiff also claimed to bring into account certain debts due to the company, but not actually appearing in their books at the date of the agreement.

These claims being disputed by the defendant, the following questions (*inter alia*) were stated by the referee for the opinion of the court:

(1) Should the bill of exchange for £600 be treated for the purposes of the said agreement as a book debt standing in the books of the company and brought into account in ascertaining the amount of the said purchase-money, or as part of the bank balance to the credit of the company's account on the 27th of February, 1905, which by the said order is not to be included in the book debts?

(2) Is the plaintiff entitled, having regard to the terms of clause 2 of the said agreement, to claim as book debts due to the company debts which may be found due to the company on the 27th of February, 1905, but do not appear in the company's books?

Cave, K.C., and *Hollis Walker* (*C. E. Dyer* with him), for the plaintiff.—By the mere fact of indorsement the property in the bill did not pass to the bank. The bank did not agree to discount the bill until the 28th of February, the day following the date of the agreement, and until the bill was discounted it remained the property of the company: *Giles* v. *Perkins*, 9 East 12. That being so, the bill was a "bill receivable" in the hands of the company, and therefore a book debt of the company on the authority of *In re Stevens, Stevens* v. *Keilly*, (1888) W. N. 110, and correction at p. 116.

H. Terrell, K.C., and *Greig*, for the defendant.—The property in the bill passed to the bank by indorsement, and to hold otherwise would be directly in the teeth of the decision of the Court of Appeal in *Ex parte Schofield, In re Firth*, 27 W. R. 925, 12 Ch. D. 337. The property in the bill having passed to the bank it could no longer be a book debt of the company, and therefore could not be included in the price to be paid for the shares as ascertained under the agreement. Further, the company treated the amount of the bill as cash in their books at the date when the bill was handed to the bank; it would therefore come under the category of "cash in hand or at the bank"; and by the terms of the consent order made in the action should not be included in the purchase price of the shares.

WARRINGTON, J., after stating the facts as set out above, proceeded: With regard to the bill of exchange for £600 the defendant claims that on the 27th of February, 1900, the amount represented by the bill was "cash in hand" of the company, and therefore, according to the order made by consent in the action, should not be included in the purchase price of the shares. Now, is that the right view? It was said on the defendant's behalf that first the customer would be debited in the company's ledger account with the amount of the debt, and that then he would be credited with the amount of the bill. So far an end is put to the debt, but does not the debt on the bill itself still remain? And would not the bill itself still be treated as a "bill receivable" by the company? *In re Stevens, Stevens* v. *Keilly* is an authority for the proposition that a "bill receivable" is a "book debt," and as such it would be a substitution for the debt in the ledger account. Now prior to the 27th of February the bill was handed to the company's bankers (I will assume from what is stated by the special case to have been the custom of the firm, though it was not actually so stated) for the purpose of being discounted; but on the 27th of February it was not actually discounted. Was this bill at that date a debt due to the company or to the banker? In *Giles* v. *Perkins* the head-note is to the following effect: "A customer paying bills not due into his bankers in the country, whose custom it was to credit their customers for the amount of such bills, if approved, as cash (charging interest), is entitled to recover back such bills in specie from the bankers becoming bankrupt; the balance of his cash account independent of such bills being in his favour at the time of the bankruptcy." That case was stronger in favour of the banker than this, because there the customer was credited with the cash by the bank, here the company was not credited until after the date of the agreement. In this case the bill was indorsed (I assume for the purpose of being discounted), and when it was discounted it would have been the property of the banker. Therefore, when the bill was handed to the bank there was a condition attached, and until it was actually discounted the money due on the bill was owing to the company, and therefore a book debt. It was said that the decision in *In re Stevens* is directly in the teeth of the decision of the Court of Appeal in *Ex parte Schofield, In re Firth*. That was a case of bankruptcy, and the head-note states that "bills of exchange indorsed by a customer to his banker in order that they may be discounted, and held by the banker pending discount"—*i.e.*, pending inquiries as to the solvency of the acceptors, the banker meanwhile making some advances to the customer on the credit of the bills, are not securities which the banker, in proving in the customer's bankruptcy for the amount due to him by the customer, is bound to value. The banker is entitled to prove for the full amount due to him, and also to recover what he can from the other parties to the bills, provided that he does not on the whole recover more than 20s. in the pound. The point made on behalf of the defendant was that by indorsement the property in the bill passed to the bank in the case I have just referred to, and therefore that the property in the bill passed by indorsement in this case. But on looking at the case it will be found that the question depends upon whether the bill was handed to the bank as security for money advanced or not. The chief judge says in his judgment at p. 342: "In my opinion these bills are no part of the estate. A man indorses bills to his banker, and says, 'I owe you a good deal of money; you can collect these bills for me and carry them to my account.' Those bills no longer remain part of the customer's estate, so as to deprive the banker of the full title in law and equity which arises out of such transactions between bankers and their customers." Clearly in that case the bill was handed to the bank, not for collection, but as security against money owed to the bank, and that distinguishes it from the present case. The result, then, is that until the bill was discounted the debt upon the bill itself remained the property of the company, and if the debt was the property of the company, it was a book debt, and should be taken into account in ascertaining the price to be paid for the shares under the agreement.

With regard to the debts of the company which did not actually appear in their books at the time when the contract was entered into, it was said that as a matter of law the mere fact of omission does not cause the debt to cease to be a book debt. I think the case of *Shipley* v. *Marshall*, 14 C. B. N. S. 566, 11 W. R. C. L. Dig. 13, is directly in point, and that debts accidentally omitted from the books do not on that account cease to be book debts according to the construction of the agreement. This question ought to go back to the arbitrator to ascertain what were the particular debts owing. The circumstances attaching to the debts may make a great deal of difference as to whether they ought to be regarded as book debts or not.

Solicitors for the plaintiff, *Andrew Wood, Purves, & Sutton*, for *Andrew & Thompson*, Lincoln.

Solicitors for the defendant, *Miller & Smithe*, for *Clitherow & Son*, Horncastle.

K. B. Div. (Buckley, J.) Feb. 5, 6, 7, 8, 9, 10, 12, 13, 14, 15, 21.

HOBART v SOUTHEND CORPORATION. (a.)

Fishery—Sea—Discharge of sewage—Contamination—Public Health Act, 1848 (11 & 12 *Vict.* c. 63), s. 49—*Public Health Act*, 1875 (38 & 39 *Vict.* c. 55), s. 23—*Sea Fisheries Act*, 1868 (31 & 32 *Vict.* c. 45)—*Sea Fisheries Act*, 1888 (50 & 51 *Vict.* c. 54).

A local sanitary authority has no right, either by common law or under the Public Health Acts, to discharge sewage into the sea so as to cause a nuisance.

An injunction to restrain a discharge of sewage by a local sanitary authority may be granted if the prescriptive rights of householders are not interfered with.

Harrington v. Derby Corporation, [1905] 1 *Ch.* 205, 53 W. R. *Dig.* 138, *explained.*

Action.

The plaintiff was the lessee of a several fishery and had the right to put his oysters on the banks of the river. The defendants were the local sanitary authority of the district, and as such had constructed certain sewage works which discharged into the river, which, being tidal as well as navigable, was for the purpose of this action treated as if it had been the sea. The plaintiff asserted that the defendants' sewage works had contaminated his oyster beds, and he claimed an injunction to restrain the continuance of the nuisance and damages.

On the question of fact the judge found that the plaintiff's oyster beds were contaminated by the sewage discharged by the defendants.

The arguments on the point of law sufficiently appear from the judgment.

Macmorran, K.C., G. A. Scott, and *A. W. Atkins*, for the plaintiff.

Sir Edward Clarke, K.C., Montague Lush, K.C., and *C. Herbert Smith*, for the defendants.

BUCKLEY, J., after dealing with the facts at great length, continued: The defendants, however, have argued that as a matter of law they are entitled to discharge their sewage as they do whether nuisance arises to the plaintiff or not. They say, first, that they have a common law right to do it; and secondly, that if that be not so, they have a statutory right to do it. In my opinion neither proposition is well founded. Is there such a right at law? The plaintiff is entitled to the enjoyment of a several fishery; he has a right to enjoy the land for the purpose of putting oysters there. That right of his on the land is interfered with by nuisance caused by the discharge by the defendants from their pipes of offensive matter in such a way as that it reaches the plaintiff's land. Upon the principle of *Fletcher* v. *Rylands*, 1 Ex. 265, 3 H. L. 330, and the decisions upon which that case was founded, the defendants must keep their noxious matter from trespassing upon their neighbour's land. The case of *Tennant* v. *Goldwin*, 1 Salk. 21, 360, 2 Ld. Raym. 1089, is an express authority upon this point. The passage from Salkeld which was read seems to me entirely applicable. It runs thus: "It was the defendant's wall and the defendant's filth, and he was bound of common right to keep his wall so as his filth might not damnify his neighbour, and it was a trespass on his neighbour as if his beasts should escape, or one should make a great heap on the border of his ground and it should tumble and roll down upon his neighbour's." The defendants have, I think, no common law right. But if there be no right at law the defendants say that they have a right by statute. For that purpose they refer to section 49 of 11 & 12 Vict. c. 63 (Public Health Act, 1848), and argue that if the sea be within 100 feet of the site of a house the owner might under that Act have been called upon to construct a drain into the sea. The Act of 1848 was, however, repealed by the Public Health Act, 1875, and section 23 of the latter Act, in reproducing the substance of section 49 of the former Act, omits all provision as to draining into the sea, while section 27 of the Act of 1875 provides that for the purpose of disposing of sewage the local authority may do certain things; but with this proviso, that no nuisance may be created in the exercise of any of these powers. Any argument based upon the repealed Act of 1848 seems to me, therefore, to be displaced. But the matter does not rest there. By the Sea Fisheries Act, 1868 (31 & 32 Vict. c. 45), the property in oysters and mussels is, by section 57, in the owner of the fishery, and by section 53 it is not lawful for any person, other than the grantee, within the limits of a fishery knowingly to disturb or injure in any manner any oyster-bed, and a penalty is imposed for doing the forbidden act. The defendants point to the word "knowingly," and it may be that until this present trial the corporation might be successful in saying that they did not "knowingly" injure the bed by discharging their sewage as they did. But after this trial they would be doing it "knowingly." Further, by the Sea Fisheries Act, 1888 (50 & 51 Vict. c. 54), provision is made for the creation by the Board of Trade of sea fishery districts and for local fishery committees for the regulation of sea fisheries carried on within the district. It is provided by section 2 that a local fisheries committee may, with the confirmation of the Board of Trade, make bye-laws, amongst other things, prohibiting or regulating the deposit or discharge of any solid or liquid substance detrimental to sea fish or sea fishing. The bye-laws may, under section 3, impose penalties. Further, section 6 provides that, for the purpose of enforcing the bye-laws, fishery officials may stop and search vessels and so on, and that for the enforcement of the provisions of the bye-laws the officer shall be deemed a constable. By section 7 a justice of the peace may by warrant authorize a fishery officer to enter and search premises. These provisions show that an act in breach of the bye-laws is an illegal act. The plaintiff's fishery lies in the Kent and Essex sea fisheries district, and within the jurisdiction of the Kent and Essex Sea Fisheries Committee, being a district and a committee constituted under that Act of Parliament. They have made bye-laws which have been properly confirmed by the Board of Trade, and bye-law 15 provides as follows: "The deposit or discharge of any solid or liquid substance detrimental to sea fish or sea fishing is hereby prohibited." Not only, therefore, have the defendants no common law or statutory right to discharge the sewage so as to cause a nuisance, but they are, in my opinion, forbidden to do so by a bye-law properly made under a statute. This bye-law is binding upon the defendants, for they are not within section 13 (c) of the Sea Fisheries Act, 1888. They have no power to discharge sewage given them by a general or local Act of Parliament, or by a provisional order confirmed by Parliament. The local Act which was referred to—namely, the Southend Local Board Act, 1887, s. 5—has no bearing upon the matter. The defence raised upon the point of law fails. In *Earl of Harrington* v. *Corporation of Derby*, [1905] 1 Ch. 205, I refused to grant an injunction upon grounds which are there stated at length. Of these the ground which might have been pertinent to the present case is that arising upon pre-

(a.) Reported by T. PAKENHAM LAW, Esq., Barrister-at-Law.

scriptive right in the householders to discharge their sewage into the existing sewers. In this case I think it right—whether a prescriptive right exists in the householders or not—to grant the injunction which in Lord Harrington's case I refused. If prescription had not been abandoned and prescriptive rights enjoyed by the householders had been shown to exist, it does not appear on the facts of this case that an injunction to restrain the defendants from committing a nuisance by pollution of the plaintiff's beds will result in any interference with the rights of any of the householders. The defendants have not shown that, if proper control is maintained as regards the times at which the sewage is discharged, they cannot, without any interruption of the householders' rights of drainage, so discharge the sewage as not to commit a nuisance. In my judgment the plaintiff has proved a nuisance against which he is entitled to an injunction, and I grant an injunction as asked in the claim, limiting it in point of time to the plaintiff's lease. I assess the damages at £1,500, and, as asked by Mr. Macmorran, the costs will be on the higher scale.

Judgment for the plaintiff.

Solicitors, *W. E. M. Buchanan; Sharp, Parker, Pritchards, Barham, & Lawford*, for *W. H. Snow*, Town Clerk, Southend-on-Sea.

K. B. Div.
(Lord Alverstone, L.C.J., and Lawrance and Ridley, JJ.) Feb. 14.

DAVIES *v.* SEISDON UNION. (*a.*)

Poor law—Rating—Assessment—Sewerage board—Value of sewage farm as means of discharging statutory duties.

A sewerage board let a sewage farm to a tenant at a fair rent including an additional sum for the manurial value of the sewage.

Held, that the sum paid by the tenant was the true basis of assessment, and the rating authority was not entitled to take into account in their assessment the annual value of the advantages and facilities accruing to the sewerage board by the user of the farm for the performance of their statutory duties.

Case stated by the quarter sessions for the county of Stafford.

Upon the hearing of an appeal by the quarter sessions against a poor rate made on the 2nd of May, 1904, whereby the appellant was rated in respect of certain hereditaments in the occupation of the appellant in the parish of Kinver, in the Seisdon Union, known as the Whittington Hall Farm, and consisting of land, house, buildings, sewerage works and plant, it was ordered that the gross estimated rental of the farm should be assessed at £479, the rateable value of the agricultural land at £380, and the rateable value of the buildings and other hereditaments, not being agricultural land, at £46, subject to the following case for the opinion of the court.

The Whittington Hall Farm and the houses, buildings, and sewerage works thereon (except a small portion of land in the parish of Wolverley, rated at a rateable value of £2 15s.) are situated within the parish of Kinver and belong to the Upper Stour Valley Main Sewerage Board, which is a sewerage board duly constituted by statute for the purpose of dealing with the sewage of a certain district situate outside the parish of Kinver and the Seisdon Union. For the purposes of carrying out the duties imposed upon them the said sewerage board acquired the Whittington Hall Farm, which farm is let in the manner hereinafter mentioned to the appellant Davies. After the farm was acquired it was converted by the sewerage board into a sewage farm for the purpose of dealing with the sewage of the said district, and for this purpose they laid down and constructed upon the farm, carriers, distributors, catchpits, and sluices, consisting of brick or pipe channels and appliances. The said plant was constructed under and upon the surface of the farm for carrying the sewage from the mains of the sewerage board to suitable places and disposing thereof on the farm. The sewage brought to the farm by the board is distributed upon the farm by means of the said plant, and is there dealt with by the system known as the broad irrigation system. The sewerage board have spent in laying down and equipping the said plant and in making roads on the farms (in addition to the cost of the farm) the sum of £8,962 or thereabouts. They were able to borrow the money at the rate of 3¼ per cent. per annum.

The Whittington Hall Farm contains about 435 acres, and has been let to the appellant by the sewerage board and the former owners for many years. By a lease under seal dated the 16th of March, 1903, the Upper Stour Valley Main Sewerage Board, in consideration of the rent and covenants therein reserved and contained, and on the part of the lessee to be paid, observed, and performed, demised to Edward Davies the Whittington Hall Farm for the term of one year at the rent of £460. The tenant thereby covenanted that he would cultivate the land demised, as a sewerage irrigation farm, and would utilize all the sewage during the tenancy delivered thereon by the board, so that the sewage might be freed from noxious matter and purified by application to the land in such a manner that it might properly be discharged by the lessee into any stream without breach of the law, and would at all times during the term receive and distribute on the land and through a sufficient portion thereof all the sewage which should be delivered on the land by the board, and would keep the board indemnified against all claims and demands made against the board on account of any nuisance caused by the sewage from the time it came upon the land until it was discharged purified into some stream.

By an agreement dated the 27th of February, 1904, the said rent was in March, 1904, increased to the sum of £490 per annum, and subject to that variation the tenancy was continued upon the terms of the said lease so far as the same were applicable to a tenancy from year to year.

The sewerage board are duly rated in respect of the whole of the premises, mains, and works (used in dealing with their sewage) other than the said plant upon the farm.

The sewerage board were at one time rated in respect of the said plant, but on appeal to quarter sessions the rate was amended on the ground that the board were not in occupation of the plant and that the plant was in the occupation of the tenant of the farm. In a subsequent rate the present appellant, as tenant of the farm, was rated separately for the plant under the heading "sewage works and plant" in the sums of £364 gross estimated rental and £291 5s. rateable value as for "buildings and other hereditaments not being agricultural land." But on appeal to the quarter sessions, which was by consent referred to Mr. A. T. Lawrence, K.C., as arbitrator, the said rate was ordered to be amended by striking out the assessment. The sewerage board during the tenancy of the appellant continue to discharge their sewage by

(*a.*) Reported by ALAN HOGG, Esq., Barrister-at-Law.

means of the said plant on to the said farm, and thereby are enabled to perform their statutory duties. The rent payable under the lease was fixed after negotiation, and is a fair rent for the advantages which the appellant gets under the lease, including the value of the sewage. The rent is more than it would be if the appellant did not get the manurial value of the sewage.

It was contended for the respondents that to assess the appellant on the basis of the actual money paid under the lease was to treat the farm merely as an agricultural holding, and to leave out of account the fact that under the terms of the lease the appellant is bound to so use the farm and by and upon it to give such facilities to the sewerage board as to enable them to carry out their statutory duties, for which facilities they would be willing to pay; that the farm in the hands of the sewerage board would be equal in value to the money paid by the appellant plus the annual value of such facilities; and that in the hands of the tenant the value of the obligation imposed by the lease upon the tenant (which would equal the value of the facilities) must be added to the actual money paid by the appellant for the purpose of arriving at the rateable value of the farm.

The justices held that the actual sum paid by the appellant was the true basis upon which the hereditaments should be rated, and that they ought not to take into account the annual value of the advantages and facilities accruing to the sewerage board in connection with the said plant, and they reduced the rate accordingly.

Glen, K.C. (*Disturnal* with him), for the appellants, the Seisdon Union.—The justices have confused the value of the tenant's occupation of the land and the value of the land. This land here produces two classes of profits, the profit to the tenant and the profit to the sewerage board. If the justices are right the parish will lose the rateable value of the sewage plant.

He cited *Reg.* v. *Rhymney Railway Co.*, 17 W. R. 530, L. R. 4 Q. B. 276.

Ryde, for the respondent, was not called upon.

Lord ALVERSTONE, L.C.J.—In my opinion the point which has been raised by Mr. Glen is one which has been negatived by many cases decided over a long period, and to adopt it would be to upset the principles of rating which have now been recognized for certainly a generation. The standard of value as fixed by the Act of 1836 is "the rate at which the same (that is, the hereditament) might reasonably be expected to let from year to year free of all usual tenant's rates and taxes, and to the commutation charge, if any, and deducting therefrom, the probable average annual cost of the repairs, insurance, and other expenses, if any, necessary to maintain them in a state to command such rent. In this case it appears that the assessment committee first rated the sewerage board in respect of these mains and carriers and on appeal the quarter sessions decided they were no longer in occupation of them, and that therefore their lessee was the proper person to be rated. Thereupon the next thing done was to rate the lessee at £291, being the annual value of the buildings and hereditaments not agricultural land, which was based upon the capital cost of those conduits and interest thereon. Under no circumstances would that have been the right method of rating, although no doubt capital cost may be a matter to be taken into consideration. That went before A. T. Lawrence, J., and he very properly struck out the assessment. Then the committee appear to have said: "Although we cannot rate the board as occupiers of these mains and carriers, and though we cannot rate the tenant in respect of them, we shall ask to have exactly the same figure added on to the value of the agricultural land." I agree with the contention of counsel that the rent reserved by the lease is in no way conclusive of the amount of rent which the hypothetical tenant was willing to pay. It is only evidence. And it was quite open to the sessions to have found that the real value of the premises was the reserved rent plus the value of the service in receiving the sewage and that consequently something ought to be added to the £490 rent received. If they had said that we should have no right to interfere. Now what have the sessions found They have found that "the rent payable by the appellant under the said lease is a fair rent for the advantages which the appellant gets under the said lease, including the value of the said sewage. The said rent is more than it would be if the appellant did not get the manurial value of the said sewage." In my opinion the sessions have here applied the right test, and I further think they were right in not including any sum in the assessment which represented the annual value to the sewerage board in respect of the facilities afforded to the board to carry out their statutory duties.

Appeal dismissed.

Solicitors for appellants, *Denneson, Horne, & Co.*, for *T. Green*, Wolverhampton.

Solicitor for respondent, *H. Taylor*, Wolverhampton.

K. B. Div.
(Lord Alverstone, L.C.J., and Ridley and Darling, JJ.) — Jan. 12.

MANSEL v. ITCHEN OVERSEERS. (*a*.)

Poor law—Rating—Demand—Distress warrant.

Upon a summons for non-payment of poor rate the justices are entitled not only to decide what is the amount due, but also, when the amount so found to be due is less than the whole amount of the rate, to issue a distress warrant for the amount found due.

Case stated by justices for the county of Southampton.

The appellant O. L. Mansel was summoned on the 24th of March, 1905, by the overseers for non-payment of a sum of £6 5s. 8d. The following facts were proved at the hearing of the summons:

On the 18th of October, 1904, a poor rate was made for the parish of Itchen for the half-year ending March, 1905, the appellant being rated in a sum of £9 7s. 3d. in respect of the occupation by him of a house and garden, land and buildings, and the above sum of £9 7s. 3d. was duly demanded in November, 1904, but was not paid, and no further demand in respect of that rate was at any time made.

The appellant, who had ceased to farm the land at Michaelmas, 1904, continued in visible occupation of it down to the 25th of November, 1904, when his farm stock was sold by auction, but he remained in possession of the house and garden down to the end of March, 1905.

On the 24th of March, 1905, the appellant was summoned by the overseers for non-payment of a sum of £6 5s. 8d. being the full amount of the rate for the house and garden, and the proportion of the

(*a*.) Reported by ALAN HOGG, Esq., Barrister-at-Law.

rate for the land and buildings down to the 17th of January, up to which the overseers claimed that he continued in occupation. The justices found that the appellant had continued in occupation of the land and buildings up to the 25th of November, 1904, and that the amount due from him was £3 10s. 3d., and they accordingly issued a distress warrant for that sum with costs. It was objected on behalf of the appellant that no demand of the precise sum found to be due had ever been made upon him, and that consequently the justices had no jurisdiction to issue the distress warrant. But the justices overruled the objection subject to a case for this court.

Emanuel, for the appellant.

J. A. Simon, for the respondent.

The arguments sufficiently appear from the judgment.

Lord ALVERSTONE, L.C.J.—The question in this case is whether upon a summons for non-payment of poor rates in Form B in the schedule to the Distress for Rates Act, 1849, it is competent for the justices not only to decide what is the amount due, but also when the amount so found to be due is less than the whole amount of the rate, to issue forthwith their distress warrant for the amount so found. It has been contended for the appellant that they cannot do so, but that they ought in such a case to find the amount due, but dismiss the summons and leave the overseers to make an amended demand upon the ratepayer. We ought not to uphold this contention unless we are compelled by the language of the statutes or by decisions to do so. The original Poor Relief Act of Elizabeth contemplated the recovery of rates by distress warrant in the event of the ratepayer refusing to pay. Then a series of decisions under that statute, of which *Hurrell* v. *Wink*, 8 Taunt. 369, is one, decided that as there could be no refusal without a demand, a demand of the rate was an essential preliminary to proceedings for a distress warrant. But in that case the effect of the statute 19 & 20 Vict. c. 38, s. 32, was not considered by the court, and no question appears to have arisen thereunder. The difficulty in the present case arises out of the later legislation.

By section 16 of the Poor Rate Assessment and Collection Act, 1869, which repeals and re-enacts in an amended form section 12 of 17 Geo. 2, c. 38, it is provided that where there is a change of occupation in the middle of the period the outgoing occupier shall be liable for so much of the rate only as is proportionate to the term of his occupation. And by the Poor Rate Assessment and Collection Act, 1882, the benefit of the former Act is extended to an outgoing occupier who is not succeeded by an incoming tenant. Here the demand which was made upon the appellant was for £9 7s. 3d., which was the whole amount of the rate; but as he had gone out of occupation during the period of the rate he was entitled to relief under the Act of 1882, and could be required to pay no more than his fair proportion. The question is, therefore, what ought the justices to do in such a case upon a summons in Form B in the Schedule of the Act of 1849, which alleges that the ratepayer "being a person duly rated and assessed to the relief of the poor . . . in the sum of . . . hath not paid the same or any part thereof, but hath refused to do so." Upon such a summons the justices have jurisdiction to determine the amount which is due from the party summoned. It is clear that they cannot issue a distress warrant to recover more than the amount due: *Davies* v. *Woodfield*, 64 J. P. 213. But I am of opinion that, having ascertained the amount due, they can proceed to give effect to their decision, and issue their distress warrant at once for the amount due. In my opinion we ought not to hold that their power is confined to a declaratory order as to the amount without following it up with a warrant, but that they can make the same order with respect to the ascertained amount as they could have made with respect to the whole rate, had the whole rate been due. There is no hardship upon the ratepayer in this view, for he knew the exact date at which the occupation ceased, and the consequent proportion of the rate which was due from him, whereas the overseers did not.

RIDLEY and DARLING, JJ., concurred.

Appeal dismissed.

Solicitors for the appellant, *Speechly, Mumford, & Craig*, for *Lamport, Bassitt, & Hiscock*, Southampton.

Solicitors for the respondent, *P. J. Nicholls*, for *Hallett & Martin*, Southampton.

K. B. Div.
(Lord Alverstone, L.C.J., and Ridley and Darling, JJ.) — Jan. 11.

WANDSWORTH BOROUGH v. BAINES. (a.)

Metropolis—Bye-law—Daily removal of house refuse—Notice to occupiers to place movable receptacles on kerbstone—Refusal of sanitary authority to remove refuse placed elsewhere—Public Health (London) Act, 1891 (54 & 55 *Vict. c.* 76), *ss.* 16 (2), 30.

A bye-law made by the London County Council under section 16, *sub-section* 2, *of the Public Health (London) Act*, 1891, *provided that where a sanitary authority arrange for the daily removal of house refuse in their district, or any part thereof, the occupier of any premises in such district, or part thereof . . . shall at such hour of the day as the sanitary authority shall fix . . . deposit on the kerbstone or on the other edge of the footpath immediately in front of the house or in a conveniently accessible position on the premises as the sanitary authority may prescribe by written notice served upon the occupier, a movable receptacle in which shall be placed for the purposes of removal by . . . the sanitary authority of the house refuse." A sanitary authority issued notices under the bye-law to the occupiers of all houses in a certain area in their district requiring each occupier to deposit on the kerbstone or edge of the footpath in front of his house a movable receptacle containing the house refuse. The respondent was occupier of a detached house situated within the prescribed area of the notice, which had a garden in front and was approached by a carriage drive. He refused to comply with the notice to place his house refuse on the kerbstone, but was willing to place, and did place, the refuse receptacle in a conveniently accessible position on his front premises. The sanitary authority refused to take it away unless the receptacle was put on the kerbstone, and the respondent thereupon took proceedings against the authority under section* 30 *of the Public Health (London) Act*, 1891.

Held, that the sanitary authority was not empowered under the bye-law to give a general notice to every occupier of premises within a particular area to place the refuse receptacle on the kerbstone for removal, and their refusal to remove the house refuse of this particular occupier from what was found as a fact to be a conveniently accessible position on his premises was a refusal without reasonable cause within the terms of the section.

Semble, *that it was no objection to the validity of the*

(a.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

bye-law that the placing of the receptacles on the kerbstone would cause a temporary obstruction of the highway.

Case stated by a metropolitan police magistrate before whom the appellants had been convicted upon an information preferred by the respondent under section 30 of the Public Health (London Act), 1891, against the appellants for that they, on the 19th of January, 1905, at 37, Carlton-road, Putney, did without reasonable cause unlawfully fail to comply with a written notice, dated the 16th of January, 1905, and duly served on them, requiring them to remove house refuse from the above-mentioned premises.

The material facts stated in the case were that the respondent Baines resided in Carlton-road, Putney, in a detached house which was situated about forty feet from the highway, and was approached by a carriage drive.

By printed notice, dated the 12th of October, 1904, the appellants gave notice to the respondent and to all other occupiers of houses within a certain defined area of the borough of Wandsworth (hereinafter called the "prescribed area"), that on and after the 1st of January, 1905, a system of daily removal of house refuse would be substituted for the weekly removal then prevailing, and the said notice (which purported to be given in accordance with a bye-law made by the London County Council) required occupiers to deposit on the kerbstone or edge of the footpath immediately in front of their respective houses a movable receptacle in which should be placed for the purpose of removal of the house refuse which he had accumulated since the preceding collection. The appellants also issued to the respondent and the said occupiers a printed circular explanatory of the said notice.

The bye-law made by the London County Council in pursuance of the Public Health (London) Act, 1891, s. 16, sub-section 2 (*b*), was in the following terms: "Where a sanitary authority arrange for the daily removal of house refuse in their district or any part thereof, the occupier of any premises in such district or part thereof in which any house refuse may from time to time accumulate shall at such hour of the day as the sanitary authority shall fix and notify by public announcement in their district deposit on the kerbstone or on the outer edge of the footpath immediately in front of the house or in a conveniently accessible position on the premises as the sanitary authority may prescribe by written notice served upon the occupier, a movable receptacle in which shall be placed, for the purposes of removal by or on behalf of the sanitary authority, the house refuse which has accumulated on such premises since the preceding collection by such authority. The sanitary authority shall collect such refuse or cause the same be collected between the hours of the day as they have fixed and notified by public announcement in their district."

On the 2nd of January, 1905, in accordance with the notice, the system of daily removal of house refuse and the bye-law were put into operation within the prescribed area. The carts arrived in the different streets at different times, and the whole collection in the prescribed area was finished by 9.30 a.m.

The respondent refused to comply with the requirements of the appellants and to place his dust-bin on the kerbstone daily, and the house refuse was after the 9th of January not removed.

On the 16th of January the respondent gave the appellants notice requiring the house refuse to be removed from his premises, and was informed that the appellants were willing to do so if the same were placed on the kerbstone or edge of the footpath in accordance with the notice of the 12th of October, 1904.

The respondent was always ready and willing to place his house refuse in a proper receptacle in a conveniently accessible position on his premises for removal, and under protest placed the house refuse in movable receptacles on the kerbstone in front of his house for removal on the 20th of January and subsequently to that date, and it was removed by the appellants.

On the 19th of January he preferred an information against the borough council for refusing to comply with his notice.

The respondent contended (*a*) that the said bye-law and notice respectively were *ultrà vires* as being repugnant to the law—(1) as involving acts of wilful obstruction and the creation of nuisances; (2) as contrary to sections 30 and 34 of the Public Health (London) Act, 1891; (3) as inconsistent with the bye-law No. 18 made by the London County Council under section 39, sub-section 1, of the same Act. (*b*) That the notice was bad in point of law by reason of its limiting the operation of the bye-law as to the time and locality. (*c*) That the bye-law was unreasonable by reason of being partial and unequal in its operations. (*d*) That assuming the bye-law to be legally valid, the appellants were wrong in applying generally the one alternative and that occupiers of premises upon which conveniently accessible positions could be found for the placing of receptacles containing house refuse should not be compelled to place their refuse outside their premises. (*e*) That on the above grounds the appellants had no reasonable cause for failing to comply with the respondent's written notice.

The appellants contended (*a*) that they had properly and legally fulfilled their duties under section 30 of the said Act in regard to the respondent's refuse on the 19th of January, 1905, and at all times; (*b*) that the bye-law and notice respectively were valid in law and neither *ultrà vires* nor unreasonable; (*c*) that in operation the new system created no obstruction or nuisance; (*d*) that the respondent's noncompliance with the appellant's notice was reasonable cause within section 30, sub-section 2, entitling them to a dismissal of the information; (*e*) that assuming the bye-law to be *ultrà vires* or unreasonable, the appellants were entitled to rely upon a bye-law duly made by the London County Council so long as it was in existence and not held to be invalid, and such reliance was reasonable cause entitling them to dismissal of the information.

The magistrate was of opinion that the appellants, under all the circumstances, failed without reasonable cause to perform the duties cast upon them by section 30 of the Public Health (London) Act, 1891, in that they had failed to remove from the respondent's premises his house refuse; that the notice dated the 12th of October, 1904, went beyond the bye-law to such an extent as to give the occupier permission to cause an obstruction in the street; that the notice amounted to an order to the respondent to place his dust-bin on the pavement in front of his premises; and that the respondent was justified in refusing to obey such order, inasmuch as it amounted to an order to do something which entailed the commission of illegal acts. He was further of opinion that for the purposes of his judgment it was not necessary for him to decide (and he did not decide) whether or not the bye-law was a valid bye-law, because by the course adopted the appellants had put it into operation in an illegal and unreasonable manner, whereas it might have been put into operation in a legal and reasonable manner, since he found as a fact that the respondent had a reasonably accessible position on

his premises from which the sanitary authority might have removed his house refuse. He was further of opinion that the bye-law contemplated voluntary arrangements being made between occupiers and the sanitary authority as to the removal of house refuse, which was not done, or attempted to be done, in the case before him. He accordingly convicted the appellants in 20s. and 25 guineas costs, but stated this case for the opinion of the court as to whether he was right in so doing.

Avory, K.C. (*Bernard Campion* with him), for the appellants.—The question really comes to this, whether the London County Council can in the excercise of their discretion impose on every occupier within a prescribed area on due notice being given the duty of placing his bust-bin or box on the kerbstone. The respondent impugns the validity of the bye-law set out in the case, but the magistrate, although deciding in his favour, did not hold that the bye-law was bad, but merely that the way in which the appellants sought to enforce it was unreasonable. The bye-law gives an absolute discretionary power to the sanitary authority to determine and say where the refuse is to be put by the occupier. That is a discretion which the magistrate cannot override. Further, the requirement by the sanitary authority in this case was perfectly reasonable. The bye-law would be unworkable if the sanitary authority had to consult the wishes of every individual occupier. [Lord ALVERSTONE, L.C.J., referred to *Borrow* v. *Howland*, (1896) 74 L. T. 787, 44 W. R. Dig. 106.] Further, sub-section 2 of section 30 of the Public Health (London) Act, 1891, under which the appellants were convicted, only imposes a penalty where the sanitary authority have failed to remove house refuse without reasonable cause, in the proper manner and at the proper times.

Macmorran, K.C., and *R. Cunningham Glen*, for the respondent, were not called upon to argue.

Lord ALVERSTONE, L.C.J.—This case is certainly one of very considerable importance, but after the very clear discussion of it by Mr. Avory, I am of opinion that the magistrate was right, although I do not agree with some of the reasons he has given for it.

The summons was against the Wandsworth Borough Council for not removing the refuse pursuant to section 30 of the Act of 1891. That was found against them on the ground that they had failed, without reasonable cause, to comply with the provisions of the section requiring them to remove the refuse. It must be taken as found by the magistrate as a fact that the respondent had a reasonably accessible position on his premises from which the sanitary authority could have removed the refuse, and that he was willing to place it there. The appellants, however, relied upon the exercise of their discretion, and said that they had a right to have, and would have, the refuse, as against this particular occupier, placed on the kerbstone.

Now, I desire to point out that the Wandsworth Borough Council have gone considerably past the bye-law made by the London County Council, if it is to be construed as contended for by Mr. Avory. I agree that a question may arise whether, if a notice had been given with regard to the particular occupier of the particular house that the refuse should be placed on a given spot, the magistrate could override the discretion of the local authority. The case before us raises no such point. The local authority have thought fit to give a notice that in a particular area occupiers should put their refuse upon the kerbstone. They have not prescribed a conveniently accessible position on the premises. Even assuming that the local authority might prescribe with regard to particular premises, although I do not decide it in favour of Mr. Avory, where the refuse shall be placed, and that the magistrate could not go beyond that, that was not what had happened in this case. There has been a notice given beyond that contemplated by the bye-law—namely, a notice that in a given area every one should place his refuse on the kerbstone. I sympathize with the desire of the local authority to have frequent removals of the house refuse in their district, but they had to consider the rights of the occupiers in the district. I desire to say that I sympathize very strongly with the sanitary authority in their wish that there should be a very frequent and, if possible, a daily removal of the refuse, and should be most unwilling to embarrass a sanitary authority in that respect; but we have really to consider what are the duties and rights of persons. An obligation to remove the house refuse rests upon the local authority. Occupiers and owners are, by statutory provisions, required to facilitate such removal, and owners might be called upon to spend money in making that removal easy and convenient, as, for instance, by providing movable dust-bins; but the question is, can a local authority give a notice applying a part of a bye-law in such a way as to relieve themselves of their obligation to remove the refuse where the occupier was willing to do everything which, apart from the particular notice, he could be called upon to do? The respondent was willing to place the dust-bin in a conveniently accessible position on his premises. The local authority said they would not remove the refuse unless it was brought out to the kerbstone. That was not a proper prescription of a conveniently accessible position as contemplated by the bye-law. If there was no prescription with respect to particular premises, then the obligation on the occupier was to put the refuse in a conveniently accessible position on the premises. It seems to me, therefore, that without saying that this notice is absolutely invalid, that the true view of it is, attempted to be put into force in the way in which it has been in this case, no matter how inconvenient it may be to some persons to put their refuse on the kerbstone, that it would be unreasonable. Therefore, in such a case the magistrate would be right in holding that the sanitary authority had failed without reasonable cause to discharge the duty cast upon them by the Act, as the respondent was willing to put the refuse in a place from which they could conveniently remove it. The other point most pressed upon us was whether there was a refusal, without reasonable cause, by the appellants, seeing that the respondent could have got the refuse removed if he had chosen to take it down to the kerb. If the hard-and-fast requisition, whatever the circumstances, was a requisition which, having regard to the law itself, the sanitary authority were not entitled to make, then their refusal to remove the refuse from the convenient position offered by the occupier was a refusal without reasonable cause within section 30 (2) of the Act of 1891. The conviction was therefore right, and the appeal will be dismissed.

RIDLEY, J.—I agree; I do not think I can usefully and anything.

RIDLEY, J.—I agree; the appeal should be dismissed.

Appeal dismissed.

Solicitors for the appellants, *W. W. Young, Son, & Ward.*

Solicitors for the respondent, *Turner & Co.*

IN BANKRUPTCY.

K. B. Div.
(Bigham and Darling, JJ.) Feb. 5.

In re A. J. HARRIS.
Ex parte THE TRUSTEE. (*a.*)

Bankruptcy—Transfer of bankrupt's business to limited company—"Fraudulent conveyance"—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-section* 1 (b).

A trader being in difficulties transferred his assets to a company in the bonâ fide *hope of thereby benefiting his creditors. His assets were estimated at* £2,000, *and his debts at* £1,000. *The consideration for the transfer was an undertaking by the company to pay his debts and the allotment of ninety-four shares and debentures of the nominal value of* £1,000. *The debentures could not be enforced until interest was two months' overdue*—i.e., *eight months from their issue, or until execution was put in against the company.*

Held, that this transfer did not necessarily tend to defeat or delay creditors, was not a fraudulent conveyance within section 4, *sub-section* 1 (b), *of the Bankruptcy Act,* 1883, *and should not be set aside as void against the trustee in bankruptcy.*

Appeal from a decision of his Honour Judge Bompas, K.C., in the county court at Bradford.

The bankrupt had carried on business as an electrical engineer and dealer in electric fittings since 1892.

In August, 1903, he borrowed from William Mitchell, the petitioning creditor, £500 at 5 per cent. interest without any security but a promissory note payable on demand. At the same time Mitchell's son, Joseph William Mitchell, was apprenticed to the bankrupt for three years, with the option of putting capital into the business and becoming a partner at the end of his apprenticeship.

In April, 1905, the bankrupt got in arrears with the interest on the loan and asked Mitchell to let the payments of interest stand over for a time, and further suggested that J. W. Mitchell should at once enter into partnership with him and bring fresh capital into the business. Mitchell refused to consent.

On the 16th of May the bankrupt again wrote to Mitchell asking him to let his son come into the business as a partner and bring in £200 capital. Mitchell again refused and advised the bankrupt to try to get an overdraft from his bank, which the bankrupt did try but without success.

On the 27th of May the bankrupt's solicitors wrote to Mitchell that the bankrupt was being pressed by his creditors, and suggested that J. W. Mitchell's apprenticeship should be terminated, but the parties came to no agreement on the matter.

About the end of June Mitchell heard a rumour that the bankrupt was about to turn his business into a limited company, and had an interview with him on the subject. The bankrupt admitted that he had thought of doing so, but said that he had practically given up the idea, and promised not to deal with his assets without Mitchell's consent.

Nevertheless, on the 3rd of July, without consulting Mitchell, the bankrupt registered the company of A. J. Harris & Co. (Limited) with a capital of £2,000 in £1 shares; and on the 7th of July executed a transfer of all his assets to the company for £1,094—£94 in shares, £750 in debentures, and £250 in cash. The company undertook to pay the bankrupt's existing debts, estimated at £1,000.

The assets were estimated to be worth £2,000, made up of stock, £1,170; plant, £662; book debts, £268.

No shares were issued to the public, and only 228 were issued in all—7 to the signatories, 94 to the bankrupt, 87 to his wife for an alleged debt, and 20 each to the two directors, Fawcett and Myers, as qualification shares.

A board meeting was held on the 19th of July, when it was resolved, with the bankrupt's consent, that he should be paid the sum of £250 in debentures instead of cash as agreed.

The bankrupt said that he had agreed to take payment of this sum in debentures because he wanted them as a good investment, but he was in such straits at that time that he had to borrow £20 on a bill of sale on the following day (the 20th of July).

By the terms of the debentures interest was payable thereon half-yearly, and no proceedings could be taken to enforce the security until interest had been unpaid for two months after it had become due. Consequently no proceedings could be taken upon the debentures until eight months from the date of their issue unless a judgment was obtained against the company and execution put in, in which event they also were enforceable.

On the 28th of July Mitchell obtained judgment against the bankrupt for the amount of his loan and interest, and, having issued a bankruptcy notice, he presented a petition on the 8th of August, upon which a receiving order was made against the bankrupt on the 18th of August.

Adjudication followed, and a trustee was appointed, who moved in the county court at Bradford to set aside the assignment to the company as a fraudulent conveyance.

Prior to serving the notice of motion the trustee obtained a private examination of the bankrupt, who stated that before the assignment he had been pressed by his creditors, he could not get J. W. Mitchell, or another man whom he had approached, to join him as partner, and had been refused an overdraft from his bank. He thought he could raise capital by forming a company, and that he would be able to borrow on the debentures allotted to him and repay Mitchell's loan. The bank, however, had refused to lend anything on the debentures.

The county court judge dismissed the motion, and the trustee appealed.

Frank Mellor, for the appellant.—The effect of the assignment by the bankrupt was to delay his creditors. When pressed he assigned his property in such a way as to put it out of the creditors' power to get anything but shares and debentures: *Ex parte Lücke, In re Wood*, 20 W. R. 403, L. R. 7 Ch. 302. [BIGHAM, J.—If he had sold for cash it would have been a proper transaction. Here he has sold for debentures charged on the property transferred. Do they honestly represent the property parted with?] The creditors cannot be compelled to take debentures. Wright, J., pointed out in *In re Slobodinsky*, 52 W. R. 156, [1903] 2 K. B. 517, that debentures and shares are not the same as cash. Here the debentures cannot be enforced for eight months from their issue.

He cited *Smith* v. *Cannan*, 22 L. J. Q. B 290; *In re Hirth*, 47 W. R. 243, [1899] 1 Q. B. 612; *Wheatley's Trustee* v. *Wheatley & Co.* (*Limited*), 85 L. T. 491, 50 W. R. Dig. 12.

Waugh, K.C., and *Newell*, for the respondents.—This was a *bonâ fide* transaction; the bankrupt handed over his business to the company without charging anything for the goodwill; the company undertook to pay his debts, and the debentures became enforceable as soon as execution is put in against the company. It is not a transfer for a past consideration.

(*a.*) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

Frank Mellor in reply.—The company are no better able to pay the debts after they have have issued the debentures than the debtor was when he had the assets free. The creditors never agreed to the transfer of his liability to the company, consequently he has not got rid of his liability. [BIGHAM, J.—The trustee can sue the company and put in execution, when the debentures will become enforceable.] The creditors could not sue the company; the debtor, not the company, was liable to them; they would have had to compel the debtor to sue the company.

He cited *In re Sharpe, Ex parte Gundry*, 83 L. T. 416, 49 W. R. Dig. 8.

BIGHAM, J.—The question in this case is whether this transaction naturally tended to defeat and delay creditors, and was therefore a fraudulent conveyance within section 4, sub section 1 (*b*), of the Bankruptcy Act, 1883.

The facts are these: The debtor was in difficulties and cast about for a way to get out of them. He had more than enough assets—they were estimated at £2,000 and his debts at about £1,000—but he could not realize them. He thought he could make his estate liquid by turning his business into a company, and that he would so get something to pay his debts with. He therefore transferred his business to a company in exchange for an undertaking by the company to pay his debts and the allotment to him of ninety-four shares and £1,000 in debentures. It is said that he thereby necessarily defeated or delayed his creditors, and that it was a fraudulent gift, delivery, or conveyance. He honestly believed it to be for the advantage of his creditors, therefore it cannot be a fraudulent transaction within the statute. He did not delay his creditors by changing the character of his assets. He was entitled to sell them for money, or for promissory notes, or for other goods. I think that he was acting within his rights and that this appeal must be dismissed.

DARLING, J.—I have much doubt whether the cases cited do not establish the case put forward by Mr. Mellor. Still I take it here that the debtor acted honestly in the interest of his creditors, hoping that he would improve the value of his business and have the means of paying them. I therefore assume that the conveyance was made honestly as far as the debtor was concerned, and that he had no sinister or oblique motive in making it. It is, however, said to amount to an act of bankruptcy as necessarily tending to defeat and delay creditors, and though not dishonest *per se*, to be "fraudulent" within section 4, sub-section 1 (*b*). If that be so, "fraudulent" would appear to have no meaning whatever, and I must admit that the decisions in *Smith* v. *Cannan*, 20 L. J. Q. B. 290, and *Ex parte Lückes, In re Wood*, 20 W. R. 403, L. R. 7 Ch. 302, do seem to amount to that.

Nevertheless in this case I think that the creditors could have sued the debtor and seized the debentures in execution, and though when they got them they might not have been able to put them in force, still I think they could have sold them as easily as the electric fittings which they represented. I therefore agree that this appeal should be dismissed.

Solicitors for the appellant, *Stamford & Metcalfe*, Bradford.

Solicitors for the respondent, *Wynne-Baxter & Keeble*, for *Banks, Newell, & Hammond*, Bradford.

Court of Appeal.

From K. B. Div. (Vaughan Williams, Stirling, and Moulton, L.JJ.) — May 18.

LUMSDEN, JUN. v. SHIPCOTE LAND PROPERTY CO. (*a*.)

Solicitor—Costs—Amendment—Alterations—Omissions—After verdict—Taxation — Reference — Solicitors Act, 1843 (6 & 7 *Vict. c.* 73), *s.* 37.

A., a solicitor, delivered to his client, B., a bill of costs which he subsequently amended by a second bill of costs increased by certain items omitted from the first bill. Subsequently A. brought an action upon the second bill of costs against B., who pleaded (1) *no retainer*, (2) *no right of action upon an amended bill of costs. It was agreed by the parties at the trial of the action that only the question of liability should go to the jury. Upon this question the jury gave their verdict in favour of the plaintiff.*

Held, that the bill sued upon—i.e., *the second bill—could not after verdict be sent by the judge to a taxing-master to be taxed under section* 37 *of the Solicitors Act*, 1843, *but could only be sent as a reference under the general jurisdiction of the court to order a reference as to* quantum. *Upon such reference it would be open to the defendants to put forward the first bill of costs as evidence of what the proper charges should be.*

Semble (*per* Vaughan Williams, L.J.), *that, although the taxing-master, acting as a referee, would bring to bear upon the question the principles of taxation, yet all the principles applicable to taxation of a bill of costs would not necessarily apply*, e.g., *the rule that the solicitor must pay the costs of taxation if one-sixth part of the bill be taxed off.*

Per Moulton, L.J.—*A solicitor may amend* bonâ fide *his bill of costs at any time before an order of taxation has been obtained or taxation has been threatened by the client.*

Appeal from the judgment of Ridley, J.

The plaintiff was a solicitor and was a joint adventurer with the defendants in a certain venture. He did certain professional services for the syndicate and was requested to make his charges as low as possible. He accordingly on the 18th of January, 1904, sent in a bill of costs for £192 10s. 10d., having intentionally omitted certain items in order to fall in with the wishes of his co-adventurers, the defendants.

The defendants denied liability on the ground that the work had been done merely as a co-adventurer.

Thereupon the plaintiff on the 16th of July, 1904, sent in an amended bill of costs for £673 2s. 10d., which included the items omitted from the first bill. Subsequently he brought an action on this bill and the defendants pleaded, for the purpose of this appeal, (1) want of retainer, (2) no action would lie on the second bill of costs.

Upon the trial of the action counsel agreed that the jury should only try the issue of liability and not the issue as to *quantum*.

The jury returned their verdict for the plaintiff. Thereupon counsel for the plaintiff asked leave, if leave were necessary, to bring in the second bill of costs for taxation.

The judge said that if leave were necessary he should refuse it, as he considered under all the circumstances of the case the first bill should be brought in for taxation.

From this decision the defendants appealed.

(*a*.) Reported by MAURICE N. DRUCQUER, Esq., Barrister-at-Law.

Section 37 of the Solicitors Act, 1843 (6 & 7 Vict. c. 73), enacts: "From and after the passing of this Act no attorney or solicitor . . . shall commence or maintain any action or suit for the recovery of any fees, charges, or disbursements for any business done . . . until the expiration of one month after such attorney or solicitor shall have delivered unto the party to be charged therewith . . . a bill of such fees, charges, and disbursements. And upon the application of the party chargeable by such bill within such month, it shall be lawful . . . for the court . . . or any judge . . . to refer such bill . . . to be taxed and settled by the proper officer, and in case no such application as aforesaid shall be made within such month as aforesaid, then it shall be lawful for such reference to be made as aforesaid . . . upon the application of the party chargeable by such bill . . . and the court or judge may restrain such attorney or solicitor from commencing or prosecuting any action or suit touching such demand pending such reference. Provided, always, that no such reference as aforesaid shall be directed upon an application made by the party chargeable with such bill, after a verdict shall have been obtained or a writ of inquiry executed in any action for the recovery of the demand of such attorney or solicitor . . . except under special circumstances to be proved to the satisfaction of the court or judge to whom the application for such reference shall be made: And in case any such reference as aforesaid shall be made, if such bill when taxed be less by a sixth part than the bill delivered, then such attorney or solicitor shall pay the costs of taxation."

Manisty, K.C. (*Newbolt* with him), for the appellants.—There is no rule of law that a solicitor may not amend his bill of costs before any order of taxation has been made. He takes the risk of so doing because there is the chance that one-sixth may be taxed off if he unduly increases it. Of course if he sends in an exorbitant bill of costs, and then upon the fear of taxation, he reduces it the court would not permit him to escape from his liability to pay the costs and would insist upon the first bill being taxed. This is clearly the case after an order for taxation: *In re Heather*, 18 W. R. 1079, L. R. 5 Ch. App. 604. The client has a right under the statute to tax, but not a particular bill, if that bill is amended. The nearest case where a bill has been increased and then taxed is *In re Cartwright*, L. R. 16 Eq. 469, at p. 474. The earliest foundation for the rule that a solicitor may not increase the items in a bill of costs once delivered is *Loveridge* v. *Botham*, 1 B. & P. 49. [VAUGHAN WILLIAMS, L.J.—That case is of no assistance for the foundation of the rule which is based upon the statute. That case only lays down a rule of evidence which is confirmed in *Anderson* v. *May*, 2 B. & P. 237, showing that the first bill is conclusive of the reasonableness of the items. It is a rule applied to bills in other trades, as is shown by the case of *Knox* v. *Whalley*, Esp. N. P. 159 (referred to in *Anderson* v. *May*), which was a case of a tailor's bill. All these cases were long prior to the statute of 1843.] *In re Chambers*, 34 Beav. 177, is a clear authority that a solicitor prior to an order for taxation may withdraw one bill and substitute another. MOULTON, L.J.—The statute does not forbid a solicitor to amend his bill. If there is any rule of law it must be a disciplinary one based on the fact that a solicitor is an officer of the court. The rule does not apply to other professions or trades.] The learned judge at the trial was greatly influenced by the case of *In re Thompson*, 34 W. R. 112, 30 Ch. D 441, but that was decided on the well-known principle that a solicitor may not reduce his bill to avoid the results of taxation.

Waugh, K.C. (*Roche* with him).—All the authorities which have been referred to show that a solicitor may not decrease or increase his bill of costs except where the omissions are due to mistake or fraud. [VAUGHAN WILLIAMS, L.J.—In every authority so far cited to us there has been either an order for taxation, or taxation has been threatened by the client.] That fact was not material to any of the decisions. [STIRLING, L.J.—This is not a case of taxation at all. It is after verdict, and the statute says a bill cannot be taxed after verdict except under special circumstances.] *In re Woollett*, 12 M. & W. 504, was a case where a bill was taxed after verdict. [STIRLING, L.J.—There was no verdict in that case.] A solicitor is bound by his bill once delivered: *In re Carven*, 8 Beav. 436. No appeal in any case lies here because the judge only refused to give leave if leave was necessary.

VAUGHAN WILLIAMS, L.J.—The case has been heard at length, and I am far from saying that it is not in its way an important case. I am also far from saying that there is not a certain amount of authority for the proposition that the rule which is applied when there is a taxation under the Solicitors Act, 1843, in respect to the delivery of a second bill of costs and the right to have that taxed, that there is an obligation upon the solicitor to get leave to have the second bill taxed, is a rule that applies not only in the case where the second bill reduces the amount of the charges, but also where the second bill increases the amount of the charges; and, speaking for myself, though it is not wise to deal with a question not actually before the court, I agree that there may be cases where the rule applies. But in my judgment the question does not arise here. Here was a case of one of several gentlemen interested in a venture, who was a solicitor and employed as the solicitor of the venture. He was invited to make his bill of costs as low as possible, and therefore he delivered a bill of costs which was low; it did not include scale charges for the rendering of certain services. Presently the persons liable to pay these charges took up the position of a total denial of liability. They denied, I suppose, that a retainer was given, or if one were given, of any work done under it, the work done being done by a co-adventurer who was therefore not entitled to be paid for it. At all events they denied their liability. But for that determination the defendant might have got an order to tax. But they did not do it because they were determined to fight the question of liability, and the solicitor brought his action, and the action having been brought, the defendants pleaded denial of liability and set up the circumstances under which they denied it. The first was the position of the plaintiff as a co-adventurer. Then they also set up a plea, which, as far as the facts were concerned, was not denied, that the bill sued upon, for some £600 instead of some £200, was the bill delivered subsequently to the first bill. I do not want to say that in my opinion the defendants might not have taken out a summons for taxation and raised the queston that they were entitled to have the smaller bill taxed and not to be subjected to having the second bill taxed. I cannot say, if they had raised it, what would have been the result. The judge, if he had taken the view that it was a case like *In re Thompson* and other cases cited to us in the course of the argument, of a solicitor who had sent in a larger bill as a try on and then diminished it in fear of taxation, might have thought the bill was not to be altered. I can conceive of cases in which the bill, although increased, ought not to be brought in for taxation, because in some cases it might be of the greatest importance to increase the total of the charges because the more the bill be

increased the further might be the danger of being ordered to pay the costs of the taxation. The defendants did not choose to take out a summons. They let the case go to trial, and the finding of the jury on the question of liability was against them. That being so, it is necessary to consider the proviso of section 37. [His lordship read it.] In my judgment, where a solicitor brings an action, and it is tried, and the jury return a verdict but do not try the *quantum*, it is referred for the purpose of ascertaining the *quantum* to a taxing-master not under the statute, but to the taxing-master as a referee, who will, as a referee, bring to bear upon the question his experience of bills of costs. Under these circumstances, the order that was made by Ridley, J., was not, I think, the right one. I think the matter ought to have gone to the master as a referee, and the judge ought to have given directions to the master not to tax, but to moderate the bill. Instead of that, the judge seems to me to have made an order as if there had been no action at all. When this case comes before the master, if what Mr. Roche contends did in fact transpire, that the plaintiff did things which might have been done by him professionally yet were not done professionally, but as one of seven co-adventurers each giving assistance to the best of his ability, the master may say that these are things which cannot be charged for. Some of the charges may be disallowed, not because they are excessive charges, but because they are in respect of work done by a volunteer. There is nothing in this case to prevent full justice being done between the plaintiff and defendants. I should like to point out that in my judgment some of the rights which the client possesses against the solicitor when there is an order for taxation cannot be claimed when there is a reference after a verdict. It is not for me to decide, but I do not think the one-sixth-taxed-off rule would apply. However that may be this judgment of Ridley, J., must be set aside to this extent: There will be the verdict for the plaintiff as found by the jury, subject to a reference to a taxing-master to ascertain the amount for which the judgment should be entered.

STIRLING, L.J.—I am of the same opinion. I think, with all respect to Ridley, J., when he directed this taxation, he ought not to have proceeded as though directing a taxation under the Solicitors Act. The proviso in section 37 says that there shall be no taxation under that Act after verdict except under special circumstances, and it seems to me that here there were no special circumstances. But notwithstanding that, the court has, by virtue of its general jurisdiction, power to ascertain the proper amount of the fees which should be charged by the solicitor in respect of professional services, by reference to a taxing-master not under the statute, but simply in exercise of its general jurisdiction. In point of fact there is no difference between this and any other action to recover in respect of a bill for work and labour done. If such a long bill is delivered involving many items it is within the jurisdiction of the court to direct the items to be gone into before an official referee. Here, by virtue of its general jurisdiction, the court would have power to direct a reference to a taxing-master to ascertain the proper amount to be allowed for professional services as a solicitor. That principle has been very frequently acted upon in the Chancery Division in correcting bills which come before the court which cannot be directly taxed. That being so, it seems to me the order made by Ridley, J., ought not to stand. There ought to be a simple reference to the taxing-master to ascertain the amount for professional services. As far as I am concerned, I think the taxing-master will have full power to deal with the bill before him in such a way as to do justice without any directions from us. I should think that the principles laid down in *Loveridge* v. *Botham* and *May* v. *Anderson* should be found useful to the taxing-master.

MOULTON, L.J.—I am of opinion that this appeal should be allowed. This is only a case of a verdict for the amount of a bill subject to a reference to a skilled tribunal competent to settle it. The point is raised whether it is open to a solicitor to correct a bill once it is delivered, or whether he is bound by a bill once delivered so that he cannot amend his claim. A solicitor is only a person doing professional work, but he differs from other professional men in that he is under the Solicitors Act and under the disciplinary power of the court, being an officer of the court. Now, if there is any principle of law that he cannot amend his claim once it is delivered in the form of a bill, it must be by virtue of one of these two things to which I have referred, because it cannot be doubted that an architect, say, can amend his bill. It cannot be a consequence of the Act, because, if so, the court would have no power to permit him in any case to send in an amended bill. It must be, then, under the disciplinary power of the court. But giving the best consideration I can to the many authorities that have been cited in argument, I can see no reason to think that the court has ever taken up, in my eyes, so unjust a position as to say that a solicitor may not amend his claim. I can see this, that if the taxation has been applied for, or threatened, the court has considered it too late then for the solicitor to amend his claim, because taxation is a right of the client granted to check exorbitant demands. Where no taxation has been demanded or threatened, I can see no reason why the court should forbid a solicitor *bonâ fide* to amend his claim, and I cannot find in any case that the Courts have made it a practice to do so. If a solicitor sends in one bill and then another it seems to me he is in the same position as any other person carrying on a profession. The first bill would be only evidence against him of the charges being right in that bill. So with a solicitor. In my opinion the passage in Archibald's Practice by Chitty (9th ed.), p. 113, exactly describes the position of a client who has received a corrected bill: "The delivery of a bill is strong evidence against an increase of charge, in a subsequent bill, for any of the items contained in the first bill, and presumptive evidence against any additional items." The value of a previously delivered bill is an evidential value, and it is of no other value in a case where it is delivered *bonâ fide* in a corrected form before application for taxation or threat of taxation; and therefore this bill must go for reference in the ordinary way, and of course it is open to the defendants to say that the first bill is evidence of what the charge ought to have been.

Appeal allowed, with costs.

Solicitors for the appellants, *Stokes & Stokes*, for *J. G. Aitchison*, Newcastle-on-Tyne.

Solicitors for the respondents, *King, Wigg, & Co.*, for *Keenlyside & Forster*, Newcastle-on-Tyne.

From K. B. Div. (Vaughan Williams, Stirling and Moulton, L JJ.) — Feb. 23; March 24.

REX v. LLOYD & SOLMAN.
Ex parte DAY. (a.)

County court—Judge—Deputy—Appointment of two deputies—County Courts Act, 1888 (51 & 52 *Vict. c.* 43), *ss.* 18-21.

A county court judge is not appointed to a circuit, but to different courts with a district, and has power therefore under sections 18 *to* 21 *of the County Courts Act,* 1888, *to appoint a separate deputy to each court district within his jurisdiction.*

Decision of the Divisional Court (ante, *p.* 410, [1906] 1 *K. B.* 22) *affirmed,* Moulton, L.J., dubitante.

Appeal from the judgment of the Divisional Court (reported *ante*, p. 410, [1906] 1 K. B. 22).

One Day, the defendant in an action of *Solman* v. *Day*, tried before Deputy-Judge Clement E. Lloyd, Esq., in the Brompton County Court, had obtained two rules to show cause respectively why a writ of *certiorari* and a writ of prohibition should not issue for the purpose of quashing the judgment obtained against him in the county court and staying all further proceedings in the action.

The action happened to be tried on a day when Deputy-Judge F. B. Fitzroy-Cooper was sitting at Marylebone—both deputy-judges having been duly appointed by his Honour Judge Stonor, in whose district (Middlesex) Marylebone and Brompton County Courts are—and the rules were applied for on the ground that the deputy-judge before whom the action was tried had no jurisdiction, and, the proceedings being *coram non judice*, should be quashed, since a county court judge being appointed to one office could appoint but one deputy to act for him on any one day.

The Divisional Court discharged the rules.

Day appealed.

Duke, K.C., and *W. O. Hodges*, for the appellant.—The power to appoint a deputy must depend upon statutory authority. The power to appoint a deputy on general principles of law does not confer power to appoint two deputies: *Parker* v. *Kett*, 12 Mod. 467, and *Denny* v. *Trapnell*, 2 Wilson 378. A county court judge is appointed to one office, and can appoint but one deputy. Judge Stonor was appointed to the county court of Middlesex holden at Brompton and Marylebone. County court judges are appointed to one district or one circuit, in which there may be one or more courts. They are not in an analogous position to recorders, who are appointed sometimes to more than one city, for they are appointed under a different commission for each city.

S. A. T. Rowlatt, for the deputy county court judge.—Each court in a circuit constitutes a separate unit. This is not a case where the judge has appointed two deputies. He appointed one deputy for one court and another for another court. In all the sections in the County Courts Act, 1888, which deal with the constitution, jurisdiction, and machinery of the court, "district" is specified as the district of the particular court and not the whole circuit of the judge. If the appeal is allowed, every order made by each of the two deputy judges during these two months is so much waste paper, and an Act of Parliament might have to be passed to put matters right. It is submitted that the view taken by the Divisional Court is correct, and that the appeal should be dismissed.

I. A. Symmons, for Solman, the plaintiff.—In *Reg.* v. *Parham*, 13 Q. B. 858, the appointment of a county court judge for more courts than one was stated to be an appointment to "several offices." The general practice has been to appoint a deputy to each court, and the defendant must therefore be presumed to have known this when he applied for an adjournment of the hearing and cannot claim to take this point now.

Duke, K.C., in reply.—There never was a judge of the Brompton or of the Marylebone County Court, because the appointment of the judge who was to sit at those courts was to the county court of Middlesex holden either at Brompton or Marylebone, and it was to the office of the county court judge of Middlesex that Judge Stonor was alone appointed, and being one office he could appoint but one deputy.

Cur. adv. vult.

March 24.—VAUGHAN WILLIAMS, L J.—In my judgment this appeal must be dismissed, and the judgment of the King's Bench Division affirmed on the grounds given by the court. Lord Alverstone says: "I therefore come to the conclusion that there being the power to appoint a deputy, and there being jurisdiction in each of these courts, and in the districts of each of these courts, it is not contrary to the statute, or contrary to any rule of law that the appointment of a deputy should be made for the district of a court"; and he goes on to say: "Therefore I think that these appointments made by the county court judge, and sanctioned by the Lord Chancellor, are within the powers of the Act of Parliament, and that both these rules should be discharged." The rules in question were rules to show cause respectively why a writ of prohibition and a writ of *certiorari* should not issue. The case arose in this way: His Honour Henry James Stonor, judge of the Marylebone County Court, being ill, made on the 13th of February, 1905, an order appointing F. B. Fitzroy Cowper, Esq., barrister-at-law, to act as his deputy for the said Marylebone Court in his absence, from the 13th of February until the 13th of April next, and failing the said F. B. Fitzroy Cowper from illness or other cause on any day or days during the said periods, further appointed Clement Elphinstone Lloyd to act as his deputy during his absence for the said court on such day or days aforesaid. Judge Stonor, who was also judge of the Brompton County Court, on the same day made an order in similar terms appointing Clement Elphinstone Lloyd to act as his deputy in the said Brompton County Court, and failing him appointing Mr. Fitzroy Cowper. The periods of appointment were the same in the two orders. The two barristers thus appointed respectively sat as deputies, the former in the Marylebone County Court, the latter in the Brompton County Court, and sat on the same day. The unsuccessful defendant in the cause of *Solman* v. *Day*, tried before Mr. Lloyd, has raised the question as to the jurisdiction of Mr. Lloyd sitting as the deputy of his Honour Judge Stonor. When the rules were first granted they were granted upon the ground that a county court judge has no power to appoint more than one deputy to sit for him on the same day, even though the deputies are appointed to sit in different district courts. But in the argument before us, and in the argument in the King's Bench Division, Mr. Duke did not argue his case upon the ground of the inability of the county court judge to appoint two deputies to act for him in different district courts on the same day,

(a.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

but argued it on the ground that a county court judge could only appoint a deputy to exercise the whole of his jurisdiction as county court judge in all the courts within the county of which he had been appointed judge; or, to put it in other words, he argued that a county court judge could not appoint a deputy to sit for him at one of the courts within his circuit as it is called, but if he appointed a deputy at all must appoint him as his deputy to sit at all the courts within his circuit and to exercise the whole of his jurisdiction. Now, in my opinion, there can be no doubt but that the court of each district to which a county court judge is appointed is a separate court, with separate jurisdiction, separate officers, and separate procedure, and the question we have to decide is whether a county court judge of the county of Middlesex can for proper cause appoint a deputy to act for him in one of the district courts of which he has been appointed the judge. Now, the power of appointment is given by section 18. That section provides, first, that in case of illness or unavoidable absence of any judge it shall be lawful for such judge to appoint a barrister to act as his deputy during such illness or unavoidable absence, provided (*a*) that the fact of appointment and name of the deputy shall be forthwith communicated to the Lord Chancellor; (*b*) that no deputy so appointed shall be entitled to act for more than fourteen days unless with the approval of the Lord Chancellor. Thus far I see nothing in the words of this section to suggest that the power to appoint a deputy is confined to the appointment of a deputy to exercise the jurisdiction of a county court judge as distinguished from the jurisdiction of a county court judge as the judge of a district. On the contrary, I think that the words "unavoidable absence" point to the absence of the judge from the district court. Secondly, it is provided that it shall also be lawful for any judge, with the approval of the Lord Chancellor, to appoint a barrister as his deputy for any time or times not exceeding in the whole two months in any consecutive period of twelve months. And that every deputy appointed under this section during the time for which he shall be so appointed shall have all the powers and privileges and perform all the duties of the judge for whom he shall have been so appointed. Now the appointment of these deputies by Judge Stonor undoubtedly was an appointment under the last-mentioned part of section 18; that is to say, an appointment for two months, and it is said that, as under this appointment the deputy is to have all the powers and privileges and perform all the duties of the judge for whom he shall have been so appointed, this appointment necessarily is an appointment by a county court judge to perform all his duties as a county court judge within all the districts in which he has been appointed to act or which he may by section 9 of the Act or any other section be empowered to exercise outside the districts in which he has been directed to act as county court judge. It will be observed, however, that these latter words of the section apply to every appointment of a deputy, whether the appointment be under the first words of the section or under the later words. Section 21, so far as the words "and he" (*i.e.*, the deputy) "shall continue to act in all the courts to which he was appointed" are concerned, point to section 18, empowering the appointment of a deputy for each district court, but the words of this section, which provide that any such deputy shall receive after the death or resignation of the judge a rateable proportion of the salary attached to the office, point certainly the other way. But in my opinion it is plain, taking all the sections of the Act of Parliament into consideration, that it is a possible construction of section 18 to hold that it authorizes the appointment by a county court judge of a deputy to act for him in one of his district courts, and inasmuch as to hold otherwise would cause great practical inconvenience, and county court judges have, we have ascertained, for the last twenty-five years, and probably ever since the passing of the Act of 1846, appointed deputies, with the approval of the successive Lord Chancellors, for the performance of the duties of the county court judge at one of his courts or in one of his districts, I think we ought to put that construction on the Act of Parliament. The result is that these appeals will be dismissed with costs.

STIRLING, L.J.—I entirely agree with the judgment that has been delivered.

MOULTON, L.J.—Although in my opinion the statutory provisions on this subject might be made clearer, I do not dissent from the conclusion arrived at by the other members of the court. The delegation of judicial powers is such an exceptional privilege of an office, and so important, that I consider the conditions under which it may be exercised should be laid down by the Legislature so as to admit of no doubt, especially when it is remembered that county court judges now administer justice to a vast mass of his Majesty's subjects. If the matter had been *res integra* I do not think I should have taken the same view of the County Courts Act, 1888, as my learned brothers. The county court system of England is thoroughly well understood. England and Wales are divided into separate county court districts, each of which has its own jurisdiction and powers. Section 13 of the Act gives the Lord Chancellor power to group two or more districts together and to place those combined districts under the jurisdiction of a particular judge. In such a case the only *nexus* between the different districts so grouped together is the personality of the judge himself, and when the judge dies or resigns, or circumstances require that there should be a different grouping, the Lord Chancellor has power to alter the grouping. Then come the sections of the Act which permit the judge to delegate his powers. Delegation of judicial functions is the exception, and not the rule. A judge of the High Court has no power of delegation. A county court judge necessarily deals with numerous local matters in his own district or districts, and in order to prevent delay and interruption to the continuity of the administration of justice, large powers of delegation were conferred upon him. Section 18 gives him power to delegate. That section deals with two different cases—first, a delegation occasioned by the illness or unavoidable absence of the judge; and, secondly, a delegation for a certain time. In the first case, the judge has only to inform the Lord Chancellor of the appointment of the deputy; in the second case, the approval of the Lord Chancellor to the appointment was required. In both cases the section speaks of the deputy as the deputy of the judge. It did not, however, define his powers and functions in any way. Reading the first part of the section, I should be disposed to come to the conclusion that the judge had only power to create a substitute, who became for the time a judge, just as the county court judge himself was. Reading the last clause of the section, I feel still greater difficulty in construing the section otherwise. "Every deputy appointed under this section, during the time for which he shall be so appointed, shall have all the privileges and perform all the duties of the judge for whom he shall have been so appointed." Sections 19 and 20 are not material upon this question, as they do not carry the matter further than section 18. Passing now to section 21. Curiously enough, both sides relied upon the wording of that

section. The section relates to the position of a deputy after the death or resignation of the judge. Naturally, upon such an event happening, the delegation came to an end. But that there might be no interruption in the administration of justice, the section provides that the appointment of the deputy should not be vacated by that event, and that he should continue to act until the Lord Chancellor should otherwise order, or a successor to the judge should be appointed. But inasmuch as the section was dealing with the case where the judge was either dead or had resigned, and was, therefore, no longer receiving remuneration, and inasmuch as the deputy was in that case no longer employed by the judge, but by the country, the deputy's remuneration had to be provided for, and accordingly the section provides that "such deputy shall receive as remuneration for the period that he may act as deputy after the death or resignation of the judge a rateable proportion of the salary and travelling allowances attached to the office so vacant during any vacancy." Now, "a rateable proportion" meant a proportion which is determined by a simple rule of three sum. Obviously it means that, if the yearly salary of the judge was so much and the deputy acted, say, for a quarter of a year, he was to have a rateable proportion—namely, one-fourth of that yearly salary. That carries out the idea that the deputy filled the whole position which the judge had filled. But the respondents to the rules also found words in the section which they said supported their contention, because the section said that the deputy was to "continue to act in all the courts to which he was appointed." They said that that pointed to this, that the appointment of the deputy might be to some, and not all, of the courts within the county court judge's jurisdiction. Those words seem to be consistent with the respondents' contention, but they also seem to be equally consistent with the appellants' contention. As I have already said, the courts were linked together by the *nexus* of the judge—that is to say, they were within what might be called the circuit of the judge. The words of the section receive their full interpretation if they are read as meaning that the grouping of the districts should continue, though the *nexus* was gone, until the Lord Chancellor should otherwise provide, and that the courts should remain courts in that collection of districts which had been presided over by the judge.

If that be the right view, then I see no difficulty in the contention that the deputy filled the whole place of the judge in all his districts. On the other hand, looking at the opposite view, I do not see that any public inconvenience would be caused if they regarded the position of the judge as being a collocation of several offices, and in my opinion there are no grounds of public convenience why section 18 should bear the restrictive interpretation which its language pointed to. That, of course, was not sufficient to justify the court in flinching from giving the language its strict interpretation, for it must be remembered that the power of delegation is not given by common law, but by statute. But side by side with the fact that no public inconvenience would arise from the appointment of separate deputies for separate districts, there is this important fact which induces me not to dissent from the judgment of my learned brothers. Both by admission at the bar and from inquiries which have been subsequently made, it appeared that there had been an unbroken practice for at least twenty-five years, beginning long anterior to the County Courts Act, 1888, of allowing a county court judge to appoint separate deputies for his different courts. That practice had not been adopted without, I will not say judicial sanction, but administrative sanction under the highest judicial authority—namely, the Lord Chancellor. It must be taken, therefore, that section 18 might have been enacted by the Legislature as laying down that a county court judge was appointed for a particular district, though it is inexplicable to me that the Legislature did not introduce words showing expressly that they were considering the judge as having been appointed as a judge of each district. That being so, I pity the judge or tribunal which has to settle the proper salary payable to the deputy after the death or resignation of the judge where the deputy was appointed only for one of the judge's courts. That problem, however, I suppose, had been solved before.

Appeal dismissed.

Solicitors for the applicant, *R. W. Beckwith.*

Solicitor for the county court judge, *Solicitor to the Treasury.*

Solicitors for Solman, *Oswald Hanson & Co.*

High Court of Justice.

Chan. Div. }
Farwell, J. } April 4.

STACKEMANN v. PATON. (a.)

Copyright — Photograph — Infringement — Photograph "made for or on behalf of any other person for a good or a valuable consideration"—Fine Arts Copyright Act, 1862 (25 & 26 *Vict.* c. 68), s. 1.

Where a person, without being under an obligation to make any payment, gives permission to a photographer to enter his house in order to take photographs thereof upon the chance of obtaining orders, there is a good consideration within the meaning of the Fine Arts Copyright Act, 1862, *s.* 1, *so that the photographer cannot make use of the photographs so obtained without the consent of the person who permitted the photographs to be taken.*

Witness action.

This was an action, brought to obtain an injunction, and to recover damages and penalties, in respect of the alleged infringement of the copyright in two photographs which had been taken by the plaintiffs.

The plaintiffs, father and son, carried on business in partnership at Turnham Green, under the style of the Photographic Tourists' Association, as photographers and printers, and an important part of their business consisted in photographing schools.

The defendants were publishers carrying on business in Cannon-street, London, under the style of J. & J. Paton, and in 1905 they produced a publication known as Paton's List of Schools and Tutors, which contained reproductions of two photographs of schools which had been taken by the plaintiffs, and which publication they sold at 1s. 6d. per copy.

The facts with regard to one of the photographs were as follows:

In the year 1904, a traveller in the employ of the Photographic Tourists' Association called upon a Mr. Price, the head master of a school for boys, at Harrow-on-the-Hill, and requested that the association might be allowed to send a representative to take photographs of the school, intimating at the same time that the association took the photographs at their own risk, and on the chance of obtaining orders if the photographs were successful, and also

(a.) Reported by P. W. PEGG, Esq., Barrister-at-Law.

that Mr. Price would not be under any obligation to pay anything.

Mr. Price, who was anxious to have some photographs taken of the school, gave his permission, and in or about the month of June, 1904, the younger plaintiff attended at the school with his photographic apparatus, and was allowed to enter and take a number of photographs, including one of the exterior of the school, the reproduction of which was complained of in this action; Mr. Price in each case directing what he wanted to be photographed. On this occasion nothing appeared to have been settled as to terms of payment.

On the 25th of July, 1904, proofs of the photographs taken were forwarded to Mr. Price by the Photographic Tourists' Association, and he ultimately purchased a number of photographs, for which he paid £15 1s. 6d.

The facts with regard to the other photograph, although not strictly proved, appeared to be that, in the year 1904, a traveller of the association called upon a Miss Cruse, the head-mistress of a school for girls at Weston-super-Mare, and made the same request as in the previous case and on similar terms, and the younger plaintiff attended at the school and was allowed to enter and take a number of photographs, including one of the dining-room, the reproduction of which was complained of in this action. Miss Cruse ultimately purchased some photographs, for which she paid 15s.

Early in the year 1905, the defendants, who were preparing their list of schools, communicated with both Mr. Price and Miss Cruse, who gave orders for the advertisement of their respective schools therein, and at the request of the defendants they respectively forwarded the photographs in question for reproduction, together with the advertisement.

The plaintiffs becoming aware of the reproduction of the photographs as aforesaid, the younger plaintiff, who had taken the photographs, registered himself as proprietor of the copyright in the photographs, on the 8th of November, 1905, and on the 10th of the same month purchased a copy of their list of schools from the defendants, which contained reproductions of the photographs complained of.

Eventually the plaintiffs issued the writ in this action, claiming damages for the alleged infringement of copyright, an injunction, and penalties.

MacSwinney, for the plaintiffs, after reading sections 1, 4, 6 and 11 of the Fine Arts Copyright Act, 1862, contended that the author is the taker of the photographs: *Nottage* v. *Jackson*, 32 W. R. 106, 11 Q. B. D. 627, and *Boucas* v. *Cooke*, 52 W. R. 99, [1903] 2 K. B. 227. The sale after registration of the copies made before registration was an infringement: *Tuck* v. *Priester*, 36 W. R. 93, 19 Q. B. D. 629.

Counsel also referred to *Fishburn* v. *Hollingshead*, [1891] 2 Ch. 371, 39 W. R. Dig. 62.

Upjohn, K.C., and *Ashton Cross*, for the defendants, contended that the plaintiffs could not sell copies of the photographs without permission obtained from Mr. Price and Miss Cruse respectively: *Pollard* v. *Photographic Co.*, 37 W. R. 266, 40 Ch. D. 345. So far as regards section 1, it is a question of fact; the burden lies on the plaintiffs to show that the photographs were taken under such circumstances as to leave in the photographer the right of multiplying copies. A contract to buy copies, if they shall be good, is a contract for a good and valuable consideration. If a man comes into your house upon the terms of you allowing him to take photographs thereof, and that if they are good you will purchase, but otherwise you will not, it is an implied term of the contract on which you allow him to enter that he shall take the photographs for you, that the copyright shall be yours, and that he shall not be at liberty to multiply copies except for you: *Ellis* v. *Marshall*, 64 L. J. Q. B. 757. The copyright must be inferred to be in Mr. Price and Miss Cruse respectively. They clearly did not contemplate copies of the photographs being sold without their permission.

MacSwinney, in reply.—The onus of proof must be on the persons who attempt to take themselves out of section 1 of the above Act.

FARWELL, J., after stating certain of the facts, said that, with regard to the photograph taken of the school conducted by Miss Cruse, there is really no evidence of the arrangement under which it was taken. With regard to the photograph of the school conducted by Mr. Price, it appears that the traveller for the plaintiffs asked for permission to take some photographs, and said something to the effect that it would be at the plaintiffs' own risk. Mr. Price gave his permission, and subsequently the younger plaintiff was allowed to enter and go over the house, and take some photographs, Mr. Price telling him what he wished to have taken. In both the case of Mr. Price and of Miss Cruse certain photographs were supplied by the Photographic Tourists' Association and paid for. With regard to Miss Cruse the plaintiffs must have got less than they hoped for, as 15s. would not meet expenses. [His lordship then read section 1 of the above Act and the proviso to the section.] What is the true meaning of section 1? I think the younger plaintiff was the author of the photograph.

The question is: Were these negatives made or executed for Mr. Price and Miss Cruse respectively for a good or a valuable consideration? Now a good consideration will do as well as a valuable one. Having regard to the circumstances of Mr. Price and Miss Cruse, was it not a good consideration to allow the photographer to go over the house and take the photographs? I think that there was a good consideration. I do not think that the fact of the traveller informing Mr. Price that he would not have to take to any of the photographs or be under any obligation to pay anything makes any difference. I do not think that the case of *Ellis* v. *Marshall* is against what I have said. [His lordship then referred to the judgment of Collins, M.R., in the case of *Boucas* v. *Cooke*, in which he approved of a passage, on p. 193, of Scrutton on Copyright (4th ed.).] But it is not necessary that the customer should pay anything in order to bring himself within the benefit of section 1 of the above Act.

There may be a good, as well as a valuable consideration, and a good consideration is sufficient. I do not think the request of the photographer, for permission to take the photograph, makes any difference, but a request is not the same thing as a solicitation of orders—the question must really depend on the facts of each case. When a schoolmaster at the request of a photographer allows him to enter a school in order to take photographs thereof, there is a good consideration, so that the photographer cannot make use of the photographs so obtained without the consent of the person, who directed the photographs to be taken. I therefore dismiss the action with costs.

Solicitors, *T. F. Peacock, Fisher, & Chavasse; Martin & Watkins.*

Chan. Div.
Buckley, J. } May 1.

In re MELSON & CO. (LIMITED) (*a.*).

Company—Winding up—Assets covered by debentures—Business of company carried on by debenture-holders—Petition to wind up—Just and equitable—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 79.

The business of a company was being carried on by the debenture-holders. A receiver had not been appointed. All the assets were charged by the debentures. The balance-sheet showed a surplus available for unsecured creditors. A judgment creditor presented a petition to have the company wound up by the court compulsorily.

Held, that, assuming that the assets were insufficient to satisfy the claims of the debenture-holders, the court was entitled to exercise the discretion vested in it under section 79 of the Companies Act, 1862, *and wind up a company so conducted. The court, however, was not satisfied on the evidence that the order would be barren, and ordered the company to be wound up.*

This was a petition to wind up the above company presented by the Bradford Dyers' Association (Limited), who had recovered judgment against the company for £98 15s. 3d. in an action for goods sold and delivered in December, 1905.

The company was incorporated in 1897 with a nominal capital of £10,000; the paid-up capital, according to the last balance-sheet, was £2,507.

In 1897 the company created £3,000 first debentures which were charged upon the undertaking of the company and all its property both present and future, and were further secured by a debenture trust deed. Of the above sum of £3,000 an amount of £300 was paid off, and in 1901 the balance of £2,700 was transferred to F. Baring Gould, who at the same time received from the company a third debenture for £300 by way of premium.

In the same year second debentures for £2,500 were issued to A. Melson, the vendor to the company. These contained a similar charge, and the second and third debentures were further secured by another trust deed. The £2,500 secured by the second debentures were in fact provided as to £1,100 by F. Baring Gould and as to £1,400 by S. S. Seal, the solicitor to the company.

In March, 1906 prior lien debentures were granted to F. Baring Gould and H. K. Paxton to secure the sum of £1,000 and at the date of the petition the amount of £6,500, irrespective of interest, was outstanding on the debentures.

On threatening to issue execution the petitioners discovered that the business of the company was being carried on in the name of the company by the debenture-holders, who were in possession of all its assets. A receiver had not been appointed.

Buckmaster, K.C., and *Ashton Cross*, for the petitioner.—If the figures in the balance-sheet of 1905 can be relied on there should be a surplus available for the payment of the unsecured creditors, and in that case there is no answer to the petition. Assuming, however, that the assets are insufficient to pay the debenture-holders in full, there can be no answer where the company is being kept on foot, not for the purpose of carrying on the business for which it was constituted, but solely in the interests of the debenture-holders. In this state of facts it is just and equitable that the company should be wound up: *In re Chic (Limited)*, 53 W. R. 659, [1905] 2 Ch. 345.

Kirby, for the company.—It is in the interest of everybody concerned that the business should be carried on for a further period; for some time to come the debenture-holders only will reap the benefit. Ultimately there may be some advantage to the ordinary creditors, who can receive nothing if a winding-up order is made, as the debentures more than exhaust the assets.

BUCKLEY, J.—This is a company which has a paid-up capital of £2,507, and a debt on debentures constituting a charge on all the assets of the company to the amount of £6,500. The petitioners are judgment creditors in respect of a sum of £98 15s. 3d., recovered by them in an action in December, 1905. Of the debenture debt £1,000 was borrowed on the security of prior lien debentures in March, 1906—that is to say, after the date on which the judgment had been obtained. The company say that all the assets are charged by the debentures, and are not sufficient to pay them, and that if an order is made there will be no assets to administer in the winding up. If that is so, the company are not really and in substance carrying on business at all. It is the debenture-holders who are carrying on the business of the company and using its credit for that purpose. In doing so they are placing themselves in such a position that by ordering goods in the name of the company and incurring debts for which the company are liable they are able to avail themselves of the law to which I drew attention in *In re London Pressed Hinge Co. (Limited), Campbell* v. *The Company*, 53 W. R. 407, [1905] 1 Ch. 576. By the appointment of a receiver they can sweep away all the assets of the company. This seems to me to be a state of things which ought not to be allowed. In the earlier cases, *In re St. Thomas' Dock Co.*, 24 W. R. 544, 2 Ch. D. 116, and *In re Chapel House Colliery Co.*, 31 W. R. 933, 24 Ch D 659, the principle had been adopted that a creditor who applied for a winding-up order, where other creditors opposed, must show that there was some expectation of obtaining payment. Those cases, however, were decided long before debentures had reached their modern development. It has never been laid down that the court was obliged to refuse the order in cases where other creditors did not oppose, but merely that the petitioning creditor is not entitled to an order *ex debito justitiæ*. The court has a discretion in dealing with the matter, and may under section 91 of the Companies Act, 1862, have regard to the wishes of the other creditors and can refuse the order although the creditor is unpaid. I do not think there exists in those cases anything which obliges me to say that the court is bound to exercise that discretion by refusing, at the instance of the company, to make the order on the ground that there would be nothing for the unsecured creditors. I think I am entitled to say under section 79 of the Companies Act, 1862, that a company conducted under such circumstances ought not to go on, and that there ought to be a winding-up order.

It is said that the company has no surplus assets. On the facts put forward by the company I am not satisfied that they represent the true position of affairs. The balance-sheet of 1905 shows a surplus of assets over liabilities of nearly £3,000, and unless the "overdraft of A. Melson, £3,787" is bad, as to which I have no evidence, there would on that balance-sheet be assets for the payment of something beyond what is due to the debenture-holders for principal and interest. I am therefore not satisfied that the order would be barren.

I ought to add this with regard to the holding of the debentures. Mr. Baring Gould holds £2,700 first debentures, £1,100 second debentures, £300 third debentures, and £500 prior lien debentures. £500 prior lien debentures are held by Mr. Paxton and

(*a.*) Reported by EDWARD J. M. CHAPLIN, Esq., Barrister-at-Law.

£1,400 second debentures by Mr. Seal. It is therefore obvious that the persons substantially carrying on the business are not the company, but a limited number of individuals. In that state of facts I think I ought to make the usual compulsory winding-up order.

Petition allowed.

Solicitors for the petitioners, *Wynne-Baxter & Keeble*, for *Banks, Newell, & Hammond*, Bradford.

Solicitor for the company, *S. S. Seal.*

K. B. Div.
(Lord Alverstone, L.C.J., and Lawrance and Ridley, JJ.) Dec. 19, 1905.

TYLER (*Appellant*) v. FERRIS (*Respondent*). (*a.*)

Weights and measures — Prosecution by inspector — "Consent" of local authority — General consent — Weights and Measures Act, 1904 (4 *Ed.* 7, *c.* 28), *s.* 14.

It is not necessary under section 14 *of the Weights and Measures Act*, 1904, *which provides that an inspector of weights and measures may, with the consent of the local authority, prosecute before a court of summary jurisdiction any information, complaint, or proceeding arising under that Act, that a separate consent be given by the local authority in each particular case; a general consent to their inspector to prosecute in such cases being sufficient.*

Case stated by justices.

An information was preferred by the appellant, an inspector of weights and measures for the county of Middlesex, under section 25 of the Weights and Measures Act, 1878, against the respondent, a butcher carrying on business at Chiswick, for having on the 8th of February, 1905, in his possession for use for trade a two pound weight which was unjust.

The case stated that the appellant had the consent of the local authority to prosecute generally before a court of summary jurisdiction or justice any information, complaint, or proceeding arising under the Weights and Measures Acts, but the local authority did not specifically direct the prosecution, that such consent was contained in a resolution of the Middlesex County Council passed on the 23rd of February, 1905, which was as follows: "That the county council do hereby consent to Mr. Walter Tyler, the inspector of weights and measures for the western district of the county of Middlesex, prosecuting before a court of summary jurisdiction or justices any information, complaint, or proceeding arising under the Weights and Measures Acts, or in the discharge of his duty as such inspector."

It was contended on behalf the respondent that under section 14 of the Weights and Measures Act, 1904, a special consent must be obtained by an inspector for every separate information, complaint, or proceeding prosecuted by him under the Weights and Measures Acts, and that the general consent produced by the appellant was not sufficient.

It was contended on behalf of the appellant that the consent produced by the appellant was a sufficient consent within the meaning of the section, and that there was no obligation to obtain a separate consent for each separate prosecution.

The justices found that the respondent had committed an offence under section 25 of the Weights and Measures Act, 1878, but they were of opinion that the consent produced was not in law a sufficient consent within the meaning of section 14 of the Weights and Measures Act, 1904, and that under that section an inspector must obtain a special consent for each separate prosecution. They accordingly dismissed the information.

The inspector appealed.

Eustace Hills, for the appellant, having read the case, the court called on

Clarke Hall, for the respondent.—In all previous statutes enabling officials of public bodies to conduct prosecutions before justices it has been provided that the person so enabled shall do so with the direct authority of, or be authorized by, the body employing him: *Isle of Wight Ferry Co.* v. *Ryde Commissioners*, 25 J. P. 454. In the Weights and Measures Act of 1904 the word "consent" is used, whereas in all previous Acts the word used is "authorized" or "empowered": see for example section 68 of the Poor Law Amendment Act, 1844 (7 & 8 Vict c. 101), section 259 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), and section 120 of the Factory and Workshops Act, 1901. The limited power to prosecute delegated by the word "consent" must refer to a particular consent given in a particular case. It has a restrictive meaning. In *Reg.* v. *Turner*, 58 J. P. 320, the difference between "consent" and "authority" was considered, and it was held by Cave and Wright, JJ., that in prosecutions for taking game without a licence the supervisor of the Inland Revenue for the district had a right to conduct the case, a general authority given to him by the commissioners being a sufficient compliance with 53 & 54 Vict c. 21, s. 27. If this section 14 was not intended to be restrictive, but was merely permissive, the section was unnecessary. It is suggested that it was inserted in the Act to protect local authorities from unnecessary proceedings being instituted by over-zealous officials.

Lord ALVERSTONE, L.C.J.—In this case an ingenious argument has been raised by counsel for the respondent founded upon the use of the word "consent" in section 14 of the Weights and Measures Act, 1904, which directs than an inspector of weights and measures may, with the consent of the local authority, prosecute before a court of summary jurisdiction or justices any information, complaint, or proceeding arising under the Act or in the discharge of his duties as such inspector. There have been several Acts of Parliament allowing local authorities and other public bodies to authorize their officials to take proceedings before justices, and it was argued that because in this Act it is provided that the inspector may take proceedings "with the consent of the local authority" the use of the word "consent" instead of "authority" shows that the consent must be specially given in each particular case. I do not agree with that argument. In my opinion section 14 provides that an inspector is a person who may conduct prosecutions if the local authority consent to his doing so. As my brother Ridley, J., has pointed out, if such a substantial change had been contemplated clearer words in explanation would no doubt have been used. The case must go back to the justices for them to convict.

LAWRANCE and RIDLEY, JJ., concurred.

Appeal allowed.

Solicitor for the appellant, *Sir Richard Nicholson.*

Solicitor for the respondent, *W. T. Ricketts.*

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

K. B. Div.
(Ridley and Darling, JJ.) } Dec. 14.

GREAT CENTRAL RAILWAY CO. *v.* ASSESSMENT COMMITTEE OF BANBURY UNION. (*a.*)

Poor law—Rating—Railway—Rateable value—Interest on cost of construction—Competitive value.

The appellants (the Great Central Railway Co.) constructed a railway about eight miles in length connecting their line with the Great Western Railway Co. in pursuance of an arrangement entered into with that company. The cost of constructing the line was £280,000, and that sum was advanced to the appellants by the Great Western Railway Co. at 3 per cent. interest per annum. There were no stations or sidings on the line, nor does the line itself originate any traffic. The whole traffic on the line consists of through traffic passing from the appellants' line to that of the Great Western Railway Co., and it was admitted that persons other than the two above-mentioned railway companies could not be found to acquire the line.

Held, that, in ascertaining the rateable value, interest on the cost of construction was not an element which could be taken into account.

A case stated by the quarter sessions for Oxfordshire on an appeal against a poor rate made on the 19th of May, 1904, for the parish of Wardington, in which that part of the appellants' line of railway which lay in the said parish was rated at £1,390 gross estimated rental and £795 rateable value.

The total length of the line, which runs from the parish of Eydon, in the county of Northampton, to the parish of Warkworth, in the county of Oxford, is eight miles eighteen chains, of which one mile forty-seven chains are in the parish of Wardington. This line of eight miles eighteen chains is connected at the northern end with the appellants' line at Woodford, and at the southern end with the line of the Great Western Railway Co. at Banbury, thus forming a main line route from the north to the south and west of England.

The line was constructed by the appellants in accordance with an arrangement made with the Great Western Railway Co. for the more convenient interchange of traffic, and under the powers of the Great Central Railway Act, 1897, and was opened for traffic in 1900.

The cost of constructing the line was approximately £280,000; and in pursuance of the said arrangement, and under the provisions of the said Act, the Great Western Railway Co. advanced to the appellants the sum of £280,000, at the rate of interest of 3½ per cent. per annum.

It was not suggested that there had been any change in the conditions affecting the two companies since the passing of the Act.

There are no stations or sidings on the line, nor does the line itself originate any traffic.

The whole traffic on the line consists of through traffic passing from the appellants' system to that of the Great Western Railway Co., and *vice versâ*.

It was admitted that persons or companies other than the appellants and the Great Western Railway could not be found to acquire the line.

It was not disputed that the only advantage or use of the line to the appellants and the Great Western Railway Co. arises during the existence of an agreement for the mutual interchange of traffic, and that in the absence of such an agreement the line would be of no value, and could not be let to either the appellants or the Great Western Railway Co.

(*a.*) Reported by ALAN HOGG, Esq., Barrister-at-Law.

For the appellants it was contended that inasmuch as the line is an integral portion of the undertaking of the appellants its rateable value in the parish of Wardington must depend on the actual net earnings of the line within the parish, such earnings being obtained owing to the mutual agreement for interchange of traffic above mentioned, and that to ascertain such net earnings there must be allocated to the line in the parish a mileague proportion of all rates and fares received by the appellants and the Great Western Railway Co. for the whole journey in respect of all traffic passing over the line, and from the receipts so ascertained there must be deducted the usual and proper allowances for working expenses, Government duty, rental of stations separately assessed, trade profits, interest on tenants' capital, and the statutory deductions for maintenance and renewal. Assessed on this principle the agreed rateable value of the line was £64 per mile, and the rateable value of the line within the parish of Wardington was £102.

For the respondents it was contended that the assessment committee in ascertaining the rateable value of this property were entitled to take into account the 3½ per cent. interest paid by the appellants to the Great Western Railway Co. on the sum of £280,000 advanced by the latter to the appellants for the purpose of constructing the line in question in accordance with the Great Central Railway Act, 1897, and that the interest might properly be regarded as evidence of the rent which either the appellants or the Great Western Railway Co. were prepared to pay for the line, and that as such it was uncontradicted, and that the interest, being at the rate of far more than £1,000 per mile, was evidence that the appellants would be willing to give a rent for the line in the parish sufficient to support the rate appealed against, and that the geographical position of the said line indicated that it had a value apart from the actual net earnings on the line, and in the alternative that the line might reasonably be expected to let to the appellants or to the Great Western Railway Co. at such a percentage of the gross receipts of the traffic carried upon it as would justify the assessment appealed against.

The court of quarter sessions overruled the contention of the appellants that the mileage proportion of receipts should be the sole basis of valuation, and held that interest on the cost of construction of the line was a matter which they were entitled to take into account as an element of calculation in ascertaining the rateable value, and having so taken it into account, they determined that the property would properly be assessed at £1,390 gross estimated rental and £795 rateable value.

The question for the opinion of the court was whether the appellants were right in their contention or whether in the particular circumstances the interest on the cost of construction of the line was an element which might properly be taken into account in ascertaining the rateable value.

It was agreed that if the court should be of opinion that the appellants were right in their contention the appeal should be allowed, and the assessment of the line within the parish reduced to £593 gross estimated rental and £102 rateable value.

Balfour Browne, K.C. (*Sir E. Boyle, K.C.*, and *Snagge* with him), for the appellants.—The quarter sessions have adopted a wrong principle. They were not entitled to take into account the cost of construction. The proper test was, what would a hypothetical tenant pay from year to year for the line?

He cited *North and South-West Junction Railway* v. *Brentford Union Assessment Committee*, 13 App. Cas.

592, and *London and North-Western Railway Co.* v. *Irthlingborough Churchwardens*, 33 L. T. 327.

Ryde (*Cecil Walsh* with him), for the respondent.—This line has a competitive value as providing an alternative through route, and that cannot be left out of account in determining the rateable value: *London and North-Western Railway Co.* v. *Cannock Churchwardens*, 9 L. T. 325. The quarter sessions were entitled to consider the interest on cost of construction as rent: *Reg* v. *Eastern Counties Railway Co.*, 2 W. R. 160, 23 L. J. M. C. 90*n*, and *South-Eastern Railway* v. *Dorking Overseers*, 3 E. & B. 491.

Balfour Browne, K.C., replied.

LAWRANCE, J.—In this case my judgment must be for the appellants. The case appears to me to be a very simple one. The two companies, the Great Western Railway Co. and the Great Central Railway Co., were the only two companies concerned in the line; no third company could by any possibility work it or have any interest in it. To find the capital for making the line it was agreed between these two companies that the Great Western should advance £280,000 at 3½ per cent. The Great Western Co. were thus interested in the matter. That having been done, what is the proper principle upon which this piece of line is to be assessed? It is said by the appellants that the rateable value must depend upon the actual net earnings of the line in the parish. On the other hand it is said that as the Great Central paid 3½ per cent. upon £280,000, that is a rent which must be taken into consideration in arriving at the value of the line. In my judgment the latter contention cannot be sustained. It seems to me that wherever it can be done we must ascertain what rent would be given for the line by a hypothetical tenant from year to year who was in a position to work it. A hypothetical tenant would say: "What can I make out of it? What are the earnings? I do not care what the line may have cost; that makes no difference to me and does not affect my power of making a profit out of it." There is nothing in the case to show that the line was worth more than it was earning. I can imagine a case where a line might be more valuable than its earnings. There might be a competition for it. In most of the cases cited for the respondents there were competitors who were anxious to buy the line. Here there is no such competition, as the two companies do not compete with each other, and the moment they cease acting together the value of the line is gone. The question, as I have said, is, what would a hypothetical tenant give for the line? As it seems to me, such a tenant would be guided simply and solely by what he might hope to get out of it. I therefore think that the conclusion arrived at by the quarter sessions was wrong, and that the appellants' contention is right.

RIDLEY, J.—I agree. I am satisfied by the argument on behalf of the appellants that, taking the basis for which they contend, no advantages have been omitted to be taken into consideration in ascertaining the net earnings of this line. I therefore think that, if we come to the conclusion that the principle of assessment which the appellants contend for is right, they have correctly stated how the amount of rate should be arrived at. As to the respondents' contention that the interest paid on the £280,000 should be taken into account, I am satisfied that that is wrong. I entirely agree with the reasons given by my brother Lawrance on that point. The cases cited by the respondents do not seem to me to support their contention. In *South-Eastern Railway* v. *Dorking Overseers*, a railway having been constructed between Reading and Reigate, the South-Eastern Railway obtained a lease for a thousand years at a rent equal to £5 10s. per cent. on the capital raised by the company which constructed the line. Some years later a different arrangement was made, by which the South-Eastern Co. bought of the other company upon the terms of paying to the shareholders of the absorbed company certain perpetual annuities. The court decided that neither the rent under the lease nor the annuities payable under the amalgamating Act was necessarily the criterion of the rateable value; that the rateable value depended upon the present annual value of the line, and might be more or less than the sum which the parties had agreed to give for it. The interest in itself had nothing to do with the rateable value. In *Reg.* v. *Bedford Union Assessment Committee* there was evidence that the competing companies would be willing to acquire the line upon the same terms as it was held by the North-Western Co., and the court said that this must be taken into account in determining the rent at which the line might be expected to let from year to year. In *London and North-Western Railway* v. *Irthlingborough Co.* Blackburn, J., expressly said that the cost of construction was quite irrelevant to the question of rating, which depended only upon what a hypothetical tenant would pay from year to year.

Appeal allowed.

Solicitor for the appellants, *D. H. Davies.*

Solicitors for the respondents, *Hopwood & Sons*, for *E. Lamley Fisher*, Banbury.

K. B. Div. (Channell, J.) — Nov. 1, 2.

SMAILES & SON *v.* HANS DESSEN & CO. (*a.*)

Ship — Charter-party — Demurrage — Discharging in customary manner—Discharging subject to lien—Time when such discharge can take place—Barry Port—Merchant Shipping Act, 1894 (57 & 58 *Vict. c.* 60), *ss.* 493, 494.

A charter-party provided for the discharge of a vessel to be "in the manner and at the rate customary at each port during the customary working hours, and if the ship be further detained through the fault of the charterers, ten days on demurrage over and above the said laying days at twenty pounds per day." Until it is clear that the ship cannot be discharged within the time allowed, the shipowner cannot insist on landing the cargo, under the Merchant Shipping Act, 1894, *subject to a lien.*

Action tried in the Commercial Court.

The plaintiffs' claim was for £160 for eight days' demurrage of the steamship *Mutual*, for a declaration that they were entitled to a lien on the cargo shipped on the steamship *Mutual*, and upon £160 deposited in respect of the said demurrage and payment of that deposit; and for damages for breach of contract contained in a bill of lading.

The plaintiffs were the owners of the steamship *Mutual*.

The defendants were taken to be the indorsees of a bill of lading referring to goods carried on the said vessel.

Messrs. Capper, Alexander, & Co., were the charterers of the vessel, and they had sold a quantity of pit-props to the shipper, one Schaumann.

The bill of lading was as follows: "Jakobstad,

(*a.*) Reported by W. T. TURTON, Esq., Barrister-at-Law.

June 15th, 1904.—Shipped in good order and condition by W. Schaumann . . . upon the steamship *Mutual* . . . now lying in the port of Jakobstad and bound for Barry, 765 cubic fathoms pit-props . . . to be delivered in the like good order and condition at . . . Barry (all and every the dangers and accidents of the seas and navigation of whatsoever nature or kind excepted) unto order he or they paying freight for the said goods and all other conditions according to the charter-party, London, May 4th, 1904 . . . quantity and quality unknown."

The charter-party was as follows: "London, May 4th, 1904, . . . agreed between Messrs. Smailes & Son, owners of the steamship *Mutual* . . . and Capper, Alexander, & Co., agents for merchants, that the said steamship . . . shall . . . proceed to Jackobstad . . . and there load . . . a full and complete cargo of usual short pit-props . . . and being so loaded shall therewith proceed to one of the destinations hereinafter mentioned at charterer's option . . . and there deliver the same, at such wharf or in such dock or berth as ordered always afloat, freight to be paid as follows: Cardiff, Barry, Newport, or Port Talbot, one port only, at 25s. all per cubic fathom delivered as ascertained in the customary manner at place of discharge in full of all port charges and pilotages as customary . . . The cargo to be supplied to and received from the steamer in the manner and at the rate customary at each port during customary working hours, and if the ship be further detained through the fault of the charterers, ten days of demurrage, over and above the said laying days at twenty pounds per day . . . Owners to have an absolute lien on cargo for all freight, dead freight, and demurrage in consideration whereof charterer's liability to cease on shipment of cargo. . . . "

The steamship *Mutual* loaded her cargo and arrived at Barry on the 26th of June, 1904.

Owing to certain disputes it was not until the 4th of July that orders were given for berthing the vessel. The next day (the 5th of July), there being an advance of part of the freight, the discharge was commenced to the Barry Railway Co. At Barry the Barry Railway Co. do the discharging.

The discharge was stopped on the 7th of July because the balance of the freight had not been paid.

On the 8th of July the defendants were appointed agents for the shipper.

The balance of freight remained unpaid on the 13th of July, and under the provisions of the Merchant Shipping Act, 1894, ss. 493, 494, notice was given by the plaintiffs to the Barry Dock Railway Co. to discharge the cargo subject to lien for freight and demurrage.

The discharge subject to lien commenced on the 15th of July and was completed on the 21st of July. The discharge could have been completed on the 13th of July in the ordinary course of events.

In order to prevent a sale of the goods (after the expiration of ninety days after the discharge subject to lien, under section 497 of the Act of 1894) the defendants deposited £160 with the Barry Railway Co. and received the goods, the freight having been paid.

The claim (iv.) for damages for breach of the contract in the bill of lading referred to the delay in commencing to unload the vessel on her arrival, and for the purposes of this report has not been dealt with.

The Merchant Shipping Act, 1894, s. 493 (1): "Where the owner of any goods imported in any ship from foreign parts into the United Kingdom fails to make entry thereof, or having made entry thereof to land the same or take delivery thereof, and to proceed therewith with all convenient speed, by the times severally hereinafter mentioned, the shipowner may make entry of and land or unship the goods at the following times: (*a*) If a time for the delivery of the goods is expressed in the charter-party, bill of lading, or agreement, then at any time after the time so expressed. (*b*) If no time for the delivery of the goods is expressed in the charter-party, bill of lading, or agreement, then at any time after the expiration of seventy-two hours, exclusive of a Sunday or holiday, from the time of the report of the ship."

Section 494: "If at the time when any goods are landed from any ship and placed in the custody of any person as wharfinger or warehouseman, the shipowner gives to the wharfinger or warehouseman notice in writing that the goods are to remain subject to a lien for freight or other charges payable to the shipowner to an amount mentioned in the notice, the goods so landed shall, in the hands of the wharfinger or warehouseman, continue subject to the same lien, if any, for such charges as they were subject to before the landing thereof; and the wharfinger or warehouseman receiving those goods shall retain them until the lien is discharged as hereinafter mentioned, and shall, if he fails so to do, make good to the shipowner any loss thereby occasioned to him."

Scrutton, K.C., Adair Roche, and *H. L. Tebbs*, for the plaintiffs.—The plaintiffs were landing the cargo from the 5th of July to the 7th of July in the customary manner, through the Barry Railway Co., as agents for the shipper. The cargo was landed at the earliest time allowed by the Merchant Shipping Act, 1894, and could not have been landed subject to lien, under that Act, between the 7th of July and the 13th of July. Under the provisions of the Merchant Shipping Act, 1894, the shipowner cannot insist upon landing the goods subject to lien for freight until the time has arrived when it is clear that the owner of the goods cannot take them within the demurrage days. The plaintiffs acted reasonably: *Hick* v. *Raymond & Reid*, 41 W. R. 384, [1893] App. Cas. 22.

Robson, K.C., and *Bailhache*, for the defendants.—The discharge should not have been stopped on the 7th of July. The plaintiffs should have landed the cargo subject to lien under the provisions of the Merchant Shipping Act, 1894. That would have diminished the damages. The vessel should not have been used as a warehouse: *Lyle Shipping Co* v. *Corporation of Cardiff*, 49 W. R. 85, [1900] 2 K. B. 638; *Modesto Pineiro & Co.* v. *Du Pré & Co.*, 7 Com. Cas. 105; *Moller* v. *Young*, 4 W. R. 149, 24 L. J. Q. B. 217.

CHANNELL, J.—The claim is for a contract demurrage under the terms of the charter-party, and the point in dispute arises in consequence of the stoppage of the discharge after it had once begun. The shipper's agent started to take the discharge. Then, having started to take it, the shipowner, through his agent, having got an advance of freight, said nothing about the payment of freight when the first quantities of the timber were being delivered, but when he had delivered a quantity upon which he thought the freight would not be covered by the advance he then began to ask for his freight, and to threaten, if he was not paid, to exercise a lien for it. He was not paid, and he stopped the discharge. Now, the principal point is whether he could, and, if he could, whether he ought then to have acted on the provisions of the Merchant Shipping Act, and have got his lien preserved for him by the dock company instead of turning his ship into a warehouse, as the expression is, and keeping the goods there in exercise

of his lien. Now as to that, assuming that he could have done it, I think the cases are quite clear that it is a question whether or not it was reasonable for him to do it. The ordinary principles of the law in reference to damages apply—that a man may not increase damages by unreasonable conduct. He is bound to act not only in his own interests, but in the interests of the party who would have to pay the damages, and keep down the damages, so far as it is reasonable and proper, by acting reasonably in the matter. That is the general rule with reference to damages, and this seems to be only one illustration of it. The provisions in the Merchant Shipping Act, 1894, of course, have been enacted for the very purposes of preventing large damage arising from the detention of a vessel, which often is an extremely expensive matter, and to give a means of securing the shipowner for his freight, or anything else that he has a lien for, without incurring the large expenses of detaining the vessel. That is the very object with which the enactment was made. Therefore, if he can do it, and if there is nothing to make it unreasonable for him to do it, I think, as Bigham, J., and Kennedy, J., seem to have said, that under these circumstances he would not be able to recover the large amount which the damage would probably reach. It is a case in which it would go in mitigation of damages. I do not think there is anything in the case of *Moller* v. *Young* to the contrary. But one has two propositions to consider: First of all, whether the shipowner was in a position to exercise his rights under the Merchant Shipping Act, 1894; and, secondly, if he was, whether it was reasonable or unreasonable to do it; and the general circumstances show whether his conduct was reasonable or unreasonable. Now I certainly thought, at first, reading section 491 of the Act of 1894, that "if at the time when any goods are landed" would cover the time when any goods have been landed, and that in this case as the landing in point of fact was going on, that it might have been continued, and that instead of stopping the discharge the shipowner might have given to the dock company a notice that as to any goods landed after that date they were to be held by them subject to his lien. These words cannot refer to goods which have been landed, when you consider it, because as to them the lien would have gone when the possession was parted with; and so they must mean when goods are being landed the shipowner gives a notice in writing that the goods which are to be landed subsequent to that are to be subject to the lien. I cannot therefore say that these goods were at the time of the stoppage of the discharge "landed" within the meaning of section 494, and the only question is as to the right to land them.

Section 493 of the Act of 1894 gives the shipowner power to land them when there has been a default by the owner of the goods; and for the purpose of seeing whether he has a right to land them you have to see whether there has been a default. Now in this case when you come to look at it there was not at the time when the discharge was stopped any default by the owner of the goods. He was still within the time. He was not taking them at the moment because he was not paying the freight, the payment of which, concurrently with the delivery of the goods, was a thing entitling him to have them delivered, so that unless he had his money for the freight he was not getting the goods, but he had still a certain number of days within which to pay and take them, because the contract gives the customary time plus so many days of demurrage. On the whole, therefore, although at first I certainly thought the contrary, I think that the position was that the shipowner could not insist upon landing the goods subject to a lien for freight until the time had arrived when it was clear that the owner of the goods could not take them within his demurrage days. I do not think it is to the end of the demurrage days, but a time so near to the end of the demurrage days that it would be impracticable to take delivery of them within the time. Then he would be in a position to say the owner is in default under section 493, and then he would be able to exercise the power of section 493, and exercising the power contained in section 493 he could then give the notice that the goods were to remain on his lien for freight. That being so, at this particular time the thing could not have been done except possibly by the consent of the parties. I am not dealing with what could have been done by consent, but what there was an absolute right to do. If I had to decide it on the ground of reasonableness I think there is a good deal to be said about it. I am quite clear that if they had been landed there would have been ninety days before the shipowner could have insisted upon the goods being sold, because that is what it is. I am not at all sure whether that would of itself have made the thing unreasonable. The ninety days are given by the statute because the case contemplated is where there is some real difficulty about the ownership of the goods, where a consignee cannot be found, and there is nobody there, and it is necessary of course to give a considerable time before the goods are sold in order to clear up the dispute which is supposed to exist. I do not feel quite sure that that in itself is enough; on the other hand, there is something in the argument that when, as in the present case, the shipowner has reason to think that if he stands firm and says, "Now I am going to stand upon my lien, and there will be demurrage to my ship; you had much better pay," he has reason to think the thing is so near being settled that it is likely to be settled to-morrow, which, I think, was the present case or getting near enough to it. I think one would be inclined on the whole to find, and I think a jury most likely would find, that his conduct was reasonable. However I think in this case my decision is based not so much on a finding of fact that his conduct was reasonable. I do not find it to be unreasonable, but I am not quite clear about that point. I think when you come to look at the thing the real truth is that he was not in a position to do it. On the whole I think the plaintiffs are entitled to judgment.

There will be a declaration under (i.), (ii.), (iii.) of the claim that the plaintiffs are entitled to a lien for £160 demurrage and judgment for that amount.

Solicitors for the plaintiffs, *Botterell & Roche.*

Solicitors for the defendants, *Trinder, Capron, & Co.*

Court of Appeal.

From Chan. Div. (Collins, M.R., and Romer and Cozens-Hardy, L.JJ.) — Feb. 9, 12, 13; March 8.

VILLAR *v.* GILBEY. (*a.*)

Will—Construction—Devise to children born in the testator's lifetime—Divesting clause—Child en ventre sa mère.

Primâ facie, *in the absence of sufficiently weighty considerations to the contrary, for the purposes of devolu-*

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at Law.

tion of property in connection with intestacies or wills, no distinction ought to be drawn between a child born at a particular time and a child en ventre sa mère *at that time and subsequently born alive. This rule applies generally and not merely in cases where it is for the benefit of the child.*

Blasson *v.* Blasson, 13 *W. R.* 113, *is overruled on this point, and cannot be supported except on the ground that the language of the particular will there in question prevented the application of the general principle above stated.*

Decision of Swinfen Eady, J. (53 *W. R.* 508, [1905] 2 Ch. 301), *reversed.*

This was an appeal from a decision of Swinfen Eady, J. (reported 53 W. R. 658, [1905] 2 Ch. 301).

George William Rush, the testator in the action, by his will dated the 22nd of June, 1854, devised his real estate to his brother Alfred for life, with remainder to Alfred's eldest son, Alfred George Anderson Rush, for life, with remainder to his first and other sons successively in tail, with remainder to his daughters in tail, with remainder to Alfred's second son, George Acland Gordon Rush, for life, with remainder to his first and other sons successively in tail, with remainder to his daughters in tail. "And in default of such issue the testator gave and devised the same estates unto the third, fourth, and every other son and sons of the body of the testator's said brother Alfred Rush severally, successively, and in remainder one after another according to priority of birth and to the heirs of the body and bodies of such son and sons lawfully issuing, the elder of such son and sons and the heirs of his body being always preferred before a younger son and sons, but the testator declared his intention to be that any third or other son or sons of his said brother born in the testator's lifetime should not take a larger interest in the said estates than for life only, with remainder to his issue in tail male, and then in tail female in all respects as near as might be as was thereinbefore declared with respect to his said two nephews then living and their issue in tail, with divers remainders over."

The testator died on the 18th of September, 1854. His brother Alfred Rush had six children, of whom the two eldest were the sons named in the will. A third son, William Beaumorice Rush, was born on the 9th of October, 1854, within one month of the testator's death, and a fourth son was born about two years afterwards.

Alfred George Anderson Rush died on the 2nd of May, 1879, without ever having had issue.

William Beaumorice Rush was adjudicated bankrupt on the 1st of December, 1882.

On the 1st of August, 1883, his trustee in bankruptcy conveyed to H. D. Bishop the life interest of William Beaumorice Rush under the testator's will, and on the 12th of June, 1884, H. D. Bishop conveyed all his interest under the said indenture of the 1st of August, 1883, to the plaintiff.

The bankruptcy was closed by order of the court on the 23rd of February, 1895, and the official receiver thereupon became trustee of the estate of William Beaumorice Rush.

George Acland Gordon Rush died on the 2nd of November, 1903, without ever having had issue.

By an indenture dated the 2nd of February, 1905, and enrolled as a disentailing deed, the official receiver conveyed the estates devised to William Beaumorice Rush to the plaintiff in fee simple.

The plaintiff brought the present action to obtain a declaration that the estate taken by William Beaumorice Rush under the testator's will was an estate tail and not an estate for life.

The defendant was the purchaser from Alfred Rush's fourth son of the estate tail given him by the will.

In all dealings prior to the disentailing deed it had been assumed that the estate taken by William Beaumorice Rush under the will was an estate for life only.

Swinfen Eady, J., held that the words "born in my lifetime" must be taken in their natural sense, and the third son's estate was not cut down to an estate for life.

The defendant appealed.

Warmington, K.C., Micklem, K.C., and *Wace,* for the appellant.—The child *en ventre sa mère* must be considered as living at the testator's death for all purposes: *Doe d., Lancashire* v. *Lancashire,* 5 T. R. 49; *Doe* v. *Clarke,* 2 H. Bl. 399; *Trower* v. *Butts,* 1 Sim. & S. 181; *In re Burrows, Cleghorn* v. *Burrows,* 43 W. R. 683, [1895] 2 Ch. 497; *In re Wilmer's Trusts,* 51 W. R. 395, [1903] 2 Ch. 411. The will does not contain the gift of an estate tail and then a subsequent cutting down of that gift to a life estate but the words must be all read together and in the events that have happened there is only one gift, and that is of a life estate: *Pearce* v. *Carrington,* 21 W. R. 729, L. R. 8 Ch. 969.

Eve, K.C., and *R. J. Parker,* for the respondent—The rule is that a child *en ventre sa mere* is only to be reckoned as living if it will be for the child's own benefit: *Blasson* v. *Blasson,* 13 W. R. 113, 2 De G. J. & S. 655. This is not a case of alternative gift It is a cutting down clause in a form well known to conveyancers.

Micklem, K.C., replied.

Long v. *Blackall,* 7 T. R. 100; *Goodtitle* v. *Wood,* Willis 211; *Thelluson* v. *Woodford,* 7 Ves. 227; *Reev* v. *Long,* 1 Salk. 227; *Richards* v. *Richards,* Johns 754. 8 W. R. Ch. Dig. 23; *Clarke* v. *Blake,* 2 Bro. C. C. 319 note; *Beale* v. *Beale,* 1 P. Wms. 244, were also cited.

Cur. adv. vult.

The following written judgment was first delivered by

ROMER, L.J.—A long series of cases has established that, for purposes of succession to property on an intestacy and for many purposes connected with wills and their construction, a child *en ventre sa mère* at a particular time, who is subsequently born alive, is to be considered as "living" or "born" at that time. The following are examples: If the owner of an estate in fee simple dies intestate and there is a child *en ventre sa mère* at the date of the death who, if then born, would be heir, and that child is subseqently born alive, that child succeeds as heir; although in that particular case, owing to the exigencies of the common law requiring a tenant to the præcipe, the child would not be entitled to the rents of the estate between the death of the intestate and the birth: *Richards* v. *Richards.* In the case of intestacy as to personal estate, a child *en ventre sa mère,* subsequently born alive, shares as if living at the date of the death of the intestate: *Wallis* v. *Hodson,* 2 Atk. 113. In case of a will, in the absence of any context negativing that view, under a gift to the children of A. "living" at a particular time (*Doe* v. *Clarke*), or "born" at such time (*Trower* v. *Butts*), a child of A., *en ventre sa mère* at that time, and subsequently born alive, shares; and views to the contrary that had been expressed by some judges (and in particular by Kenyon, M.R.) are unsound. The reason was pithily put by Leach, V.C., in *Trower* v. *Butts* thus—"because the potential existence of such a

child places it plainly within the reason and motive of the gift," a reason which may well be applied to the provision in the will in the present case on which the question before us turns. Nor is the rule limited to cases where the gift is for the benefit of the child itself: see *Pearce* v. *Carrington* and *In re Burrows*. In *Doe d. Lancashire* it was decided under the old law that marriage and the birth of a posthumous child revoked a will made before marriage. Again, it has long been held, with regard to questions of perpetuity under a will, that a child *en ventre sa mère* at the time of the testator's death, who is subsequently born alive, must be treated as having been alive at the testator's death: see *In re Wilmer's Trusts*, [1903] 2 Ch. 411, and cases there cited: In addition to these cases I may refer to what was said by Buller, J., with reference to the recognition by the law of a child *en ventre sa mère* in *Thellusson* v. *Woodford*: "He may be vouched to a recovery, though it is for the purpose of making him answer over in value. He may be an executor. He may take under the Statute of Distributions. He may take by devise. He may be entitled under a charge for raising portions. He may have an injunction; and he may have a guardian." And in the Thellusson Act the Legislature was careful with regard to accumulation by will from the death of the testator during minority, to provide that it might be during minority of any person "living *en ventre sa mère*" at the death of the testator.

The question now arises what conclusion ought to be drawn from the very varied circumstances pointed out above in which a child *en ventre sa mère* at a given time and subsequently born alive has been treated as if born at that time. Are these varied circumstances to be treated as having given rise to decisions only establishing several isolated and different rules governed by no common principle; or is there not some general underlying principle to account for the varied decisions? It appears to me impossible to suppose that there is no such general underlying principle. It cannot be said that the principle is limited to cases in which the benefit of the child is concerned. The modern authorities are opposed to that limitation, and, indeed, so are some of the older authorities. For example, I take it that the decisions establishing that a will is revoked by marriage and the birth of a posthumous child would be applicable even if the person benefited by the revocation were the widow and not the child, as might be the case. What, then, is the general underlying principle? The full extent of it may be matter of doubt. But I am driven to the conclusion, from a consideration of the many varied circumstances I have referred to above, that the principle at any rate goes to this extent—that *primâ facie*, in the absence of sufficiently weighty considerations to the contrary, for the purposes of devolution of property in connection with intestacies or wills, no distinction ought to be drawn between a child born at a particular time and a child at that time *en ventre sa mère* and subsequently born alive. In particular, I think, with regard to wills, that they ought to be construed and given effect to without making any such distinction, unless the context requires a distinction to be made. The only case which appears to militate against this view is that of *Blasson* v. *Blasson*, a decision of Westbury, L.C. That decision, amongst modern cases, stands alone and opposed to the general current of authority in drawing the distinction I have been dealing with, unless the judgment be founded on the special governing words in the will of the testatrix there dealt with, those words being "children . . . born and living at the time of my decease." It may be—and as to this I need not express any opinion—that those words draw a distinction between "born" and "living," and required a child not only to be "living" in the sense of being *en ventre sa mère* at the testatrix's death, but also required the child to be then "born." But unless that view be taken of the case, I think it is not binding upon us and ought not to be allowed. For not only is it opposed in principle to the general current of authority, as I have pointed out, but Lord Westbury bases his decision on the ground that "the fiction or indulgence of the law which treats the unborn child as actually born applies only for the purpose of enabling the unborn child to take a benefit which, if born, it would be entitled to." That ground, as the authorities show, is unsound. The "indulgence of the law" is not so limited. I may add that Lord Westbury's decision was generally regarded as having unsettled previously settled law. This appears from several of the recognized text-books of authority. Take, for example, Jarman on Wills. Prior to *Blasson* v. *Blasson*, it was stated in editions of that work that "for all purposes of construction a child *en ventre sa mère* is considered as a child *in esse*. But after Lord Westbury's decision these words had to be added in brackets in the subsequent editions, "[if it will be for its own benefit to be so considered]"—see the fourth edition, vol. 2, p. 185. That being so, it appears to me that the principle I have indicated affecting the construction and effect of wills ought to be applied in the present case, unless there is something in the will, taken as a whole, to negative its application. Not only do I not find in the will now in question anything to negative the application of the principle, but it appears to me that not to apply the principle would be to refuse to carry out the object of the testator to be gathered from his will, which appears to me to have been to settle his lands as strictly as the law would permit him. I cannot attach weight to the argument of the respondent's counsel founded on the difficulty that might arise in some cases of proving the time of conception of a child. The difficulty existed in most of the numerous cases to which I have called attention. For these reasons I think the appeal should be allowed.

COZENS-HARDY, L.J.—The question in this case is whether upon the true construction of the will of George William Rush his nephew William Beaumorice Rush took an estate tail or a life interest only. [His lordship stated the provisions of the will, and continued:] The testator died on the 18th of September, 1854. The limitations in favour of the first and second sons of Alfred Rush and their issue have failed. William Beaumorice Rush, the third son of Alfred Rush, was born on the 9th of October, 1854—that is to say, within one month after the testator's death and the question is whether he is to be considered as being "born in the testator's lifetime" for the purpose of the construction of the will. Swinfen Eady, J., has answered this question in the negative, and has held that he took an estate tail.

Now it is perfectly settled law that for many purposes a child *en ventre sa mère* is deemed to be in the same position as if actually born. For example, such a child takes real estate as heir-at-law, although for reasons connected with feudal tenure he is not entitled to the rents and profits until his actual birth. He takes personal property under the Statute of Distributions as a child. At common law he might be vouched in a common recovery: *Wallis* v. *Hodson*. In equity a bill might be filed on his behalf, and Sir Orlando Bridgeman granted an injunction to restrain waste in such a case: *Lutterel's case*, cited in *Hale* v. *Hale*, 1 Ch. 50. He can take by devise or bequest. It was held more than 200 years ago in *Hale* v. *Hale* that under a trust for such child or

children of A. as shall be *living at A.'s death* a posthumous child was entitled. The same doctrine was applied in *Trower* v. *Butts*, where the words were *born* in A.'s *lifetime*. In short, it cannot now be questioned that under a devise or bequest to the child of X., or to children of X., as a class living or born at a particular time, a child *en ventre sa mère* at the time and afterwards born alive, is a child entitled under the devise or bequest.

There was at one time a view that this doctine only applied where it would be for the benefit of the child himself that he should be considered a child *in esse*. That was the doctrine of the civil law, but I think it is now settled by authority which binds us that this limitation can no longer be maintained: *Pearce* v. *Carrington*, *In re Burrows*, *In re Wilmer's Trusts*. Indeed the contrary was scarcely contended for by counsel for the respondent.

There is not, so far as I am aware, any modern decision adverse to this view, unless it be *Blasson* v. *Blasson*, where Lord Westbury spoke of "this peculiar rule of construction which is limited to cases where such construction of the word *born* is necessary for the benefit of the unborn child." That case may possibly be supported on the ground that the words there were "who shall have been *born and living* at the time of my decease," such words possibly indicating a sufficient contrary intention to take the case out of the general rule. Unless it can be supported on that ground, I think that case ought not to be followed.

It has been argued that this doctrine or rule of law ought to be limited to the particular cases which have been decided, although those cases are very numerous and cover almost every conceivable state of circumstances. I cannot assent to this argument. I think that as a general rule of construction the words child living at or born at a particular date include a posthumous child, in the absence of any context indicating a contrary intention, and I desire to base my judgment in favour of the appellant on that broad principle.

The clause under which the question arises is commonly found in wills settling real estate, and if there were any proof of a general opinion on the part of conveyancers adverse to the view I have expressed, I should attach great weight to it. But the precedents referred to by Mr. Micklem satisfy me that the opinion of conveyancers has been and is that a posthumous child is included in a clause of this nature unless words are added expressly to exclude him.

I am not sure that in this particular will the same conclusion might not be reached on somewhat narrower grounds. The will shows an intention to tie up the property as far as the law allows. Moreover, it is not the case of a vested estate tail with a subsequent clause of defeasance. The nephew took, as from the testator's death, *either* an indefeasible estate tail, *or* an estate for life. And in the event which happened, the alternative second gift took effect, in accordance with established authorities to which I have referred.

The result is that in my opinion this appeal must be allowed.

COLLINS, M.R.—I agree with the judgments which have been delivered by the Lords Justices.

Solicitors, *Baileys, Shaw, & Gillett; Reed & Reed*, for *Reed & Co.*, Taunton.

High Court of Justice.

Chan. Div. Kekewich, J. — Dec. 18, 19; Feb. 21.

BETTS (LIMITED) v. PICKFORDS (LIMITED). (a.)

Lessor and lessee—Grant of land for specific purpose—Light—External or party-wall—Trespass—Derogation from grant—Authority of architect—London Building Act, 1894 (57 & 58 *Vict. c.* 213), *s.* 5, *sub-section* 16.

The defendants, who owned some land, which was covered with buildings, leased a portion of that land to the plaintiffs for the purpose of erecting a warehouse and showrooms, for which purpose a large amount of light would be necessary, the plans which were approved by the defendants showed that there were to be windows in the external wall of the new buildings adjacent to the land retained by the plaintiffs. By another agreement the defendants undertook to demolish the buildings on the demised land. Some rafters and purlins of the buildings on the defendants' land were left projecting a few inches over the land leased to the plaintiffs, and they were supported by stanchions which stood partly on the plaintiffs' land. These purlins and rafters were, with the consent of the plaintiffs' architect, but without the knowledge or consent of the plaintiffs themselves, built into the external wall of the plaintiffs, which was built entirely on the plaintiffs' land. The stanchions were also grouted in to the wall, the plaintiffs' wall and the defendants' building being in fact connected. The local authority took proceedings against the plaintiffs to close the windows in that external wall, which they alleged had become a party-wall through the acts of the defendants. The plaintiffs brought this action to restrain the defendants from using their wall and to compel them to remove the rafters and purlins from the wall.

Held, that the use by the defendants of the plaintiffs' wall which had led to the local authority's demand was a trespass and amounted to a derogation from their grant, and the injunction asked for was accordingly granted.

Held, also, that it was not within the scope of the plaintiffs' architect's authority to sanction the rafters and purlins being built into the plaintiffs' wall, and that the plaintiffs were not bound by it.

Witness action.

This action was brought to restrain the defendants trespassing upon a certain wall so as to convert it into a party-wall.

The plaintiffs, F. Betts & Co. (Limited), who were builders' merchants, being desirous of erecting a warehouse, offices, and showrooms, in 1903, entered into negotiations with the defendants, Messrs. Pickford & Co. (Limited), for the acquisition of a plot of ground which belonged to the defendants in Long-lane, Bermondsey, which was at that time covered with old buildings.

The plaintiffs' architect submitted to the defendants plans of the warehouse which they proposed to erect, and which was to consist of a ground floor and three upper floors. Each of these upper floors were to have three windows in the south or back wall of the warehouse. The first floor was one large room and was intended to be used as a showroom.

The defendants at first raised some objections to these plans on the ground that certain premises belonging to the defendants which adjoined the proposed new buildings would be overlooked by the proposed windows in the south wall, but eventually the defendants gave their consent, as the plaintiffs

(a.) Reported by R. FRANKLIN STUBBING, Esq., Barrister-at-Law.

insisted that these windows were absolutely necessary for their business.

In accordance with these arrangements the defendants demised by an indenture of lease dated the 28th of October, 1903, a portion of their property in Long-lane to the plaintiffs for a term of 62 years. The plaintiffs covenanted to well and sufficiently fence off the premises from the adjoining property and also to build a warehouse upon the demised property within seven calendar months from the date of the lease in accordance with the plans and specifications to be approved by the surveyor of the defendants. The defendants entered into the usual covenant for quiet enjoyment.

The plaintiffs erected the warehouse, which was entirely upon the demised premises, in accordance with the approved plans.

Another agreement was entered into at the same time under which the old buildings that were on the premises were demolished by the defendants. In the course of demolition some roof timbers of that portion of the shed which remained upon the defendants' adjoining property were cut off, and about four inches of them were left projecting over the southern side of the premises demised to the plaintiffs, and they were supported by iron stanchions which stood for an inch or two upon the demised premises.

These timbers and stanchions were built into the southern wall of the plaintiffs' warehouse without their knowledge, but with the knowledge and consent of their architect. A cement fillet was also laid between the edge of the roof of the shed and the southern wall of the plaintiffs' warehouse, so that in fact the defendants' shed and the wall of the plaintiffs' warehouse were connected. The roof of the defendants' shed was about level with the sills of the first floor windows in the plaintiffs' warehouse, touching the two eastern windows.

The defendants also erected a building, which was used as stables, up against the eastern wall of the plaintiffs' warehouse without erecting any boundary wall of their own; this also was done without the knowledge or consent of the plaintiffs.

On the 31st of October, 1904, the plaintiffs were summoned by the local authority for an alleged infringement of the London Building Act, 1894, by making the southern wall of their warehouse a party-wall within section 5 (16) without complying with requirements of the Act as to a party-wall, as two of the windows in the wall were openings which were not allowed by the statute.

The magistrate held that the southern wall of the plaintiffs' warehouse was a party-wall within the meaning of the Act, but postponed making an order to close the windows in order to give the plaintiffs an opportunity to bring the present action against the defendants, and adjourned the summons until after the hearing of this action.

Section 5 (16) of the London Building Act, 1894, provides that "party-wall" means (*a*) a wall forming part of a building and used or constructed to be used for separation of adjoining buildings belonging to different owners, or occupied or constructed or adapted to be occupied by different persons.

The plaintiffs alleged that the southern wall of their warehouse was an external wall built upon their own premises, and that if it were a party-wall within the meaning of the London Building Act it had been converted into one by the trespass of the defendants and in derogation of their grant to the plaintiffs, and they accordingly asked for an injunction to restrain the defendants from committing any trespass so as to convert their wall into a party-wall, and for an order compelling the defendants to disconnect their shed and stables from the plaintiffs' wall, and for damages.

P. O. Lawrence, K.C., and *R. J. Parker*, for the plaintiffs.—The plaintiffs' wall was built as an external wall and not as a party-wall and no party-wall notices were given in respect of it. The use of this wall by the defendants constituted a trespass, which was committed without the plaintiffs' knowledge or consent. The plaintiffs' architect had no authority to allow the defendants to build the purlins and rafters into the plaintiffs' wall. If he had authority it only amounted to a revocable license, and there was no consideration for it. It only amounted to a parol agreement to grant an easement, and an easement could only be granted by deed. The defendants could not use this wall so as to derogate from their own grant and cause the windows which they had expressly sanctioned to be closed. *Alden* v. *Latimer, Clark, Muirhead, & Co.*, 42 W. R. 553, [1894] 2 Ch. 437: "Where a landlord demises part of his property for carrying on a particular business he is bound to abstain from doing anything on the remaining portion which would render the demised premises unfit for carrying on such business in the way in which it is ordinarily carried on," per Stirling, J. When a grantor had made a grant of land, and it was in the contemplation of the parties that a building would be erected with windows looking out on the land retained by the grantor, he was under an obligation not to use his land in any way so as to interfere with that grant: *Bailey* v. *Icke*, 64 L. T. 789. The Court of Appeal held in *Davis* v. *Town Properties Investment Corporation (Limited)*, 51 W. R. 417, [1903] 1 Ch. 797, that unless there were special words the covenant for quiet enjoyment did not enlarge the grant. The defendants ought to be restrained from using the plaintiffs' external wall and so converting it in to a party-wall.

Stewart Smith, K.C., and *Leverson*, for the defendants.—The plaintiffs erected the wall intending that it should be used as a party-wall, and therefore the defendants were relieved from all the consequences of its being a party-wall In the circumstances under which the wall was built both parties knew that the wall must be a separating wall. The plaintiffs have got all the easement they were entitled to. A grant made expressly for the purpose of the grantees building a house created a legal easement over the adjoining land retained by the grantor to such an extent as might be strictly necessary for enabling the grantee to build the house and to enjoy it when built: *Robinson* v. *Grave*, 21 W. R. 223. There was no express grant of an easement of light, and when the question was as to an implied grant regard must be had to all the circumstances under which the implied grant was said to arise: *Birmingham, Dudley, and District Banking Co.* v. *Ross*, 36 W. R. 914, 38 Ch. D 295. There was no contract by the defendants that the windows should be kept open or that the wall should not be a party-wall. There was no derogation from their grant on the part of the defendants. Derogation implied some act of the grantor which lessened the value of the grant, but the defendants had done nothing, as the purlins and rafters were built into the wall by the plaintiffs' agent. This was done by the permission of the plaintiffs' architect acting in the ordinary course of his authority, therefore the license was not revocable. Even if a trespass was committed, if it was done by the license of a duly authorized person, such license could not be revoked: *Taylor* v. *Waters*, 7 Taunt. 373. The plaintiffs could have cut these purlins and rafters off instead of building them into the wall, but having built them in the defendants could not now be called upon to remove, because to do so they would have to interfere with the plaintiffs'

wall: *Powell* v. *Aiken*, 4 K. & J. 343. It was doubtful whether anything but a direct interference with the enjoyment of land could constitute a breach of a covenant for quiet enjoyment: *Davies* v. *Town Properties Investment Corporation (Limited)*.

P. O. Lawrence, K.C., replied.

KEKEWICH, J.—There is no occasion to go at length into the facts of this case, but a brief statement as to how the question arises is perhaps necessary.

The plaintiffs are lessees of the defendants under a deed of the 28th of October, 1903, which is a lease of land so described with reference to a plan which indicates that it had at that time some buildings on it, and that lease contains a covenant by the lessees to erect buildings of a certain description according to approved plans, those plans being in existence and there being no doubt about what they are. Those plans show a certain number of windows. We know from the evidence that the plaintiffs stipulated for those windows, and that they stipulated for them for a certain purpose, and that the defendants knew why that stipulation was made. But I put that aside because it is sufficient for me to know, at least so it seems to me, that as a matter of fact the bargain between the two parties was that the plaintiffs should erect buildings containing certain windows. Windows were an essential part of the approved plans, and therefore I think the purpose for which the windows were required, I mean the special purpose, becomes immaterial.

Now it is said that the defendants have acted in derogation of that grant, and especially as regards the grant of the windows and of the right to open those windows and the privilege of having light coming through them, by what they have done. What they are said to have done is this: They have by their acts, so the plaintiffs say, converted or made what ought to have been an external wall into a party wall within the meaning of section 5, subsection 16, of the London Building Act, 1894, and the result of that is that the local authority is competent to demand, and does demand, that these windows shall be shut up, and that they must come out of the plan. It is unnecessary to go into the question as to what is the foundation of the local authority's demand, except that they say, and apparently with some justification, that if this wall which I am going to mention is used as a party-wall, these windows cannot be allowed to remain, and it is further said that that is a derogation from the defendants' grant.

Now the defendants' main answer shall be postponed for a moment; but assuming that what the defendants have done—that is to say, that they have really used or constructed a party-wall where a party-wall ought not to be—then they have led directly to the local authority's demand, which must be complied with, and so in that way they seem to me to have acted in derogation of their own grant.

There are many authorities on this point, but I will take the general law as stated by Stirling, J., in his judgment in the case of *Alden* v. *Latimer, Clark, Muirhead, & Co.*, 42 W. R. 553, [1894] 2 Ch. 437. He says: "The result of these judgments appear to me to be that where a landlord demises part of his property for carrying on a particular business he is bound to abstain from doing anything on the remaining portion which would render the demised premises unfit for carrying on such business in the way in which it is ordinarily carried on." I have already indicated that there is evidence to show that here a particular business was in contemplation and that the windows were required for that purpose, to the knowledge of the defendants; but again, I do not go upon that, because I think that the language of Stirling, J., may be read as applying directly to this case. He says: "Where a landlord demises part of his property for carrying on a particular business, he is bound to abstain from doing anything on the remaining portion which would render the demised premises unfit for carrying on such business." I can only apply the principle of that language to the present case.

There is more than one answer to that on the part of the defendants. The first is that you must regard any alleged derogation from the grant with reference to all the circumstances under which that grant was made; and for that purpose reference is made to the case of the *Birmingham, Dudley, and District Banking Co.* v. *Ross*, 36 W. R. 914, 38 Ch. D. 295, which I need not mention further. It does establish the proposition that you must look into all the circumstances at the time of the grant. What the defendants say is this: The plaintiffs accepted this lease with the obligation to build according to the plans, knowing that they were bound to build a wall separating the demised premises from the adjoining premises retained by the lessors. They must be taken to have known that there would be necessarily this external wall which might be, at any rate, if it was not a matter of course, a party-wall. They knew that there were to be buildings on the other side, and if there were buildings at the time, though they were to be interfered with by the plaintiffs' buildings, they must have known that other buildings were to be erected there and that the separating wall, the dividing wall, would, at any rate, in all probability, if not necessarily, become a party-wall. They must have contemplated that it would become a party-wall, and therefore they must be taken to have made this grant, or entered into this implied obligation which is derived from the lease, with the knowledge that there might be, and probably would be, a party-wall, and that, if there were a party-wall, the consequences would follow that the windows which they had, so to say, guaranteed, could not be erected.

It seems to me that that is pressing the doctrine for which the case of *Birmingham, Dudley, and District Banking Co.* v. *Ross* is an authority a great deal too far. In the first place, I am not sure that the plaintiffs ought to be treated as contemplating the existence of a party-wall. All they knew was that they were going to build a wall containing their own premises. They might have also contemplated, and I will take it that they did contemplate, that the defendants would erect buildings in the place of those then standing with or without alteration, but I see no reason for concluding that the plaintiffs knew or reasonably contemplated that the defendants' buildings would have their containing wall the same as the containing wall of the plaintiffs so as to make it a party-wall. But even if that were so, and if they ought to be regarded as having had that in contemplation, it does not seem to me to follow that they ought to have reasoned thus: There may be, and probably will be, a party-wall. If there is, all our plans will be upset; the windows for which we have stipulated will have to come down, because in the London Building Act there is a provision that enables the local authority to shut up windows in a party-wall. It seems to me that is carrying the doctrine of obligation construed by circumstances a great deal too far.

Then the other defence on the part of the defendants is this: "We have done nothing, the principle which the learned judge in the case of *Alden* v. *Latimer, Clark, Muirhead, & Co.* enunciates is, that you must do nothing in derogation of your grant—that is, the ordinary form of expressing it, borne out by his language; we have done nothing at all, but what

happened was this: There was a contemporaneous agreement, but not included in the lease, by which we agreed to clear the ground, and when we came to clear the ground we cleared it for the purpose of building, but there were overhanging the demised ground some beams and purlins which belonged to our main building, a building which had been to some extent pulled down in order to clear the ground, and there they were; they were strutted up and they were wanted for the buildings which we were going to complete. For the moment they were safe and we have done nothing with them, we did not bring them there, we simply left them there, we did not clear them away, and with the consent of the plaintiffs' architect we allowed them to be built into their wall; we were content that they should remain." The same is true of certain stanchions which formerly supported part of the defendants' wall, but which were left on the ground just at this dividing point, but on the plaintiffs' side—that is to say, on the site of their wall. The defendants say: "We were willing, if they had made no objection, to allow them to be built into the wall; we did not care very much whether they were there or not but we did not want to remove them; we allowed them to be built into the wall; we have done nothing, and therefore we cannot be treated as trespassers, because a trespasser is one who comes on another man's ground, cuts down a tree, or does something like that; but we have done nothing at all." The answer to that, in my view, is, "You have done, and are doing, a great deal; you are using the plaintiffs' property—whether you cared about it or not, or whether there was any consideration for it or not, is immaterial; you are as a matter of fact using the property which is demised to the plaintiffs, and occupying it with your stanchions and purlins, and you have no right to do that." That seems to me to be quite as much an act as if they had brought these things on the land. I am not speaking, for the moment, of their not having removed them, which they ought to have done, of course, under the collateral agreement; but they have used, and are using, the plaintiffs' property for unauthorized purposes, and that seems to me to be a trespass which the court can remedy. Then it is said "If we did do it, we did it with authority." All that is quoted in support of that view is what the plaintiffs' architect states. I am not finding fault with him, because he thought, no doubt, that he was acting within his authority; he was the architect of the plaintiffs, and it does not matter whether the defendants' architect asked him or whether he asked the defendants' architect, but between them they agreed that these purlins and stanchions should be built into the wall, and he, purporting to act on behalf of the plaintiffs, allowed it to be done. It is clear upon the evidence that he did not communicate it to the plaintiffs and they did not find it out until some time afterwards. He allowed it to be done. Was that within the scope of an architect's authority? It seems to me it clearly was not. What is within the scope of an architect's authority I am not called upon to say; but I will say this much, that I apprehend his authority is strictly limited by the nature of his employment—that is to say, as defined by any letters or agreement constituting his employment So far as I know in this case he was simply employed to superintend the erection of the buildings. That, I take it, he has done. He did superintend; but that cannot possibly give him any implied authority to allow these stanchions and purlins to be built into the wall. He could not even have allowed, according to the constitution of the employment as it is before me, the slightest deviation from the plans. All he had to do was to superintend the erection of the buildings according to the plans which had been approved, and it does not go beyond that. Of course we know that, in many cases, the architect has generally certain powers given him in verifying the builders' work and certifying the result, and you may find that all that comes within his authority; and indeed there may be, and probably are, many details which would be implied in those provisions; but beyond that, it is impossible to say that an architect has any more authority than any other person who is employed to superintend work. His duty, to sum it up in a word, is to superintend and nothing more.

There is one other important question remaining. This wall, which has been spoken of, and conveniently so, in the argument, as being divided into two parts, but is really one wall with a turn, has been trespassed on, as I have held, by the including in it and building into it certain purlins and stanchions, and that makes it, so I apprehend, a party-wall. It is therefore used as a party-wall within the Act. That is the case of the local authority into which I am not going at all. I am assuming that the local authority is perfectly right, and are entitled to insist upon the shutting up of the windows if the wall is used as a party-wall; but it has also been used as a party-wall in a different way. So far we have dealt with it above the ground, but down below the ground, in the basement, it constitutes or is still the separating or external wall of the plaintiffs—that is to say, the wall separating the demised premises from the premises retained by the lessor. But down below the ground, on the other side of the wall, there are stables used by the defendants, and they have no other wall on that side, the south side of their stables, but this, and they have used this as the wall between their stables and the plaintiffs' premises, the wall being still entirely on the plaintiffs' ground. That may or may not (again I am not deciding that) make it a party-wall, and if it is a party-wall down there, it may or may not be a party-wall up above in consequence. I am not dealing with that question at all, but I will assume that in using it in that way it is used as a party-wall. Then what right had the defendant to use that as a party-wall? It is the external wall built by the plaintiffs on their own ground. If the defendants desire to use the adjoining premises for stables or for any other purpose, they can erect their own containing wall; they have no business to use the wall of the plaintiffs, and it seems to me they are doing that; and there again they are using as a party-wall what they have no business to use as a party-wall. The only answer to that is that it always has been a party-wall from the first brick that was laid until now. That is quite possible, and I think it is very likely; but they have not brought home to the plaintiffs any knowledge of that; and as soon as the plaintiffs knew it, so far as I am aware, they protested and said that it must not be used in that way. So that whether it was used from first to last or not seems to me to be immaterial.

Then there is a question raised about the breach of the covenant for quiet enjoyment in the lease. I do not see myself that there has been any breach of the covenant for quiet enjoyment; but I need not say more about that because if I give the plaintiffs what they ask on the other ground, that, no doubt, will suffice.

So far as there are any damages there must be an inquiry. I am not in a position to say how far damages have been occasioned—there may be some, but if the plaintiffs think it worth while to take an inquiry as to damages, reserving the costs, I think they are entitled to that. There will therefore be an injunction restraining the defendants from using this wall and an order to remove the rafter and purlins.

Solicitors, *Peake, Bird, Collins, & Co.; Upton & Co.*

Chan. Div.
Swinfen Eady, J. } March 16; April 5; May 3.

In re CARY-ELWES' CONTRACT. (*a.*)

Lands Clauses Acts—Compulsory purchase—Purchaser compelled to take a conveyance—Form of conveyance—Lands Clauses Consolidation Act, 1845 (8 & 9 *Vict c.* 118), *ss.* 75, 81, 82—*Finance Act*, 1895 (58 *Vict. c.* 16), *s.* 12.

A local authority had under a compulsory purchase paid the purchase-money into court, accepted title and taken possession, but refused to take a conveyance.

Held, on summons by vendor, that they were compelled to take a conveyance to be settled in case of difference by the court.

In re Pigott and Great Western Railway Co., 29 *W. R.* 727, 15 *Ch. D.* 146; Harding *v.* Metropolitan Railway Co., 20 *W. R.* 321, 7 *Ch.* 154; *and* Wolverhampton and Walsall Railway Co. *v.* London and North-Western Railway Co., 16 *Eq.* 439, 22 *W. R. Dig.* 118, *followed.*

Summons.

This was a summons by the vendor under the Vendor and Purchaser Act, 1874, under the following circumstances:

The Scunthorpe Urban District Council under their special Water Act, 1903, which incorporated the Lands Clauses Acts and the Waterworks Clauses Acts, had compulsorily acquired from the vendor, a tenant for life of settled land, two plots of ground and an easement to run pipes over a strip of land not acquired. After the notice to treat had been given objection was taken on behalf of the vendor that the easements required by the council were in excess of those authorized to be taken by the special Act. This resulted in an agreement being made between the parties that the notice to treat should be regarded as amended, and the amendments were introduced into the copy of the notice to treat annexed to the award.

Before the arbitration proceedings there was correspondence between the parties with a view to reduce the area of land over which easements were to be acquired.

The solicitors for the council wrote agreeing to this, and sent an amended plan showing the strip over which easements were to be acquired reduced to fifteen feet in width.

In answer, the vendor's solicitors wrote: "On examining the proposed amended plans we find that the old boundardy lines remain in black ink, with the words, 'limits of deviation on deposited plans' inserted. These words must be omitted . . . if inserted they might give rise to questions of doubt." The solicitors to the council replied that they could not eliminate the lines of deviation without considerable expense, but undertook that in the conveyance they would not ask that these lines should be shown on the plan to the deed. The council subsequently took up the position that they objected to the expense of a conveyance as being unnecessary, at any rate for the present, and that in consequence they did not propose to take a conveyance, but to rest their title upon the special Act, the notice to treat and the award.

The vendor, who wished for the proper definition of the easements granted, in order to avoid prejudice to his surrounding land, issued this summons claiming (1) a declaration that the contract constituted by the special notice Act to treat and award ought to be completed by some proper deed of conveyance, covenant, or assurance, containing a proper description and definition of the lands and easements agreed to be sold, and containing all proper covenants and provisions for the protection of the vendor and the purchaser; (2) an order that such deed in default of agreement might be settled by the court.

C. H. Sargant, for the vendor.

H. Fellows, for the purchasers, in reliance on the Lands Clauses Act, 1845, ss. 75, 81, 82, contended that the council were entitled to require a conveyance from the vendor if they chose, but could not be compelled to accept a conveyance against their will; in any case that the form of conveyance was a matter to be settled by the purchasers and not by the court on dispute or by conveyancing counsel to the court at the instance of the vendor.

Cur. adv. vult.

SWINFEN EADY, J., in a considered judgment, stated the above facts, and continued: It is well settled that in cases of compulsory purchase, after notice to treat and ascertainment of the price, a contract is established, enforceable in a court of equity, and with regard to which both vendor and purchaser can enforce specific performance: *Adams* v. *London and Blackwall Railway Co.*, 2 M. & G. 118; *Regent's Canal Co.* v. *Ware*, 5 W. R. 617, 23 Beav. 575. Following these decisions, it was held by Jessel, M.R., in *In re Pigott and Great Western Railway Co.*, 29 W. R. 727, 18 Ch. D. 146, that as specific performance of the contract, as a contract of purchase and sale, or sale and purchase, may be enforced, all the ordinary rules apply, unless you find some statutory enactment in the way. In that case the Master of the Rolls applied the rule, stated in Dart's Vendors and Purchasers (5th ed.), pp. 629-630, that where the vendor has shown his title the purchaser pays interest from the time at which he might prudently have taken possession, supposing it to have been offered him—that is, the time when a good title was shown. That is the ordinary rule. The reason why equity interfered to enforce a statutory contract, after notice to treat and ascertainment of the price, is stated by Wood, V.C., in *Mason* v. *Stokes Bay Pier and Railway Co.*, 11 W. R. 80, 32 L. J. Ch. 110. It was because a court of law would be unable to do complete justice between the parties, having no machinery either for investigating the title or settling the conveyance. In that case, which was a suit to compel specific performance of a compulsory purchase of freeholds, he made a decree against the company, and said that the Master of the Rolls had put the matter on the right grounds in *Regent's Canal Co.* v. *Ware*; that after notice given and the price fixed, the relation of the parties, as vendor and purchaser, was as fully constituted as in the case of a formal and regular agreement. And in a subsequent case of *Harding* v. *Metropolitan Railway Co.*, 20 W. R. 321, 7 Ch. 154, the same learned judge, when Lord Chancellor, overruled the Master of the Rolls and compelled the railway company, against their will, to take an assignment of leasehold premises which they had purchased compulsorily and had already paid for. The principle is fully established that when land is purchased compulsorily, after the price has been ascertained, the purchaser is in the same position with regard to the landowner as an ordinary purchaser, and will be compelled by a court of equity to complete the purchase. It is an implied term of every contract for the sale of real property, if not expressed, that the contract shall be followed by a deed of conveyance conveying the property to a purchaser, and this may be enforced by a suit for specific performance. In *Wolverhampton and Walsall Railway Co.* v. *London and North-Western Railway Co.*, 16 Eq., at p. 439, Lord Selborne said:

(*a.*) Reported by C. H. CARDEN NOAD, Esq., Barrister-at-Law.

"The common expression 'specific performance,' as applied to suits known by that name, presupposes an executory as distinct from an executed agreement, something remaining to be done, such as the execution of a deed or a conveyance, in order to put the parties in the position relative to each other in which by the preliminary agreement they were intended to be placed." The intention of the parties in an ordinary contract for the sale and purchase of real property is that the purchaser shall pay the purchase-money and that the property shall be conveyed by a duly executed deed to the purchaser. Equity looks upon things agreed to be done as actually performed; consequently, when a contract is made for sale of an estate, equity considers the vendor as a trustee for the purchaser of the estate sold, and the purchaser as a trustee of the purchase-money for the vendor: Sugden's Vendors and Purchasers (14th ed.), p. 175, ch. 5, section 1 (1). It is not, however, in the contemplation of the parties that the vendor shall remain a trustee for the purchaser for an indefinite period; the intention is that in due course the property shall be conveyed to the purchaser, and the vendor divested of all estate and interest in it, legal and equitable. In my opinion the position is the same under a statutory purchase and sale, and a conveyance must be executed, except, of course, in those cases in which the Act of Parliament itself operates as a conveyance. This position is recognized by the Finance Act, 1895, s. 12 (58 Vict. c. 16). This section provides that where by virtue of any Act any property is vested by way of sale in any person, such person shall within three months after the passing of the Act, or the date of vesting, whichever is later, produce to the Commissioners of Inland Revenue a copy of the Act, or some instrument relating to the vesting duly stamped with the *ad valorem* duty payable upon a conveyance on sale of the property; and where any person by virtue of any Act is authorized to purchase property (which is the present case) such person shall within three months after the completion of the purchase produce to the commissioners an instrument of conveyance of the property duly stamped. In my judgment the respondents are bound, as in the case of an ordinary purchase, to take a conveyance, and there must be an order in the terms of the summons—the conveyance in case of disagreement to be settled under the direction of the court. The respondents must pay the costs of the application.

Solicitors, *Tamplin, Tayler, & Joseph; Collyer-Bristow & Co.*, for *Freer, Hett, & Hett*, Brigg.

Chan. Div. }
Warrington, J. } Feb. 24.

In re BLEW.
GUNNER *v.* BLEW. (*a.*)

Will—Discretionary trust—Remoteness.

A testator gave property to his trustees and directed them to apply the annual income, or any part thereof, "in such proportions and generally in such manner as to my said trustees in their absolute discretion should seem best for the support of my son A. B. and his wife and children, or any of them," or to accumulate the same in their like discretion for the benefit of the children of his son who should become entitled to the capital of the property under the trust thereinafter contained, and, subject to the discretionary trust, he directed his trustees to pay the income to his son and his son's widow, and after their deaths to stand possessed of the capital for the son's children, as therein mentioned.

Held, that if the discretionary trust was not limited to the lifetime of the son, it was void as infringing the rule against perpetuities.

But, held, that upon the true construction of the will the trust was limited to the lifetime of the son.

In re Wise, 44 *W. R* 310, [1896] 1 *Ch.* 281, *not followed;* Gooding *v.* Read, 4 *De G. M. & G.* 510, *explained;* In re Watson, *W. N.* 1892, *p.* 192, *considered.*

John William Blew, by his will, after appointing trustees and executors, gave and bequeathed to his trustees a freehold messuage and the goodwill of a business carried on therein called "Bayleys," a warehouse, and the stock, furniture, and contents of the premises, upon trust, in their discretion to carry on the business so long as they thought well, with power to sell the property. And the testator then directed as follows: "And I hereby direct my said trustees to apply the said net annual income of 'Bayleys' aforesaid, and the dividends or annual income of the securities for the time being representing the proceeds of sale thereof, or of any part thereof, in such proportions and generally in such manner as to my said trustees in their absolute discretion shall seem best, for the support of my son William Charles Arlington Blew, and his wife, and children, or any of them, or to accumulate the same or any part thereof at their like discretion for the benefit of the children of my said son, who shall become entitled to the capital of 'Bayleys' under the trust hereinafter contained; and subject to such discretionary trust I direct my said trustees to pay the said net annual income, and the dividends or annual income aforesaid, to my said son during his life, and from and after his decease to his widow (if any) during her life, and so long as she shall remain his widow, and from and after the death of the survivor of them or the re-marriage of his widow, I declare that my said trustees shall stand possessed of 'Bayleys' aforesaid, and of the securities and investments by which the proceeds of sale, or any part thereof, may for the time being be represented, as well the capital as the income, upon trust for the child or children of my said son who, being sons, shall attain the age of twenty-one years, or, being daughters, attain that age or marry under it; if more than one, in equal shares as tenants in common."

The testator died in December, 1894. His son, W. C. A. Blew, died in June, 1904, leaving only one child, the plaintiff W. Walter H. Blew, who attained the age of twenty-one years in September, 1904.

The property comprised in the above gift and devise, except the messuage, had been sold, and the proceeds of sale invested in stocks and securities.

The widow of W. C. A. Blew and his son, W. Walter H. Blew, now claimed to be the sole beneficiaries of the trust property and funds, and to have them transferred as they directed; and they took out this summons asking for an order to that effect, the trustees being unwilling to hand over the property without the sanction of the court.

Norton, K.C., and *Van Neck*, for the plaintiffs.—On the true construction of the clause the discretionary trust is confined to the lifetime of the testator's son. It is therefore now at an end, and the plaintiffs are absolutely entitled to the whole fund. If that is not the true construction the result is the same, as the discretionary trust in that case is void for remoteness. It would be exercisable during a period which might be more than the period of a life

(*a.*) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

in being and twenty-one years afterwards. The case of *In re Wise*, 44 W. R. 310, [1896] 1 Ch. 281, seems opposed to this view, but in that case the question was not argued. *Gooding* v. *Read*, 4 De G. M. & G. 510, is not an authority to the contrary, although from the head-note, which is incorrect, it would seem so. *In re Watson*, W. N. 1892, p. 192, is so shortly reported as to be inconclusive.

Rowden, K.C., and *G. Fellowes*, for the trustees.—We think it is better that the discretionary trust should continue. The trust is not confined by the will to the lifetime of the testator's son, but continues during the lives of the plaintiffs. Nor is it void for offending the rule against perpetuities. *In re Wise* and *In re Watson* are decisions to the contrary. Moreover it may be considered as a power, and as such is valid if exercised in favour of persons within the period allowed: see Farwell on Powers, pp. 114, 115. The trustees are therefore bound to retain the property.

W. Howland Jackson, for mortgagees.

Norton, in reply.—If it were a power it would still offend the rule against perpetuities and be void, as the persons, in whose favour it might be exercised, might not be born within a life in being and twenty-one years.

WARRINGTON, J.—The question is whether a certain discretionary trust contained in the will of John William Blew is still exercisable or not. It is contended that the trust is limited to the life of W. C. A. Blew, as the use of the word "wife" shows that the power was only to be exercised during his life, and not after his death, when the object of the trust could not be properly so described. And the use of the term "widow," when the testator speaks of her after the death of his son, gives support to this view. I think, then, that on the construction of the will the trust is limited to the life of W. C. A. Blew. It has, however, been contended that if that view is not correct, and if the trust was not so limited, it is void for remoteness. I think it is desirable to see if this is so or not. First, if the trust is to continue beyond the life of W. C. A. Blew, for how long is it to continue? It must plainly continue during the lives of all his children and the life of the survivor of them. If so, the trust would be exercisable so long as any child is alive; that is, during the life of a child whose life might last more than twenty-one years after the death of W. C. A. Blew. That being so, the shares in which the fund should be distributed, and the persons for whose benefit the trust should be exercised, might not be ascertained or be ascertainable until more than twenty-one years after the death of W. C. A. Blew. If, then, the trust is not confined to the life of W. C. A. Blew it would seem to infringe the rule against perpetuities So far I have dealt with the matter independently of authority. But I am referred to *In re Wise*, which is an authority directly in point, and which is against this view. In that case it was contended that the trust for maintenance was separable from the trust of the capital, and for that contention the case of *Gooding* v. *Read* was cited. That was the only point dealt with by North, J., in his judgment. The question whether, if separable, the trust was or was not nevertheless void for remoteness was not discussed. Finding that the trust for maintenance was separable the learned judge said that in his opinion the trust was good. I cannot help thinking that the learned judge was misled by the head-note of *Gooding* v. *Read*. From that head-note it appeared that the trust for maintenance was the same as that which we have here, but when we look at the will itself as quoted in the body of the report it appears that the trust for maintenance was to pay and apply the rents, issues, and profits equally for the benefit of the children of the daughter living at her decease until the youngest attained twenty-five years. That was, therefore, simply a gift of life interests to each of the children in equal shares until the youngest attained twenty-five years. There was no discretion given as to the application of the fund, and there was obviously nothing infringing the rule against perpetuities. The Lords Justices gave no reasons for their judgments. I cannot help thinking that North, J., read the head-note, and had not his attention called to the fact that the question of infringement of the rule against perpetuities did not arise there. The case of *In re Watson* is unsatisfactory, because no reasons are given in the judgment, nor do we know what provisions there may have been in the will other than that stated in the note. I do not think that either *In re Wise* or *In re Watson* is a satisfactory case to rely upon. I must therefore follow my own view, which is that the discretionary trust is void for remoteness, and consequently not now exercisable, and that the widow and son take the property absolutely.

Solicitors, *Wingfield & Blew; Mundy & Nevile; Fladgate & Co.*

K. B. Div.
(Lord Alverstone, L.C.J., and Ridley and Darling, JJ.) Jan. 17.

REX *v.* LICENSING JUSTICES OF CHESHIRE.
Ex parte KAY'S ATLAS BREWERY (LIMITED). (*a.*)

Licensing law—Justices—Bias—Reference of renewal of licence to quarter sessions—Licensing justice subsequently appointed to sit on compensation committee—Renewal of licence refused — Validity of order—Licensing Act, 1904 (4 *Ed.* 7, *c.* 23), *s.* 1, *sub-section* 2; *s.* 5, *sub-section* 5.

When the justices of a licensing district acting under section 1, *sub-section* 2, *of the Licensing Act*, 1904, *refer the matter of the renewal, with their report thereon, to quarter sessions, the reference to quarter sessions is not in the nature of an appeal. Therefore although in a particular case a justice might have taken such an active part as a member of the licensing committee as to be ineligible, on the ground of bias, to sit at quarter sessions, there is nothing in the Act to prevent him taking part in the subsequent proceedings, since the report to quarter sessions is in the nature of a motion rather than a decision.*

Rule *nisi* calling upon the justices of the Cheshire County Licensing Committee (sitting as the compensation authority under the provisions of the Licensing Act, 1904) to show cause why a writ of *certiorari* should not issue to bring up and quash an order made by them whereby the licence of the Grapes Inn, Hyde, had been refused.

Kay's Atlas Brewery (Limited) the applicants, were owners of the Grapes Inn, which was an *ante*-1869 beerhouse and was also licensed for the sale of wine. The facts shortly were that on the 2nd of March, 1905, the licensing justices of Hyde referred the question of the renewal of the licence of the Grapes Inn to the quarter sessions, and at this meeting a Mr. Blackwell, presided. On the 9th of June, 1905, the licensing committee of the quarter sessions

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

appointed under section 5 (2) of the Licensing Act, 1904 (the compensation authority), met on the 9th of June, and, subject to the payment of compensation, refused the renewal of the licence. At this meeting Mr. Blackwell, who was also one of the licensing committee of the quarter sessions, left the court when they retired to consider their decision, and returned into court with them when they gave it. He had been appointed under section 5 (5) of the Licensing Act, 1904, an additional member of the licensing committee.

Before the case was opened before the compensation committee, counsel for the brewery company objected to any justice who had sat on the licensing committee at the meeting held on the 2nd of March sitting and adjudicating on the question of the renewal of the licence of the Grapes Inn but the objection was overruled. The case was then fully argued and the renewal refused.

The licensing justices were duly represented by counsel, but Mr. Blackwell made an affidavit that he had taken no part in instructing him.

This rule was then obtained on the ground that the licensing committee was improperly constituted by reason of Mr. Blackwell's being disqualified from sitting and adjudicating on the question of the renewal of the licence of the Grapes Inn.

Danckwerts, K.C., and *R. M. Montgomery*, against the rule.—The report of the licensing committee is in no sense a judicial act; it is not a decision, and the proceedings before the compensation committee are not an appeal. Mr. Blackwell took no part in instructing counsel to oppose this renewal. The licensing justices of Hyde directed their clerk to instruct counsel, thus making themselves respondents, and it seemed to have been assumed that Mr. Blackwell himself was a respondent, and was, therefore, disqualified from sitting, whereas his affidavit showed that he took no part in the instructing of counsel to oppose. The proceedings created by the Licensing Act, 1904, are entirely novel: *Rex* v. *Tolhurst*, 53 W. R. 619, [1905] 2 K. B. 478, and the cases where the question has been raised of the propriety of justices sitting at quarter sessions to review their own decisions have no application. In the old courts *in banc* and in the House of Lords, for instance, there are reported cases where judges have taken part in appeals from their own decisions.

Trevor Lloyd (*S. S. Kay* with him), in support of the rule.—The principle that a judge cannot sit to hear an appeal from his own decision applies here to a justice who has taken part in the preliminary proceedings under section 1, sub-section 2; and Mr. Blackwell must be taken to have concurred in the action of his brother justices in instructing counsel to appear. It is submitted that a reference to quarter sessions is in the nature of an appeal in judicial or *quasi*-judicial proceedings. But if it be regarded only as an expression of opinion that the question of renewal should be considered on grounds other than those with which they (the licensing justices) can deal, a justice who has been a party to the reference is debarred from sitting at quarter sessions, because by section 1, sub-section 2, he is an interested person, and as such can appear by counsel to oppose the renewal. All the justices were respondents to this appeal; all were represented by counsel to oppose, although any one of them might have taken no part in instructing him. There ought to be no suspicion of bias, and the fact that Mr. Blackwell presided at a meeting of the licensing justices when it was decided that the house was not necessary for the requirements of the neighbourhood suggests that he was strongly biassed against the renewal and decided to be present when the matter came up before the compensation committee: *Reg.* v. *Justices of Hertfordshire*, [1845] 6 Q. B. 753; *Allinson* v. *General Council of Medical Education*, 42 W. R. 289, [1894] 1 Q. B. 750.

Lord ALVERSTONE, L.C.J.—To my mind this case presents very considerable difficulty, and though I think the rule ought to be discharged, I am by no means satisfied that the case is so plain as Mr. Danckwerts' argument would imply. Apart from the special provisions of the Act there is a good deal which might properly be urged in favour of the view that a gentleman who had been party to the decision come to by the licensing authority to refer by way of report the question of the renewal of a particular licence to the quarter sessions ought not to sit when the question of that report whether the licence should be renewed or not was considered.

Quite apart from any question of instructing counsel, the position of Mr. Blackwell in this case was very nearly that of those justices referred to by Mr. Lloyd who could not sit at quarter sessions. My doubts in the case are strengthened by Mr. Danckwerts' admission, that if he had taken any part in instructing counsel he ought not to have sat. If this was or ought to be regarded as in the nature of an appeal, I think I should come to the conclusion that he ought not to sit. But when the statute is looked at I cannot think that if this objection was intended to operate in a case like the present one, that the Act would have been framed as it was. [His lordship read section 1 (2) of the Licensing Act, 1904.] The words are "requires consideration on grounds other than those on which the renewal of an existing on-licence can be refused by them." As I have pointed out in *Tolhurst's case*, section 1, sub-section 2, excludes the grounds on which the justices may act judicially as members of the licensing authority and refuse a renewal. The repeated references to that case seem to show that the reasons given for that judgment were confirmed by the subsequent discussion—namely, that where a question is raised on an application for a renewal, the licensing justices must act—as they had to previously—on sworn evidence; but it was pointed out that the amount of evidence which might be sufficient for the purpose of enabling the justices to form an opinion, might be very different from the amount necessary if they had to decide judicially whether or not a particular licence should be renewed or refused. It was pointed out that evidence of the character of the district, the locality of the public-house, and the number of houses might be sufficient to justify making a report. I only mention this to show why these proceedings ought not to be regarded as an appeal. This is a procedure of a novel kind, a preliminary step taken by the licensing judges acting, as I still think, in a judicial capacity, but still only embodying their own view in a report which enables the quarter sessions to act. Then comes section 5 (5). [His lordship read the section.] Now, it seems to me that if it had been intended to prevent the members of the licensing justices from being members of the compensating authority, the section ought to have gone on to add, "not being a member of the licensing committee of the justices," or words to that effect. I was impressed by an observation of my brother Darling, who appreciated the point early in the case, that the borough would be deprived of the advantage of sending to quarter sessions a justice who had considerable personal knowledge of the particular case. I cannot help thinking that the connection between the licensing justices and the compensating authority was intended by the Legislature to be very close, because by rule 11 there was to be a meeting

between the two bodies; but if all the members of the renewal authority were members of the compensating authority there need not be this preliminary meeting at all. It is quite plain, therefore, that the compensating authority is not to exclude knowledge it has acquired as members of the licensing authority. That does not bear directly on the appointment of a particular justice, but it supports the view that this preliminary report was put before quarter sessions in the nature of a motion, and not in the nature of a decision in the sense that the reference to quarter sessions was an appeal from that decision. There was another point which Mr. Lloyd prayed in aid—namely, that this gentleman being represented by counsel as one of the respondent justices could not therefore sit to adjudicate on the report. I think that would have been a good objection if he had so appeared only as a member of the committee which decided to report. In my opinion the words "including the justices of the licensing district" merely mean that those justices should have a *locus standi* to appear. The fact that this gentleman was a member of the committee, if he in fact took no part in appointing counsel to appear—if he did not in fact appear himself to oppose—would, in my opinion, not be sufficient to disqualify him. At the same time I have felt the difficulty pressed by Mr. Lloyd, that this gentleman could have been one who appeared, and was one of the body who did appear. On the whole I have come to the conclusion that this does not constitute a valid objection to his sitting and acting as he did, and therefore the rule must be discharged.

RIDLEY, J.—I am of the same opinion. I confess that I do not feel pressed with the difficulties which the Lord Chief Justice has referred to. The action of the justices under section 1 (2) is not such a decision against anyone as to disentitle one of the justices who was a party to it from appearing when the matter came before the compensating committee, since the proceedings before them were not in the nature of an appeal.

DARLING, J.—I agree. I too have less difficulty than had the Lord Chief Justice in coming to the conclusion that his decision is the right one in this case.

Rule discharged.

Solicitors for the justices, *Philpot & Morrell.*

Solicitors for the brewery company, *Sharpe, Parker, & Co.*, for *Frederick Knowles*, Hyde.

K. B. Div.
(Lord Alverstone, L.C.J., and Ridley and Darling, JJ.) — Jan. 17.

REX *v.* JUSTICES OF SOUTHAMPTON.
Ex parte CARDY. (*a.*)

Licensing law—Justices—Renewal of licence—Report—Proceedings before compensation committee—Judicial proceedings—Jurisdiction to state a case—Licensing Act, 1904 (4 *Ed.* 7, *c.* 23), *ss.* 1 (2), 5 (2).

Where the question of the renewal of a licence is referred to quarter sessions under section 1 (2) *of the Licensing Act*, 1904, *the proceedings before quarter sessions or before the committee appointed by the quarter sessions under section* 5 (2) *of the Act are judicial proceedings, and the justices have power to state a case for the opinion of the High Court.*

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

Morgan *v.* Aylesford Justices, [1906] 1 *K. B.* 437, *explained.*

In this case a rule *nisi* had been obtained calling upon the justices of the county of Southampton, acting as a committee duly appointed under the Licensing Act, 1904, and the rules made thereunder, to show cause why a writ of *mandamus* should not issue commanding them to hear and determine the matter of an application by one Cardy to state a special case.

The following facts appeared from an affidavit of the applicant's solicitor:

On the 27th of February, 1905, application was made to the licensing justices of the Southampton division of the county on behalf of Cardy, the tenant of the Yew Tree Inn, for the renewal of his "on" beer licence. The application was referred by the justices to quarter sessions under the Licensing Act, 1904, s. 1. The only ground of objection was one served by the clerk to the justices of the Southampton Petty Sessional Division, which stated that the renewal would be opposed "on the ground of redundancy."

It was contended before quarter sessions on behalf of the applicant that this ground was unintelligible and bad for uncertainty, and did not constitute a valid or legal objection; but the quarter sessions held that the objection was sufficient in point of law. At quarter sessions general evidence was given as to the population, and the number of licensed houses and their position, but it was contended that there was not sufficient evidence to differentiate the Yew Tree Inn from other licensed houses in the district, in accordance with *Riven* v. *Southampton Justices*, 52 W. R. 574, [1903] 1 K. B. 430, and that they were therefore not entitled to deprive the applicant of his licence.

Counsel for the applicant thereupon applied for a special case on the point that the ground of objection was unintelligible and bad for uncertainty, but the quarter sessions refused the application for a special case, holding that they had no power to grant it.

This rule was then obtained.

Duke, K.C. (*J. A. Simon* with him), showed cause.—A survey of the jurisdiction vested in local justices from the earliest times shows that under the various commissions of the peace the justices were not invested with judicial authority. Nor has subsequent legislation increased their jurisdiction, and justices still under the powers vested in them by the Act of 1904 cannot exercise judicial functions, and therefore cannot state a special case: *Reg.* v. *Sutton Coldfield*, L. R. 9 Q. B., at p. 155; *Reg.* v. *Chantrell*, 23 W. R. 706, L. R. 10. Q. B. 587; *Walsall Overseers* v. *London and North-Western Railway Co.*, 27 W. R. 189, 4 App. Cas., at p. 39; *Boulter* v. *Kent Justices*, 46 W. R. 114, [1897] A. C. 556.

Pickford, K.C. (*Temple Cooke* with him), in support of the rule.—Quarter sessions has now the same power to state a case when it is sitting as the compensation authority as when it is sitting as an appeal court, because the compensation committee stand in the position of the quarter sessions, and the new jurisdiction must be exercised in accordance with the general powers which belong to the quarter sessions: *Dale's case*, 6 Q. B. D., at pp. 450, 451. Quarter sessions has jurisdiction to state a special case, and this court in *Morgan* v. *Aylesford Justices*, [1906] 1 K. B. 437, considered a special case stated by those justices, but the question of jurisdiction was not raised. [He was stopped.]

Lord ALVERSTONE, L.C.J.—I express no opinion as to the circumstances in which the quarter sessions ought to state a special case, but the justices have

decided that they could not entertain the application made to them to do so here simply on the ground that they had no jurisdiction. The question, therefore, is whether such tribunal, when it is dealing with the question of renewal under the Licensing Act, 1904, possesses the power to state a case. I think, assuming that the body which acted was acting judicially, the matter scarcely admits of argument, for it has long been recognized that if an order is made which is a "speaking" order and a final order, then the King's Bench Division can look at the whole of the order and say whether it ought to stand or ought to be quashed, though, since *Reg.* v. *Sutton Coldfield*, which was decided as long ago as 1873, it has never been doubted that the King's Bench Division would not entertain special cases where there would not be a final result and order, depending on the view the court took of the special case. We have, therefore, to decide whether the committee of quarter sessions, acting under the Act of 1904, is giving a judicial decision or not. It was said that they were in the position of licensing justices, and therefore the reasoning in *Boulter's case* applied, and their decision ought not to be regarded as the proceeding of a court or a judicial proceeding. For myself, I think that view is too narrow. The Act of 1904 limits the grounds on which the licensing justices can refuse to renew to certain specified grounds, but it provides that where they are of opinion that the question of the renewal of a particular licence required consideration on other grounds, they should refer the matter to quarter sessions. I think that shows that the proceedings before the quarter sessions are in the nature of a judicial proceeding. The matter is to be entertained by quarter sessions, and although I do not attach great importance to a definition section, it is clear that the body referred to by the Act as "the quarter sessions" is the court of quarter sessions (section 9 (4) of the Act). That is not conclusive, because there might have been in the Act other language showing that the quarter sessions were not acting in a judicial capacity. Section 5, however, seems to show that the committee are exercising the powers of quarter sessions, and the conclusion I have come to is that upon such an inquiry it is a case of new jurisdiction given to a court to act through a committee of the members, and the principle laid down by Lord Justice James in *Dale's case*, at pp. 450, 451, that where a new jurisdiction is given to an existing court it is to be exercised in accordance with its general rules and powers, is one to which effect ought to be given. It follows, therefore, that, subject to the exercise of their discretion—a discretion with which this court would not interfere—they have power to state a special case or to frame their order stating such facts as would make it a "speaking" order, and thus enable this court to look into it and see whether it was a good or a bad order.

The rule must be made absolute.

RIDLEY, J., concurred.

DARLING, J., gave judgment to the same effect.

Rule made absolute.

Lord ALVERSTONE, L.C.J.—I wish to say a word about the case of *Morgan* v. *Aylesford Justices*. The point that no special case could be stated was not raised in that case, and of course, so far as the question of jurisdiction is concerned, this decision governs that, but it may be that in that case there was no final order. I do not know how that was, but it must not be taken that in *Morgan* v. *Aylesford Justices* we meant to decide any point inconsistent with the general rule, that we do not entertain a special case where there is not a final order. We did not in any way intend to depart from that practice which was recognized in the *Sutton Coldfield case*. The fact is we gave judgment on the assumption that there was one. I do not say whether there was or was not.

Solicitors for the prosecutor, *Speechly & Co.*, for *Charles Lamport*, Southampton.

Solicitors against the rule, *Robbins, Billing, & Co.*, for *H. Barber*, Winchester.

House of Lords.

From C. A. (England). March 20.

WILLIAMS v. NORTHS' NAVIGATION COLLIERIES (LIMITED). (a.)

Master and servant—Employers' liability—Wages—Deductions—Set-off—Sum payable under magistrate's order—Truck Act, 1831 (1 & 2 *Will.* 4, c. 37), *s.* 3.

Section 3 *of the Truck Act*, 1831, *prohibits an employer deducting from the wages earned by a workman any sum of money* (*other than medical attendance, &c., under sections* 23 *and* 24), *even if such money is due and payable to the employer under an order of a court of competent jurisdiction.*

Decision of the Court of Appeal, 52 *W. R.* 564, [1904] 2 *K. B.* 44, *reversed.*

Appeal from an order of the Court of Appeal (Collins, M.R., and Romer and Mathew, L.JJ.) (reported 52 W. R. 564, [1904] 2 K. B. 44), reversing that of Bucknill, J.

The appellants were six workmen who were in the employment of the respondent colliery company.

In December, 1903, the appellants, in breach of their contract of employment, absented themselves from work without leave and without having given notice.

The respondent company thereupon proceeded against them under section 4 of the Employers and Workmen Act, 1875, and on the 16th of January, 1904, an order was made on each of the appellants to pay to the respondents 30s., the money to be payable in three fortnightly instalments of 10s. each, and on the dates of the fortnightly colliery pay days. In paying the appellants their wages the company deducted the sum of 10s. in each case.

The workmen brought this action to recover the sums of 10s. so deducted, and claimed a declaration that such deduction was illegal under the Truck Act, 1831, and an injunction as to future deductions.

An application was made at chambers for an injunction to restrain the respondent company from making any similar deductions until the trial of the action.

Bucknill, J., granted an *interim* injunction.

The company appealed, and it was agreed to treat the application as the trial of the action, and a declaration was alone sought.

The Court of Appeal considered the colliery company were justified in deducting the 10s.

The workmen appealed.

S. T. Evans, K.C., and *Bailhache* (*J. Sankey* with them), for the appellants.—The deduction was a violation of section 3 of the Truck Act, 1831. There is no authority against the appellants for a deduction such as this. Bowen, L.J., in *Hewlett* v. *Allen*,

(a.) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

41 W. R. 197, [1892] 2 Q. B. 662, said: "Payment on account will not do." In *Chawner* v. *Cummins*, 8 Q. B. 311, and *Archer* v. *James*, 10 W. R. 489, 2 B. & S. 61, deductions (which have since been disallowed by statute) were permitted, but it was a necessary method for ascertaining what the wages were. Certain deductions are allowed by section 23, but they do not apply in the present case; and must be the subject of a written contract: *Pillar* v. *Llynvi Coal and Iron Co.*, 17 W. R. 1123, L. R. 4 C. P. 752; *Ex parte Cooper*, 26 Ch. D. 693, 33 W. R. Dig. 23; *Lamb* v. *Great Northern Railway*, 39 W. R. 475, [1891] 2 Q. B. 281; *Smith* v. *Walton*, 3 C. P. D. 109, 26 W. R. Dig. 140; *Willis* v. *Thorp*, 23 W. R. 730, L. R. 10 Q. B. 383—a case under the Hosiery Manufacture (Wages) Act, 1874.

Bankes, K.C., and *Lush, K.C.* (*A. J. Ashton* with them), for the respondents.—The Truck Act, 1831, and the amending Acts deal only with the mode of payment. The Act requires that when the wages are ascertained they shall be paid in coin. The words of Bowen, L.J., quoted for the appellants are not adverse to the respondents. This is a case of lawful set-off. In *Hewlett* v. *Allen* in the House of Lords both the Lord Herschell, L.C., and Lord Watson declare set-off—when not expressly prohibited by the statute—to be lawful (42 W. R. 670, [1894] A. C. 383). In an action for wages the respondents would be successful in a counter-claim for these deductions.

S. T. Evans, K.C., replied.

THE HOUSE took time for consideration.

Lord LOREBURN, L.C.—I do not propose to enter upon a consideration of the authorities that were cited to us in the course of the argument, or dealt with in the Court of Appeal, as I understand that my noble and learned friend Lord Davey intends to refer to them; but I have come to the conclusion that the judgment appealed from ought to be reversed, and a declaration given in the sense asked for by the plaintiffs. The facts of this case lie in the narrowest compass.

Certain workmen in the service of the defendant company were entitled to wages payable on the 30th of January, 1904. A fortnight earlier each of them had been ordered by magistrates in petty sessions to pay a fine to the defendant company, of which 10s. was due on the 30th of January. On that date the defendant company made out an account with each of them, in which, apart from other items which were not complained of, the sum of 10s. for the fines was deducted from the wages, and the balance alone was paid. In the case of the plaintiff Jacob Williams, whose case is typical of the rest, he had earned £3 13s. 2d., and received £3 2s., the difference consisted of an agreed deduction of 1s. 2d. for doctor and the 10s. fine, which was not agreed.

Upon this the workmen commenced an action for damages and an injunction and a declaration that the deduction of the 10s. was illegal. After some discussion it was agreed in the Court of Appeal that the relief sought should be limited to a declaration, and on that footing the case came here.

The question is whether the employers, when they paid the wages on the 30th of January, were in law bound to pay in coin the total sum due for wages, or were entitled in law to deduct 10s. due from the workmen to the employers, and pay merely the balance in coin.

This turns upon the true construction of section 3 of the Truck Act, 1831. Now I find in that section an explicit enactment that "the entire amount of the wages earned by or payable to a workman" shall be "actually paid" to him in the current coin of this realm, "and not otherwise." The section does not say when it is to be paid, for the common law will settle that as soon as the agreement of service is ascertained. The section does say that when paid it shall be paid in coin of the realm, and not otherwise. I cannot think this means that it shall be paid as to part in coin and as to the remainder in account.

Our attention was directed in argument to the word "payable"; we were invited to hold that the obligation to pay in coin applied only to the entire amount of wages payable after deducting cross-claims. In this case it was argued only £3 2s. was payable, because, on striking an account, that was the balance due.

A reference to section 23 shews conclusively to my mind that this would be a wrong interpretation even if the language of the Act admitted of it.

Section 23 provides, with elaborate care, and under strict safeguards, the cases in which debts due from the workman may be deducted from the wages due to the workman when the employer is paying the wages. These provisions would be wholly unnecessary if an employer were already authorized by section 3 to deduct anything that the workman owed him and to pay him in coin merely his balance.

The word "payable" may have been inserted because otherwise the law could have been evaded by making wages payable in advance, before they had been earned. Or it may have been inserted because there might be deductions authorized by section 23 which would not diminish the wages earned, but would diminish the sum payable for wages. However that may be, it appears to me clear that an obligation rests upon the employer under the Truck Act, 1831, s. 3, to pay in coin (for we are not concerned with bank-notes in this case) all the money payable as wages; and that in ascertaining how much is payable as wages he can subtract nothing except the deductions expressly sanctioned by section 23. The deduction of 10s. for fines was therefore in the present case illegal.

Mr. Lush argued that this construction would be very anomalous. He urged that if the employer did not pay the wages at all, and were sued, he would be entitled then to set off in the action anything due to him except such sums as fall within the prohibition of section 5. It would be strange, said Mr. Lush, if an employer could, by breaking his contract and forcing litigation, obtain an advantage denied to him if he fulfilled his contract. No doubt this would be an anomaly, as are the Truck Acts themselves and some of the Acts which interfere in a limited degree with freedom of contract. It is necessary to distinguish between the clauses of the Act relating to set-off in an action and that relating to stoppage or deduction when the wages are paid. Possibly the Legislature thought a court might be trusted to strike a balance in the rare cases where the dispute came into court, but that the vast multitude of weekly or other payments which never come near a court ought to be regulated by a simple and wholesome rule—namely, that they should be paid wholly in coin save for certain carefully specified exceptions. This is, however, a mere conjecture. It is enough to say that, assuming the Act of Parliament has so provided, the fact that the provision is anomalous does not permit us to disregard the plain meaning of the words used.

Accordingly I advise your Lordships to reverse the judgment of the Court of Appeal, and to restore that of Mr. Justice Bucknill.

Lord MACNAGHTEN said that he had had the opportunity of reading the Lord Chancellor's judgment, and entirely agreed with it.

Lord DAVEY.—I agree with the judgment of my noble and learned friend on the woolsack, and with the reasons which he has given for his judgment. The learned judges in the Court of Appeal rested their decision mainly on the ground that it was neither an offence, nor a violation of the statute, to give effect to a legal right of set-off. Set-off in an action I understand. It is a right given by statute to a man who is sued for a sum of money to defend himself by claiming a debt due to himself from the plaintiff in satisfaction or reduction of the debt for which he is sued. But a set-off outside the court means nothing more than a claim of deduction and retention, and the question comes to be whether the deduction of a cross-debt which might be the subject of a set-off in an action is a legitimate deduction, or whether the express enactment that the entire amount of the wages shall be actually paid in current coin can be so qualified. I agree with my noble and learned friend that there can be but one answer to that question. By section 23 certain deductions are permitted to be made, or, to use the language of the marginal note, "particular exceptions to the generality of the law" are made under strictly defined conditions, and no other deductions or particular exceptions are, in my opinion, authorized.

The learned counsel for the respondents argued that the employer was not bound by the Act to pay in full, and that non-payment was not an offence under the Act. Be it so; but this was not a case of non-payment or repudiation by the master of his debt, but of retention of a part of the workman's admitted wages in payment of a debt to the master, and was intended to be payment or satisfaction *pro tanto* of the workman's wages. Bowen, L.J., stated the exact point in *Hewlett* v. *Allen*, when, commenting on the third section, he said that payment on account would not do, and that the employer cannot for the purpose of compliance with the statute be both payer and payee; while, on the other hand, he held that set-off in an action was only prohibited in the cases mentioned in section 5. It is sufficient to look at the account printed on p. 10 of the appendix, which was handed to one of the appellants, to see that this is nothing more than payment on account, which I agree with the Lord Justice will not do. I will only add that I can see very good reasons why the Legislature should not allow a deduction to be made by the employer himself, although it might be the subject of set-off in an action, where the amount and propriety of it could be impartially investigated.

Mr. Lush boldly said that there was a clear and consistent course of authority in favour of the respondents, and it was too late for this House to revert to the views of the appellants. The exact contrary of this statement appears to me to be nearer the truth. Not a single one of the numerous cases which were cited, in my opinion, supports the argument of the respondents, and a good deal is to be found in the judgments of the learned judges which is against them. In *Chawner* v. *Cummins* the plaintiff was presumed to have contracted upon the usual and well-known terms in the trade, and certain customary deductions which had been made from his nominal wages were held not to be in the nature of payment at all, but the mode of calculating and ascertaining the actual amount of his wages. *Archer* v. *James* was a similar case, and was decided in the first instance on the authority of *Chawner* v. *Cummins*. In the Exchequer Chamber three judges held that *Chawner* v. *Cummins* was wrongly decided; and three other judges, on the other hand, approved the decision, and held that the deductions in question in the case before them were in the same category, and were an element only in calculating the true amount of the workman's wages. But there is not a word in any of the judgments which supports the contention that, where the amount of the wages is ascertained, the employer can discharge himself by set-off or payment on account. In *Pillar* v. *Llynvi Coal and Iron Co.* it was only decided that deductions of the character authorized by section 23 could not be made unless there was a contract in writing as required by the section. In *Smith* v. *Walton*, the workman having damaged a piece of cloth through negligent workmanship, the employer delivered to him the damaged cloth and deducted from his wages the value placed by the employer on the cloth. The question arose on an information against the employer for making an illegal payment. The court reversed the decision of the magistrates, who refused to convict, Lindley, L.J., saying that, whether there was a payment in goods or a set-off, the respondent had infringed the Act. The decision in *Ex parte Cooper*, has no bearing on the case before the House. *Lamb* v. *Great Northern Railway* was a decision on the amending Act, 1887, but the judgment of A. L. Smith, J., contains *dicta* on the construction of sections 2, 3, 4, and 23 of the Truck Act of 1831, which are in the appellants' favour. The judgment of Bowen, L.J., in *Hewlett* v. *Allen* has already been referred to. That case, however, was decided on the ground that the plaintiff had authorized and directed certain payments to be made by the employer on her behalf, and the decision was confirmed in this House on the same ground.

The writ in this action claimed payment to each of the appellants of the sum of 10s. deducted by the respondents. In the court of appeal, by some arrangement between the parties, the appellants confined their claim to a declaration that such deduction was illegal. The Master of the Rolls expressed some doubt whether the Court ought to entertain a suit for a declaration not ancillary to the putting in suit of any legal right. I share that doubt; but as the case has been fully argued and both parties appear to desire the decision of the House upon it, I am not disposed to say more. I am of opinion that the order appealed from should be reversed, and, the appellants and respondents having consented to the hearing in the Court of Appeal being taken as the trial of the action, that it be declared that the deduction by the respondents on the 30th of January, 1904, of the sum of 10s. from the wages due to the appellants respectively from the respondents at that date, was unauthorized and illegal, and that it be ordered that the respondents pay to the plaintiffs their costs of this suit, including the costs of the appeal to the Court of Appeal, and also the costs of this appeal.

Lord ROBERTSON.—I concur in the judgment about to be delivered by Lord Atkinson, which I have had the opportunity of reading.

Lord ATKINSON.—In this case, in which by the agreement of the parties, arrived at in the Court of Appeal, the relief claimed is limited to a declaration that a sum of 10s. was improperly deducted by the defendants from the wages of certain workmen employed in their service, the question for decision turns upon the construction of the third section of the Truck Act of 1831. The case of Jacob Williams, the plaintiff, is typical of the others.

It is admitted that he had, on the 23rd of January, in respect of the fortnight ending on that day, earned wages amounting to £3 13s. 2d. This sum, according to the practice prevailing in the defendants' colliery, would be payable on the 30th of January, 1904. On the 22nd of December, 1903, the plaintiff had wrongfully absented himself from his duty, and in respect of that

misconduct had, on the 16th of January, 1904, been fined 30s., payable in three instalments of 10s. each, on the 30th of January, and on the 13th and 27th of February respectively. The defendants claim the right to deduct the sum of 10s., the instalment payable on the 30th of January, 1904, from the aforesaid sum of £3 13s. 2d. The plaintiff disputes that right.

The 3rd section of the Truck Act of 1831, as printed in the revised edition of the statutes, runs as follows: "The entire amount of the wages earned by or payable to any artificer in respect of any labour by him done, shall be actually paid to such artificer in the current coin of the realm, and not otherwise, and every payment made to any such artificer by his employer of or in respect of such wages by the delivery to him of goods, or otherwise than in current coin aforesaid, except as hereinafter mentioned, shall be, and is hereby declared illegal, null, and void."

Some comment was made on the use in this section of the word "or payable to such artificer."

I think these words are introduced for the purpose of meeting a case where some deduction or stoppage authorized by sections 23 and 24 of the statute has, in fact, been made, and the workman is only entitled to receive the balance of his wages remaining due after such deduction. It has been urged on behalf of the appellant that such a deduction as this does not come within the mischief aimed at by the Truck Acts; that those statutes were merely designed to prevent the payment of workmen's wages in equivalents for cash as distinguished from cash itself.

It may well be that this was the main object and purpose of this legislation, and that in this section the Legislature has used language which extends beyond the mischief aimed at, and reaches harmless transactions or practices not within its spirit. Still there is no ambiguity in the words used in the section. They are precise and clear, and require that the entire amount of the wages earned shall be "actually paid in the current coin of the realm and not otherwise."

It cannot, I think, be contended that the withholding by the master from the workman of a portion of the wages earned by the latter against his consent is, or could be held to be, a payment by the master to the workman of that very same portion. It is, in fact, the very opposite of payment. It is a refusal to to pay, for the not unnatural reason that an equivalent sum is due to the master by the workman. The requirements of the statute have therefore not been observed in this case. The wages earned have not been paid. The drawback, or stoppage, or deduction, or whatever it may be termed, is not one of those authorized by sections 23 or 24, yet it is sought to justify the course taken on this ground—that, inasmuch as in any action brought by the workman to recover his wages the master would be entitled to set off the debt due to him in reduction of the workman's claim, it is absurd and anomalous to hold that the master cannot before action brought make a deduction in respect of the claim which, after action brought, he can successfully rely upon by way of set-off. No doubt, at first sight, there would seem to be much force in this argument, but a little consideration will show that there may be good reason even for this anomaly. The whole principle upon which this legislation is based is that the workman requires protection, that if not protected he may be over-reached; and it is quite consistent with that principle to hold that in any such action brought by him to recover his wages he may be liable to have the sum, found on investigation before the legal tribunal to be due to him by his master, diminished by the sum found by the same tribunal on the same occasion to be due by him to his master, and yet at the same time to prohibit the master from, as it were, substituting himself for the legal tribunal, investigating his own claim against his workman in his own office, and deciding in his own favour. In this particular case no doubt the sum sought to be deducted is the amount of a judgment debt, and the danger referred to could not arise; but the argument as to the anomaly which I have mentioned dealt with the general scheme and machinery of the statute, and it was in respect of its general application that I consider it open to criticism.

The several authorities cited appear to me to support rather than refute the contention of the appellants. They may, I think, be roughly divided into two classes—namely, those cases like *Chawner* v. *Cummins*, in which charges were made by the employer for the use of the instrument by which the workman did his work and earned his wage; and those like *Hewlett* v. *Allen*, in which payments were in effect made by the master out of the wages by the authority of the workman for certain purposes not prohibited by the Truck Acts. In none of these cases was it contended that the master had the right to deduct here relied upon. On the contrary, the effort of the master in each of these cases was to justify the drawback on grounds entirely different from, and inconsistent with, those relied upon in this case.

In the first class of cases it was successfully contended that the charges made by the master were not deductions properly so-called from sums due for wages earned, but were sums to be taken into account in ascertaining the amount of wages actually earned; and in the second class of cases the so-called drawbacks or deductions were justified on the grounds that these sums in truth and in fact represented portions of the wages earned, paid in current coin of the realm at the request of the workman to his duly appointed agent.

All the reasoning upon which the several tribunals in the cases cited based their respective decisions would have been unnecessary, and indeed beside the point, if the Truck Act had conferred upon the master the right here contended for—namely, the right to deduct from the workman's wages whatever the master could set off in a suit brought by the workman against him to recover those wages.

It may well be that the appellant has no merits—that a decision in his favour will enable him to violate his duty with impunity and evade the payment of his just and legally established liabilities; but, if that be so, the fault must lie on that "tutelary shelter," to use Lord Bowen's words, which the Legislature has thrown around him, without taking sufficient care so to mould and fashion it that it could not be open to abuse.

I think this appeal must be allowed, and the judgment of Bucknill, J., restored.

Appeal allowed.

Solicitors for the appellants, *Smith, Rundell, & Dods*, for *Walter Morgan, Bruce, & Nicholas*, Pontypridd.

Solicitors for the respondents, *Bell, Brodrick, & Gray*, for *C. & W. Kenshole*, Aberdare.

Court of Appeal.

From K. B. Div. (Vaughan Williams, Stirling, and Moulton, L.JJ.) — May 3.

PALETHORPE v. THE HOME BREWERY (LIMITED). (a.)

Landlord and tenant—Covenant—Lease of public-house—Covenant to keep and conduct the house in a regular and proper manner—Knowingly do or suffer any act whereby renewal of licence refused—Act of sub-lessee.

By a lease of a beerhouse the lessee covenanted that he would at all times during his term keep and conduct the house in a regular and proper manner in every respect, and would not knowingly or willingly do or suffer any act whereby the licence might become indorsed, forfeited, or the renewal thereof refused, and would not commit any offence against the licensing laws for the time being in force. The lessee sublet the house, and the sub-lessee was convicted of permitting drunkenness on the premises, and the renewal of the licence was in consequence refused. In an action by the lessor against the lessee to recover damages for breach of covenant,

Held, that the first part of the covenant was an absolute covenant to keep and conduct the house in a regular and proper manner, and was not qualified by the subsequent part, and that there had been a breach of it entitling the lessor to damages.

Bryant v. Hancock & Co., [1899] *A. C.* 442, 48 *W. R. Dig.* 88, *distinguished.*

Appeal from a judgment of Farwell, J.

By a lease, dated the 1st of June, 1897, of a licensed beerhouse for the term of seven years from the 25th of March, 1897, at the yearly rent of £80, the defendants, who were the lessees, covenanted with the plaintiff, who was the lessor, that they "will not at any time during the continuance of the said term, without the consent of the lessor first had and obtained, convert the said demised premises into a shop, warehouse, or place of sale for goods or merchandize, or into a private dwelling-house, or open or use, or suffer the same to be opened or used, for any other purpose than a beerhouse, and also will at all times during the said term keep and conduct the same in a regular and proper manner in every respect, and will apply for and use their best endeavours when required to obtain a renewal of the existing licences or permission of her Majesty's justices of the peace for the vending of wines, ale, beer, and tobacco on the said demised premises, and shall not knowingly or willingly do or suffer any act whereby the same may become indorsed, forfeited, or the renewal thereof refused, and will not commit any offence against the licensing laws for the time being in force."

The defendants sublet the house and premises to a tenant from year to year, who agreed to conduct the house and premises in a regular and proper manner; but he was subsequently convicted of having permitted drunkenness on the premises, and the renewal of the licence was in consequence refused. The plaintiff thereupon brought an action against the defendants to recover damages for breach of the above covenant.

Farwell, J., held that the covenant to keep and conduct the house in a regular and proper manner in every respect was an absolute covenant by the defendants, and was not qualified by the subsequent part of the covenant, and that there had been a breach of it, and he gave judgment for the plaintiff for damages.

The defendants appealed.

Hugo Young, K.C., and *Wood Hill*, for the defendants.—The construction placed by the learned judge on the first part of the covenant—namely, that the lessees will at all times keep and conduct the house in a regular and proper manner in every respect—renders the subsequent part of the covenant superfluous. In construing the covenant the court ought to give due effect to each part of it, and to read it as a whole. It is wrong to read the first and subsequent parts of the covenant as covering the same thing: *Bryant* v. *Hancock & Co.*, [1899] A. C. 442, 48 W. R. Dig. 88. The only way in which the various parts of the covenant can be consistently read together is by construing the first part as referring to the ordinary conduct of the house apart from offences against the licensing laws, which are dealt with by the later parts. The later parts of the covenant are clearly qualified, and hit at an act done by the lessees themselves, and not at an act of their assignees or underlessees: *Wilson* v. *Twamley*, 52 W. R. 529, [1904] 2 K. B. 99. Secondly, even if the first part of the covenant applies to offences against the licensing laws, upon its true construction it is limited to acts done by the lessees and does not include acts by their assignees or underlessees. There was therefore no breach of covenant by the defendants.

Montague Lush, K.C., and *Arthur Houston*, for the plaintiff.—In *Bryant* v. *Hancock & Co.* the whole question turned upon the meaning of the word "discontinuing" a licence—whether it meant refusing to renew or forfeiting. The House of Lords, upon the particular words of that covenant, held that it was directed to forfeiture, because otherwise the two parts of the covenant would cover the same thing. Here there is no qualification in the first part of this covenant. It is an absolute unqualified covenant to keep and conduct the house in a regular and proper manner in every respect. That covenant has been broken by the defendants.

VAUGHAN WILLIAMS, L.J.—We have heard an argument with reference to the application of the decision of the House of Lords in *Bryant* v. *Hancock & Co.* to the present case, but I do not think that we need really trouble ourselves with that at all, because there is in this case a covenant of which there has been a complete breach quite irrespective of the considerations which had necessarily to be gone into in *Bryant* v. *Hancock & Co.* Here there is a covenant by the defendants that they "will at all times during the said term keep and conduct the same in a regular and proper manner in every respect." It is said, and I think rightly said, that that is a positive covenant by the defendants that they will keep and conduct the house in a regular and proper manner in every respect, and that as a matter of fact in the events which have happened they have ceased to do so. They have in fact broken their positive covenant. In these circumstances we need not enter into the topics discussed by the House of Lords in *Bryant* v. *Hancock & Co.* In *Wilson* v. *Twamley* Collins, M.R., speaking of that case said: "The covenant in that case consisted of two parts, the first part being absolute in its terms, and the second being qualified by the introduction of the word 'wilfully.' The second part of the covenant applied to a matter which might also, in the ordinary use of language, be said to be described by the language of the first part; a matter which, if the word 'wilfully' had not been used in the second part, would come equally well within the terms of

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

either part. The difficulty was as to whether, upon the construction of the covenant, the matter in question might be treated as coming within the first part, which was wide enough to cover it and was not qualified by the word 'wilfully'; and it was held that, because the covenant was divided into two parts, one so qualified and the other unqualified in its terms, the subject-matter of the first part must be limited, so as to give effect to the qualification imported by the word 'wilfully' in the second part." If we adopt, as we must do, the construction of the covenant pressed upon us by the learned counsel for the defendants, no such difficulty arises here as arose in that case, inasmuch as there is here a positive covenant by the lessees to keep and conduct the house in a regular and proper manner in every respect. It is quite immaterial why the house came to be not so kept. In truth and in fact the house came to be closed as a licensed house, and that was a breach of the covenant. The appeal must be dismissed.

STIRLING and MOULTON, L.JJ., agreed.

Appeal dismissed.

Solicitors for the plaintiffs, *Field, Roscoe, & Co.*, for *Warren & Allen*, Nottingham.

Solicitors for the defendants, *Dawes & Sons.*

High Court of Justice.

Chan. Div. } March 23.
Swinfen Eady, J. }

GRIFFITHS v. VESEY. (a.)

Vendor and purchaser—Failure of purchaser to complete—Specific performance—Forfeiture of deposit—Practice—Costs—Form of order.

A defaulting purchaser failed to comply with a decree of specific performance, and further failed to pay the purchase-money and costs certified to be due from him to the vendors on the day fixed for payment thereof by the court on a motion of the vendors. The vendors, by a further motion, asked for a declaration that the deposit money was forfeited, and that they were at liberty to proceed to another sale, and for an order that the defaulting purchaser should pay the certified costs and also the costs of the previous motion.

The Court declined to make any order as to the costs of the previous motion, but otherwise made the order as asked.

Motion.

In this action the plaintiffs, as trustees of the will of a testatrix who died in January, 1904, contracted with the defendant to sell to him a house at the price of £2,400. On the signing of the contract the purchaser paid to the auctioneer a deposit.

The contract was entered into by the parties subject to and on the basis of certain conditions of sale, which had governed the sale by auction. Amongst these conditions of sale there was a condition in the usual form providing for forfeiture of the depos t money in the event of default on the part of the purchaser, and empowering the vendors in such a case to resell, the purchaser making good any loss which might thus be incurred. The 31st of December, 1904, was the date fixed for completion, but the purchaser failed to complete on that date, and the vendors accordingly commenced an action for specific performance.

On the 28th of June, 1905, judgment was given decreeing specific performance in default of appearance by the purchaser. This judgment directed the amount of purchase-money, interest, and costs to be computed, and an account taken of rents and profits received by the vendors since the date of completion. The plaintiffs, upon executing a conveyance which in the event of the parties differing was to be settled by the judge, and delivering to the defendant the title-deeds, were to be paid the certified balance produced by deducting the rents and profits from the purchase-money, interest, and costs.

On the 9th of August, 1905, the master certified the whole balance due to the plaintiffs to be £2,424 8s. 9d., and, on a motion of the plaintiffs, the court made an order, on the 17th of November, 1905, appointing a definite time and place for the payment of such balance, at which time and place the plaintiffs were to deliver the conveyance to the defendant. The defendant was ordered to pay the taxed costs of that motion.

On the appointed day the defendant failed to pay the certified balance to the plaintiffs, and the plaintiffs now moved for a declaration that the deposit money was forfeited to them, and that they were at liberty to proceed to another sale, the defendant making good any loss so occasioned, and paying the expenses of the same, and for an order that the defendant should pay the costs included in the master's certificate, together with the plaintiffs' taxed costs of the motion of the 17th of November, 1905.

Eve, K. C., and *T. L. Wilkinson*, for the plaintiffs.—We do not desire rescission of the contract, because in that case we might not be entitled to retain the deposit money. We are not in this case asking for the usual order as appearing in Seton's Forms of Judgments and Orders, vol. 3, p. 2288. If the contract is not rescinded, the plaintiffs are clearly entitled to retain the deposit money: *Jackson* v. *De Kadich*, W. N. 1904, 168.

The defendant did not appear.

SWINFEN EADY, J.—I will make the order as asked in the notice of motion, except that I cannot make an order for payment of the costs of the motion of the 17th of November, 1905, as there is an order outstanding as to those costs. All proceedings in the action are to be stayed, except those necessary for enforcing payment of the costs directed to be taxed by the order on the motion of the 17th of November, 1905, or for giving effect to the present order.

Solicitors, *Dubois & Co.*

Chan. Div. } March 13, 20.
Warrington, J. }

In re AFRICAN FARMS (LIMITED). (a.)

Company—Winding-up—Statutory affidavit—Petitioner abroad—Power of attorney—Affidavit of attorney—Companies (Winding-up) Rules, 1903.

It is not a fatal objection to a petition to wind up a company that the affidavit verifying it has been made by some one other than the petitioner, rule 29 of the Companies (Winding-up) Rules, 1903, being merely directory in this respect; and the court can accept any affidavit sufficient according to the ordinary practice as

(a.) Reported by F. HARDINGE DALSTON, Esq., Barrister-at-Law.

(a.) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

sufficient for the purpose. Therefore where the petitioner was resident in the Transvaal Colony, and the affidavit was made by a person resident in this country who knew the facts of the case better than the petitioner, and who was acting under a power of attorney for the petitioner, the affidavit was accepted.

In re Chartered Stores and Trading Co., 49 *W. R.* 75, [1900] 2 *Ch.* 870, *not followed.*

Petition.

This was a petition to have the above company wound up by the court.

The company was incorporated in 1902 under the Companies Acts, 1862 to 1900, and their registered office was in London. They owned farms in the Transvaal Colony.

The petitioner, Harry Blashfield Ramsey, was in the employment of the company, and managed one of their farms in the Transvaal, where he resided. He had executed a power of attorney appointing Arthur Walter Ramsey, who lived in the county of Kent in this country, to be his attorney and agent, with power (among other things) to ask, demand, sue for, and recover such sums of money as were owing to the petitioner, and to prosecute any action in any court in his name, and to manage and transact his affairs in Great Britain.

The statutory affidavit verifying the petition according to Form 9 of the rules of 1903 was made by the atterney, A. W. Ramsey, who described himself in the affidavit as the attorney of the petitioner. At the hearing of the petition a preliminary objection was taken on behalf of the company that the affidavit verifying the petition did not comply with the rules, and ought not to be accepted.

A. F. Peterson, for the company.—Rule 29 of the Companies (Winding-up) Rules, 1903, requires the petition to be verified by the affidavit of the petitioner. It is not sufficient if made by his attorney: *In re Charterland Stores and Trading Co.*, 49 W. R. 75, [1900] 2 Ch. 870.

He also referred to *In re The Brandy Distillers Co.*, 17 Times L R. 272, and *In re Carrara Marble Co.*, W. N. 1896, 87.

J. M. Gover, for the petitioner.—*In re Charterland Stores and Trading Co.* is the only case where a similar affidavit has not been allowed; and that case is in fact distinguishable.

WARRINGTON, J.—I think that I need not trouble you further, Mr. Gover. It is plain that the affidavit of the attorney in this case, who knows the facts of the case, is of more value than that of the petitioner, who is residing in South Africa. I should therefore have had no hesitation in accepting his affidavit if it had not been for the decision of Wright, J., in *In re Charterland Stores and Trading Co.*, where a similar objection to that taken here was taken, and where Wright, J., refused to accept the affidavit considering that he had no power to dispense with the affidavit of the petitioner. I have looked into the practice upon the matter and have found that there have been a number of cases (some of them unreported) where an affidavit other than that of the petitioner has been accepted. I have also consulted Buckley, J., to whom, with myself, the business of company winding up is assigned, and he has pointed out, and I desire to point out, that rule 29 does not state what is the consequence of the affidavit being made by a different person. It does not state that the petition shall fail. The rule is, I think, merely directory as to the kind of affidavit which should be accepted as evidence of the facts stated in the petition. That leaves it open to the court to accept any affidavit which according to the ordinary practice of the court would be accepted as sufficient. I have already said that in this case the attorney's affidavit is of more value than that of the petitioner, and, therefore, upon the principle I have stated, I accept it as *primâ facie* evidence of the facts of the petition.

Objection overruled.

Solicitors, *F. Kimber, Bull, & Duncan; Whitehouse & Co.*

K. B. Div.
(Lord Alverstone, L.C.J., and Ridley and Darling, JJ.) — May 1.

ECCLESIASTICAL COMMISSIONERS FOR ENGLAND *v.* DURHAM RURAL DISTRICT COUNCIL.
WILLIAMSON *v.* DURHAM RURAL DISTRICT COUNCIL. (*a.*)

Local government—Sewer—Drain—Nuisance—Highway Board—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 4, 95—*Local Government Act*, 1894 (56 & 57 *Vict c.* 73), *s.* 25.

Public Health Act, 1875, *s.* 4: "'*Sewer*' *includes sewers and drains of every description . . . except drains in or under the control of any authority having the management of roads and not being a local authority under this Act.*" *Local Government Act*, 1894, *s.* 25 (1): "*As from the appointed day, there shall be transferred to the district council of every rural district all the powers, duties, liabilities . . . of any highway authority in the district, and highway boards shall cease to exist and rural district councils shall be the successors . . . of the highway authority.*"

Held, that a drain formerly under the control of a highway board did not become a "sewer" after the coming into operation of section 25 of the Local Government Act, 1894, *although but for section 4 of the Public Health Act*, 1875, *it would have been a "sewer" within the meaning of that Act.*

Case stated by the justices of Durham.

Complaints were preferred by the respondents against the appellants under section 95 of the Public Health Act. 1875, whereby it was alleged that in or on land in the village of Old Quarrington, situate within the district of the respondents, there was a nuisance arising from a collection of foul sewage which was standing in a disused pond, and that the said nuisance was caused by the act or default of the appellants, the owners of said premises, and that notices had been served on the appellants requiring them to abate the said nuisance and to execute certain works and do certain things necessary for that purpose, to wit, to cause the whole of the stagnant water and foul sewage to be drained from the disused pond, the latter to be cleaned out, and the whole of the foul matter to be removed so that the same should no longer be a nuisance or injurious to health as aforesaid; and that the appellants had made default in complying with the notices aforesaid.

The following facts were either proved or admitted at the hearing of said complaints: The appellants were the owners of the farmhouse marked A in the plan which accompanies the case. The nuisance consists of a large collection of foul sewage standing in a disused pond in the middle of the village green at Old Quarrington, and has been caused by sewage coming from the premises, A, of the appellants, who admitted the existence of the nuisance.

(*a.*) Reported by MAURICE N. DRUCQUER, Esq., Barrister-at-Law.

Neither the land between the west side of the public highway and the pond, nor the pond, is the property of the appellants. . . . Formerly a stone conduit at the same point as the existing gully passed under the highway, and drains stated by the appellants to have been constructed by them about twenty years ago carried the sewage from the said premises into a hole where the gully now stands, and thence through the conduit under and to the west of the road into an open ditch on the other side of the road, which ditch emptied itself into the pond. A 4in. drain was stated to have been put in by the appellants about eighteen years ago to drain the water from certain spouts. About twelve years ago the old conduit was taken out by the Durham and Chester-le-Street Highway Board and the present gully, with 9in. pipe under the road and short 4in. drain, were substituted by the said highway board for the purposes of carrying off the surface water from the road and conveying it to the pond, the work being carried out under the superintendence of their surveyor, and the highway board connected the drains conveying the sewage from the appellants' premises with the gully. Neither the appellants nor the highway board gave notice as required by the regulations of the respondents of their intention to connect the drains from the appellants' premises with the gully, &c., constructed by the said highway board twelve years ago. On the Local Government Act, 1894, coming into operation the Durham and Chester-le-Street Highway Board ceased to exist, and its power, duties, and liabilities were transferred to the respondents, whose servants have since periodically cleared out the 9in. pipe and gully. The respondents have never in any way repaired the said gully or open channel.

The justices were of opinion that the nuisance existing in the said pond was caused by the act of the appellants, and made an order for the same to be abated, but stated this case for the opinion of the court.

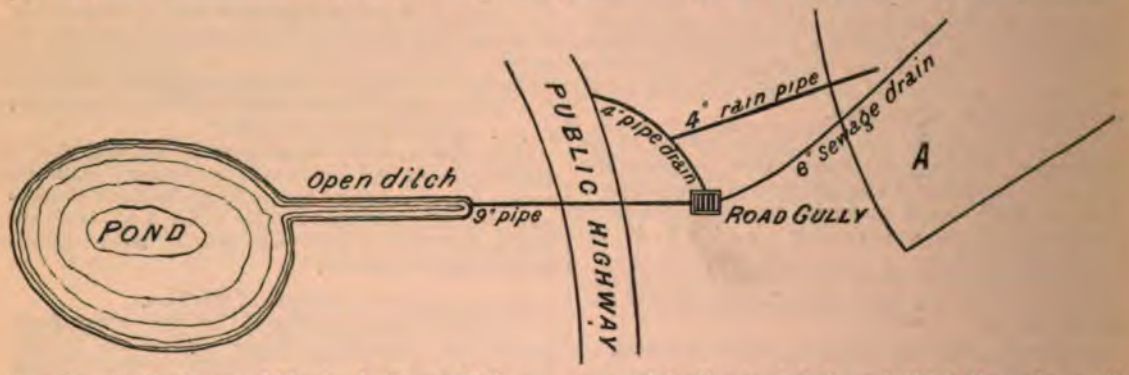
The facts in respect to the second case were, for the purposes of the judgments below, identical.

Meynell, for the appellants.—For the purposes of this case I will admit that the appellants might clear out the pond without committing a trespass, although as a matter of fact they are not the owners. It is clear that this 9in. pipe is a sewer as it drains the sewage of more than one house, and that being so the case of *Wilkinson* v. *Llandaff Rural Council*, 52 W. R. 50, [1903] 2 Ch. 695, is an authority of the Court of Appeal directly in favour of the appellants. The duty of effectually draining is upon the local authority: *Fordham* v. *Parsons*, [1894] 2 Q. B. 780. If it is suggested that this sewer was a drain because under the control of a highway authority, *vide* section 4 of the Public Health Act, 1875, the answer would be that by section 25 of the Local Government Act, 1894, the drain became vested in a local authority and thereby became a sewer.

Macpherson, for the respondents.—This 9in. pipe was admittedly a drain prior to 1894. It did not alter its character by operation of the 1894 Act, but became vested in the local authority as a drain. Secondly, it is only the duty of the local authority to supply a proper system of drainage, it is not obliged to provide sewers for a couple of isolated farms: *Wincanton Rural Council* v. *Parsons*, [1905] 2 K. B. 34, 53 W. R. Dig. 93. It is not sufficient to create liability, for the appellants merely to say that somehow they have got their sewage into the respondents' sewer: *Brown* v. *Russell*, 16 W. R. 511, L. R. 3 Q. B. 251; *Kinson Pottery Co.* v. *Corporation of Poole*, 47 W. R. 607, [1899] 2 Q. B. 41. Thirdly, in this case the respondents did not themselves make the drain, and would not be liable: see *Attorney-General* v. *Guardians, &c., of Dorking*, 30 W. R. 579, 20 Ch. D. 595. They only permit to remain what they find in being when they take over the drains: see *per* Cotton, L.J., in *Glossop* v. *Heston and Isleworth Local Board*, 28 W. R. 111, 12 Ch. D. 102, at p. 125.

Meynell replied.

Lord ALVERSTONE, L.C.J.—In this case an order has been made against the appellants to abate the nuisance. [His lordship stated the facts.] As the



case originally stood I do not think the order could stand. The order was to clear out the stuff in the pond, and if it were true that the appellants, not being the owners, could not obey the order without trespassing, it would be fatal to the order; but very wisely Mr. Meynell has consented to argue the case on the footing that both the appellants might clear out the pond without trespassing. What are the rights of the appellants in regard to the 9in. pipe under the road? To a large extent this case depends on the broad facts. It appears before the Act of 1894, about 1892, the highway authority put in the 9in. pipe in lieu of the conduit for the purpose of the protection of the road. They put in also a 4in. pipe, and they connected up the pipes which carried down the sewage from the farmhouse with the 9in. pipe. It cannot be contended that they purported to construct sewers. The work was quite different to what could have been done had a sewage system been in contemplation. No one would call that pipe a sewer in fact. The reason of the work being done, I come to the conclusion, was to protect the road. Was it a sewer under the Public Health Act, 1875? That turns on section 4 [which his lordship read]. One has only to read those words to see that up to the year 1894 it was not a sewer. Now I come to section 25 of the Act of 1894. [His lordship read it.] It seems to me, unless the language be clear, it could not be intended by that transfer of duties from the highway authority

to the district council to alter the status of the physical thing then in existence. Therefore this pipe which was substituted for the conduit passed to the rural district authority as successors of the highway authority as a drain, and not as a sewer into which anyone might pour their sewage. Mr. Meynell argued that the pipe having vested in the local authority it became a sewer and was taken out of the exception of section 4. That seems to me to be going too far. Had it been otherwise, speaking for myself, I do think the *Llandaff case* is a distinct authority in Mr. Meynell's favour, where it was held that the local authority should be the party to prevent the nuisance. [His lordship read the head-note.] We should be bound, I think, by that judgment but that the pipe was excepted from being a sewer by section 4, which exception was not destroyed by the transfer of powers and duties effected by section 25 of the 1894 Act. For these reasons I think the order against these appellants was the right order. The appeal must be dismissed.

RIDLEY, J.—I am of the same opinion. But for the exception clause (section 4 of the Act of 1875) I think our judgment would have been in favour of Mr. Meynell. Until 1894 it cannot be disputed that it was not a sewer, because it was under the control of an authority having the management of roads. In 1894 the Local Government Act was passed, of which section 25 is material. [His lordship read it.] It may be said that the exception ceased to exist because the highway authority ceased to exist. But it seems to me if that was intended to be the operation of the Act of 1894, the Legislature should have clearly stated it. There must have been some reason for excepting channels under the management of highway authorities from being classed as sewers. That reason still remains why such channels should not be treated as other channels are treated where under the control of the local authority. I am, however, troubled by the fact that we are leaving in existence the distinction between a highway authority and a local authority, whereas the Legislature has made the bodies the same.

DARLING, J.—I agree.

Appeal dismissed.

Solicitors for the appellant, *Crump & Co.*, for *Aynsley Smith*, Durham.

Solicitors for respondents, *Robbins, Billing, & Co.*, for *J. Chambers*, Durham.

K. B. Div.
(Ridley, Darling, and Bray, JJ.) April 7.

WALKER *v.* MAYOR, &c., OF YORK. (*a.*)

Highway—Diversion of highway—Persons aggrieved—Public interest—Questions left to jury—Highway Act, 1835 (5 & 6 *Will.* 4, *c.* 50), *s.* 89.

Section 89 *of the Highway Act,* 1835, *provides: "In case of such appeal the justices at the next quarter sessions shall . . . impannel a jury of twelve disinterested men out of the persons returned to serve as jurymen at such quarter sessions, and if after hearing the evidence produced before them the said jury shall return a verdict that the proposed new highway is nearer or more commodious to the public 'or' that the party appealing would not be injured or aggrieved, then the said court of quarter sessions shall dismiss such appeal . . . but if the said jury shall return a verdict that the proposed new highway is not nearer or not more commodious to the public, or that the party appealing would be injured or aggrieved, then the said court of quarter sessions shall allow such appeal, and shall not make such order as aforesaid.*

Held, that the word "or" must be read "and," with the result that if the jury return a verdict that the party appealing is aggrieved, the court of quarter sessions must allow the appeal notwithstanding that the jury also return a verdict that the new highway is more commodious.

Case stated by the recorder of York.

The justices having certified that the proposed diversion of a certain public footpath would be more commodious to the public than the footpath proposed to be stopped up, the appellant, on the 15th of March, 1905, gave notice of appeal to the next court of quarter sessions under section 88 of the Highway Act, 1835, as being a party aggrieved.

Upon the hearing of the appeal on the 13th of April, 1905, evidence was given on the part of the appellant that he would be deprived of the exit from his land which he then had upon the public footpath.

The recorder left two questions to the jury under section 89: (1) Whether the proposed new highway was more commodious to the public than the existing one; (2) whether the parties appealing would be injured or aggrieved if the existing highway were stopped up as proposed and a new one substituted. The jury answered both questions in the affirmative.

The recorder thereupon dismissed the appeal, but stated this case for the opinion of this court.

Jenkins.—The section is a contradiction, but it is quite evident from the concluding words of the section that "if the jury shall return a verdict . . . that the party appealing would be injured or aggrieved," the recorder should have allowed the appeal. The recorder was influenced by the case of *Rex* v. *Justices of Essex*, 5 B. & C. 431, decided upon the Act of 1815, which, however, had no such section as section 89. If the recorder were right a man might be land-locked and yet could obtain no remedy because the jury had found the new highway to be more commodious. The recorder took the view, in order to make the section intelligible, that the jury must first find that the party appealing was injured or aggrieved in order to give him a *locus standi* to appeal at all. The section would bear no such interpretation.

S. G. Lushington.—There can be no doubt that the section as it stands is a contradiction, and the mistake has been discovered, for in section 64 of the Inclosure Act of 1845, which is practically word for word the same as this section, the word "or" has been replaced by the word "and," and so the contradiction is removed. But the court must be careful before it deliberately turns "or" into "and." Lord Halsbury, L.C., in *Mersey Dock* v. *Henderson*, 37 W. R. 449, 13 App. Cas., at p. 603, says: "I believe it is wholly unexampled so to read it when doing so will upon one construction entirely alter the meaning of the sentence, unless some other part of the statute or the clear intention of it requires that to be done."

RIDLEY, J.—In this case we think the appeal must be allowed. The question arises under section 89 of the Highway Act, 1835. Two questions were left to the jury, and the jury found, (1) The highway was more commodious to the public; (2) the party appealing was injured or aggrieved. Upon these findings the recorder came to the conclusion that the appeal ought

(*a.*) Reported by MAURICE N. DRUCQUER, Esq., Barrister-at-Law.

to be dismissed. He founded his decision upon the case of *Rex* v. *Justices of Essex*, under an older Highway Act of 1815, containing similar provisions, and came to the conclusion that the Legislature must have intended that the party appealing, in order to have a *locus standi*, must first prove that he is a party aggrieved, and if he succeeded, then the court would consider the question whether the new highway were more commodious. That reasoning is not satisfactory. The Act of 1815 does not contain a section of this kind. I think it is true that the words in section 89 are contradictory. [His lordship read the first part of the section.] The argument is that the jury having found the highway more commodious, the appeal must be dismissed, and you could not get out of that result if that was the end of the section. But the concluding words of the section put the converse case, "if the jury shall return a verdict that the proposed new highway is not more commodious, or that the party appealing is aggrieved," the appeal shall be allowed. We think that upon the finding that the party appealing is aggrieved the proper order to make is to allow the appeal. If there were any doubt about it, it is removed by the words of section 64 of the Inclosure Act, 1845, which Mr. Lushington has very properly pointed out to us, although it adversely affected his argument. Now, when we come to look at that section in an Act ten years later we find the Legislature has amended what we must regard as a mistake and put "and" in the place of "or."

DARLING, J.—I am of the same opinion. Clearly the two halves of section 89 are irreconcilable. It is perfectly plain that what they meant was that the appellant should not succeed if the road was commodious and if he was not aggrieved, but if the road was commodious, yet if the party appealing was aggrieved, the appeal should be allowed. That is the only way the section could be read to do justice, and that is the reading of the second half. The case comes absolutely within the words of Lord Halsbury in the *Mersey case*.

BRAY, J.—I am of the same opinion, and it is quite clear that in the earlier part of the section there is a mistake. Suppose the jury had found that the new highway was *not* more commodious, yet that the appellant was not aggrieved, the appeal must be dismissed, which would obviously be absurd.

Appeal allowed with costs.

Solicitors for the appellant, *Ridsdale & Sons*, for *Crombie & Sons*, York.

Solicitors for the respondent, *Bell, Brodrick, & Gray*, for *Holtby & Procter*, York.

C. C. R.
(Lord Alverstone, L.C.J., and Kennedy, Ridley, Darling, and Walton, JJ.) April 28.

REX *v.* LINNEKER. (*a*.)

Criminal law—Intent—Attempt—Offences Against the Person Act, 1861 (24 & 25 *Vict. c.* 100), *ss.* 14, 18.

The Offences Against the Person Act, 1861, *s.* 14: "*Whosoever shall shoot at any person or shall by drawing a trigger or in any other manner attempt to discharge any kind of loaded arms at any person with intent in any of the cases aforesaid to commit murder shall, whether any bodily injury be effected or not, be guilty of felony.*" *Section* 18: "*Whosoever shall maliciously shoot at any person, or by drawing a trigger or in any other manner attempt to discharge any kind of loaded arms at any person with intent in any of the cases aforesaid to do some grievous bodily harm to any person, shall be guilty of felony.*" *To commit an offence under these sections it is not sufficient to intend to shoot or to make preparations to shoot, but there must be "an attempt," an act in a series of acts which, if not interrupted, would lead to the commission of the crime.*

A. was seen to put his hand in his pocket and draw out a loaded revolver; B. caught his arm after the revolver was clear from his pocket, a struggle ensued, and finally B. wrenched the revolver from A. During the struggle A. said repeatedly to B., "You've got to die."

Held, that A. was rightly convicted of the offence of attempting to discharge loaded arms.

Case stated by Jelf, J., at the trial of James Reginald Linneker at the Derby Winter Assizes on the 3rd of March, 1906, in an indictment charging him under the statute 24 & 25 Vict. c. 100, ss. 14 and 18, in the first count with feloniously attempting to discharge a certain revolver loaded with gunpowder and leaden bullets at one John Plowright Houton with intent to murder him; in the second count the same with intent to commit murder; and in the third count the same with intent to do the said John Plowright Honton grievous bodily harm. The indictment did not contain the words "by drawing a trigger," nor did it specify any other manner in which the attempt was made, but no objection was taken to the indictment on this score, the only objection being as hereinafter mentioned, that the evidence did not bring the case within the statute. The prisoner was convicted under the third count, sentence being postponed to the next assizes, and the prisoner being admitted to bail meanwhile subject to the following case: Mr. Honton was the general manager of the Bolsover Colliery. The prisoner, a young man in the employment of the colliery owners, interviewed Mr. Honton at his office on the 16th of February on the subject of his chances of promotion in the service. There was no sort of quarrel between them. Presently, in answer to a question, Mr. Honton said, "Why do you ask me that question?" The prisoner said, "I am going to tell you why," and he at once put his right hand into his overcoat pocket and commenced to pull something out. Mr. Honton saw something glitter like silver (which turned out to be a six-barrelled revolver), and it at once struck him that there was going to be mischief. Before the prisoner got the revolver (five barrels of which were loaded) quite clear from his pocket, Mr. Honton jumped up from his chair and sprang upon the prisoner, and was able to lay hold of his arm before he could raise it up. Prisoner had got the revolver clear from his pocket and had half risen from his chair when Mr. Honton seized him. They struggled for a few minutes. Once when Mr. Honton tried to open the door prisoner nearly got his arm loose, his right hand holding the revolver. While they were struggling the prisoner said several times "You've got to die." Eventually Mr. Honton wrested the revolver from him and with the assistance of another witness took him to the police station. On the way prisoner said, "I shall very likely do time for this, but whether it is long or short I shall do for you when I come out." Mr. Honton said, "Why; what have I done to you?" and prisoner said, "I think you have kept me back." Upon the facts, it was submitted by counsel for the defence, that there was no evidence of an attempt under the statute either with intent to murder or to do grievious bodily harm. The judge overruled the objection and told the jury that if they thought the prisoner took the revolver out of his pocket for the purpose of shooting

(*a*.) Reported by MAURICE N. DRUCQUER, Esq., Barrister-at-Law.

Mr. Honton, and that if he had not been interrupted he would have, or probably would have accomplished that purpose, they might find him guilty of an attempt to discharge the revolver at Mr. Honton with intent to murder (first and second counts), or with intent to do grievous bodily harm (third count), and they convicted him on the third count. No objection was taken to the language of the summing up, the only point being that there was no case within the statute.

The prisoner was not represented.

A. M. White, for the prosecution.—There was ample evidence of "intent," and, it is submitted, also of the "attempt," as defined by Stephen, J., in his Digest of the Criminal Law, art. 50: "An attempt to commit a crime is an act done with the intent to commit that crime and forming part of a series of acts which would constitute the actual commission if it were not interrupted." Upon almost the same facts the judges said, in *Reg.* v. *Brown*, 15 Cox 199, that there might be a conviction under section 14, although they held that there was no offence under section 15; they did not look with approval on *Reg.* v. *St. George*, 9 C. & P. 483, or *Reg.* v. *Lewis*, 9 C. & P. 523, and the former case was now directly overruled by *Reg.* v. *Duckworth*, 40 W. R. 448, [1892] 2 Q. B. 38.

Lord ALVERSTONE, L.C.J.—In my opinion the conviction should be confirmed. The prisoner was indicted, so far as is material for the purposes of this conviction, for feloniously attempting to discharge a loaded weapon. The indictment was under sections 14 and 18, but did not contain the words "by drawing a trigger or in any other manner." It seems to me that the gist of the offence is the attempt to discharge loaded arms with intent to do bodily harm, and when there is evidence of that the conviction can be supported. I think it is necessary to distinguish between the offence of attempting to discharge and that which might have been made or might be an offence under some other provision of the criminal law, which involves only the intent to discharge or the intent to shoot a pistol or preparation to shoot, having got the pistol. I think there must be an attempt to discharge the firearms. Having said that in order that it might not be supposed that our opinion goes further than what I have endeavoured to suggest, we ought to see whether in this case there is evidence of an attempt. [His lordship referred to the facts set out above.] It seems to me that there is evidence. The test laid down by Stephen, J., in his Digest, and referred to in *Reg.* v. *Duckworth*, may be applied. It seems to me that there was an attempt to discharge; at any rate the attempt to discharge began when the man draws the pistol from his pocket and holds it in his hand, struggling to get his hand free. If we were not to hold that to be an attempt, it would lead to a serious defect in the administration of the law. On authority it seems to me that this view is supported. *Reg.* v. *St. George* was directly overruled in *Reg.* v. *Duckworth*, where a man had raised a pistol towards his mother. *Reg.* v. *Lewis* does not touch this case because in that case the weapon was not in a condition to be discharged, and therefore, whatever may be the facts in that case, it does not affect this question. In *Reg.* v. *Brown* the learned judge left the case to the jury under section 15; and the judges in their judgment, doubting *Reg.* v. *St. George* and *Reg.* v. *Lewis*, while they quashed the conviction, all expressed the opinion that the case was within section 14 or 18. I think, therefore, not only for the reasons I have endeavoured to express, but also because we have the support of the opinion of the judge to which I have referred, that this conviction must be confirmed.

KENNEDY, J.—I am of the same opinion. I only wish to add this: The evidence here is sufficient to justify the jury in finding that there was an attempt to discharge. We must be very careful, as it seems to me, always to bear in mind that while a criminal attempt involves intent, a criminal intent does not involve an attempt. Even when a man may be found in possession of a weapon apparently to carry out an attempt, if would be wrong to leave to the jury on these facts whether there was an attempt, for which there must be some overt act or a series of acts as it has been put by Stephen, J.

RIDLEY, J.—In reading this section, it may be called the shooting section, it must be remembered that the Legislature is repeating the former statute of 1837. There is evidence in this case of an attempt to discharge loaded arms.

DARLING, J.—I am of the same opinion. Section 14 requires two things to be present in order to constitute the crime aimed at. There must be an intent, and a physical factor, an attempt to discharge a pistol. If a man does all those things which a man attempting to discharge a pistol would do as far as he was not interrupted by another man holding his hand, there is evidence for the jury of an attempt to discharge the pistol. There was that evidence here. [His lordship stated briefly the facts.] It has been assumed in some of the cases there were no consummate acts in proof of intent. But here there is sufficient evidence. And as for the attempt being proved, there was evidence for the jury and the conviction was perfectly right.

WALTON, J.—The question in this case is whether there was evidence of an attempt. It is obvious that every act done for the purpose of committing a crime is not necessarily an attempt. It may be merely preparation. I agree with my brethren that there was evidence of an attempt as distinguished from mere preparation. I say nothing about the form of the indictment because that has not been raised by the case.

Conviction affirmed.

Solicitor for prosecution, *M. H. Humble*, of Chesterfield.

K. B. D.
(Ridley, Darling, and A. T. Lawrence, JJ.) — April 10.

WAKEFIELD AND DISTRICT LIGHT RAILWAY CO. (*Appellants*) *v.* MAYOR, &c., OF WAKEFIELD (*Respondents*) (*a.*)

Local government—Rating—Light railway—"Used only as a railway"—Light Railways Act, 1896 (59 & 60 *Vict. c.* 48), *s.* 12, *sub-sections* 1, 2—*Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 211, *sub-section* 1 (b).

Section 211 *of the Public Health Act*, 1875, *which gives the power to levy district rates provides* (*sub-section* 1 (b)) *as follows: "The owner of any tithes . . . or the occupier of any land used as arable meadow or pasture ground only . . . and the occupier of any land covered with water or used 'only' as a canal or towing-path for the same, or as a railway constructed under the powers of any Act of Parliament for public conveyance, shall be assessed in respect of the same in the proportion of one-fourth part only of such net annual value thereof."*

(*a.*) Reported by MAURICE N. DRUCQUER, Esq., Barrister-at-Law.

Held, that the word "only" must be read with "railway."

Section 12, *sub-section* 1, *of the Light Railways Act*, 1896, *provides: "The Clauses Acts, as defined by this Act, and the enactments mentioned in the second schedule to this Act shall not apply to a light railway authorized under the Act except so far as they are incorporated or applied by the order authorizing the railway."* *Sub-section* 2: *"Subject to the foregoing provisions of this Act and to any special provisions contained in the order authorizing the railway, the general enactments relating to railways shall apply to a light railway under this Act in like manner as they apply to any other railway; and, for the purposes of these enactments and of the Clauses Acts, so far as they are incorporated or applied by the order authorizing the railway, the light railway company shall be deemed a railway company, and the order under this Act a special Act, and any provision thereof a special enactment. . . ."*

A light railway was constructed under an order made in pursuance of the Light Railways Act, 1896, *the following clauses of the order being material:* (16) *Notwithstanding anything in this order contained the company shall not acquire or be deemed to acquire any right other than that of user of any road along or across which they lay the railway.* (17) *Nothing in this order or in any bye-law made under this order shall take away or abridge the right of the public to pass along or across every part of any road along or across which the railway is laid with carriages not having flange wheels or wheels suitable only to run on the rails of the railway.* (49) *The company may use on the railway carriages with flange wheels, or wheels suitable only to run on the rails of the railway, and subject to the provisions of this order, the company shall have the exclusive use of the railway for carriages with flange wheels or other wheels suitable only to run on the rails of the railway.* (50) *If any person (except by agreement with the company, or otherwise as by the order provided) uses the railway, or any portion thereof, with carriages having flange wheels or other wheels suitable only to run on the rails of the railway, such person shall for every such offence be liable to a penalty not exceeding twenty pounds.*

Held, that the land occupied by the lines of the rails of the light railway was land used only as a railway, and that the light railway was a railway constructed under the powers of an Act of Parliament for public conveyance within the meaning of section 211 (1) (b) *of the Public Health Act*, 1875.

Case stated by the justices of the city of Wakefield sitting as a court of summary jurisdiction at Wakefield.

The material parts of the special case are as follows:

"This was a complaint preferred by the Mayor, &c., of Wakefield against the Wakefield and District Light Railway Co., for that they being a company duly rated and assessed to two several rates made by the said mayor and corporation . . . and in and by a rate in the nature of a general district rate . . . which had been lawfully demanded in writing, had not paid the same or any part thereof, but had refused to do so (save as hereinafter appears) for the space of fourteen days before the making of the complaint, and after hearing the parties and the evidence adduced by the appellants and respondents we did thereupon order that the said sums be paid by the appellants. . . ."

"1. At the hearing of the said complaint it was proved or admitted that the said rates were duly made and demanded of the appellants, and that the appellants were therein rated in respect of certain light railways described in the rate as lines of rails. Such rails are laid and situated in certain public streets . . . It was further proved that the appellants had tendered to the respondents in respect of the said rates the sum of £10 0s. 7d., being the total sum charged by the said rates calculated on one-fourth part only of the said net annual value, and that the respondents had refused to accept the same. It was admitted that the appellants were in occupation of the said lines of rails and the land occupied thereby.

2. The said lines of rails comprise Railways Nos. 3, 6, 7, and 8, authorized by clause 10 of the Wakefield and District Light Railway Order, 1901, and lie entirely in certain streets within the city of Wakefield . . . which are highways dedicated to the public and repairable by the inhabitants at large, and are vested in the Corporation of Wakefield as urban authority pursuant to the Public Health Act, 1875. The traffic along the said lines of rails is worked by electricity on what is commonly called the overhead system by means of electricity conveyed to the vehicles travelling along the said line of rails by wires suspended from posts placed alongside the said roads. The said vehicles are used for the conveyance of passengers and parcels, and the public are entitled to be conveyed along the said line of rails on payment of the rates and charges authorized by the said orders.

3. The said orders may be referred to and are to be deemed to form part of this case.

6. We held that the said land occupied by the said line of rails was not land used only as a railway, and that the said railways were not railways constructed under the powers of an Act of Parliament for public conveyance within the meaning of section 211 (1) (*b*) of the Public Health Act, 1875.

The questions for the opinion of the court are: (1) Whether the land occupied by the said line of rails is or is not land used only as a railway constructed under the powers of an Act of Parliament for public conveyance within the meaning of section 211 (1) (*b*) of the Public Health Act, 1875. (2) Whether the said railways are or are not railways constructed under the powers of an Act of Parliament for public conveyance within the meaning of the said sub-section. (3) Whether the occupiers of the said land occupied by the said lines of rails are or are not entitled to the benefit of the partial exemption provided for in section 211 (1) (*b*) of the Public Health Act, 1875."

Ryde (*Danckwerts, K.C.*, with him), for the appellants.—In this court I must admit that the word "only" in section 211 (1) (*b*) must be also read with the word "railway": *Swansea Improvements and Tramways Co.* v. *Swansea Urban Sanitary Authority*, 40 W. R. 283, [1892] 1 Q. B. 325. The question then is: "Are these lines only used as a railway?" It is submitted they are. It is true that the public have access, vehicles may cross or run along the surface of the lines if the wheels are spaced the same breadth as the lines, but they cannot by clause 50 of the order use the grooves, and by clause 49 the company has the exclusive use of the grooves. It is in respect of these lines—the exclusive use of these lines—that the company is rateable at all, and therefore it cannot be said that the lines are not "only used" as a railway. This is strengthened by considering the use of the word "only" in connection with "land used as arable meadow or pasture ground only." It is a fact that over a large portion of such land there are sporting rights. Are the occupiers to be deprived of the exemption of the sub-section for that reason? Secondly, assuming that the land is used only as a railway, is it a "railway constructed under the powers of any Act of Parliament for any public conveyance"? Certainly tramways are not now exempt: see the *Swansea case*. But light railways are not tramways, but railways, within the meaning of

section 211 (1) (*b*). This is shown by reference to section 12, sub-section 2, of the Light Railways Act, 1896, which enacts that the "general enactments" relating to railways shall apply to a light railway under the Act in like manner as they apply to any other railway, and the light railway for such purposes shall be deemed a railway company and the order a special Act. Hence section 211 (1) (*b*) being a "general enactment" relating to railways, it applies to a light railway which is to be deemed for that purpose a railway company and the order a special Act. "Enactment" is used, not "Act," and must include a reference to a single "section": see the use of the word later in the same sub-section, "any provision thereof a special enactment."

He referred also to *Yorkshire (Woollen District) Electric Tramways Co.* v. *Ellis*, 53 W. R. 303, [1905] 1 K. B. 396.

Clavell Salter, K.C. (*Mackenzie* with him), for the respondents.—The land is not "only used" as a railway. In rating cases the substance of the matter must be looked at, and in substance the land occupied by these lines is used freely by the public and by vehicles. What the appellants seek to establish is not that it is "used only as a railway" but that it is used only as a railway by the appellants. If the court is with me on the first point it is unnecessary to argue the second. This is not a "railway constructed under the powers of any Act of Parliament." The words "general enactments" do not apply to any section in an Act dealing with railways with which the Act in other respects has nothing to do. They only refer to Acts dealing peculiarly with railways, and only in respect to such Acts is the order to be deemed a special Act. This is borne out by the "enactments" mentioned in section 12 (1) and set out in the second schedule to the Act. All these enactments are Acts or parts of Acts dealing solely with railways; it must be admitted that the Legislature certainly there uses the word "enactment" to cover individual sections, still they are sections out of Acts relating to railways solely.

RIDLEY, J.—This case on one point has been one of great difficulty, but on the other point the difficulty has not been so great The question arises in this way: [His lordship read the facts set out above.] The magistates decided that the land occupied was not used only as a railway and that the railway was not a railway constructed under an Act of Parliament within the meaning of that section. It is true, I think, that tramways are different both from light railways and from fully constituted railways. There can be no doubt, following the judgment of Wills, J., in the *Swansea case*, that tramways are well known, both in their origin and nature, to be something essentially different from railways, and that in the Public Health Act of 1875, where railways are spoken of, it cannot possibly be supposed that tramways are included. He declined to define either tramways or railways, and I shall follow his example. But when one deals with the distinction between a light railway and a fully constituted railway the difficulty is more substantial. The words of section 211 (1) (*b*) are: [His lordship read them.] I read in the word "only" in connection with the word "railway" following the decision I have spoken of. Therefore we have to ask ourselves "Is this land used only as a railway?" I suppose these words were used with reference to the usual kind of railway, where the land, enclosed between fences, was owned by the railway, and they fit into that state of circumstances without difficulty. But in this case with which we have to deal, this particular light railway is in no respects, as far as I can make out, distinguishable from a tramway so far as outward circumstances are concerned. It passes along a highway, over which other persons have the right to pass; carts and passengers can pass to and fro without committing a trespass. The only thing in respect of which the occupiers of the light railways are assessable to the poor rate is the metals which they place on the highway, or possibly a smaller thing still, viz., the opening in the railway lines to which they have the exclusive right; for other persons can pass to and fro along the metals so long as they do not use the grooves of the metals themselves, and it is not a trespass to use the metals merely because the breadth of the vehicle is identical with the gauge of the lines. Under these circumstances, is the land used only for that purpose? I had considerable doubt whether, considering the rights which the public exercise, this railway ought not to be classed with tramways, but on the whole I think that the appellants' argument is right: "I am rated only for the metals, and that is the only thing for which I am rated; I have the exclusive right, and the land is only for the railway." I think that is the right decision. Allowing, as I do, for the difference between a fully constituted railway and this railway, still they are alike in this respect, that what they have got is used for themselves only. And the difference in the case of some light railways would not be so marked because in some districts they are the owners of land in the same way as an ordinary railway. On the first point, therefore, I think Mr. Ryde is right.

On the other point I do not find so much difficulty. Was the light railway constructed under an Act of Parliament for public conveyance? Now, in the first instance it was not directly so, because it was made under an order in pursuance of the Light Railways Act, an order made in 1901. But when you look at the provisions of section 12 of the Light Railways Act, 1896, that difficulty is got over. It is a section dealing with the question how far existing legislation relating to railways is to be applied to light railways, and provides: [His lordship read the section.] It seems to me, therefore, that that section says you are to treat the light railway, although not made directly under an Act, as though made under a special Act, and that the order is to be called a special Act. That gets over the difficulty which I have mentioned, but it is not directly made under an Act of Parliament, but only indirectly. The Act of Parliament seems to say you are to treat the order as a special Act. It says the "general enactments relating to railways" shall apply to light railways. If section 211 of the Public Health Act is a "general enactment relating to railways," it seems to me that this point must be decided in favour of Mr. Ryde. Mr. Salter meets that by saying the enactments to be found in the schedule of the Light Railways Act, 1896, are in the main, if not entirely, regarding the conduct and management of railways, and he says that it is only in respect to such subject-matter that this section 12 applies. Well, I do not think that this is a very sound argument—for there ought to have been on this supposition something like this, "general enactment relating to the 'conduct or management' of railways," whereas these words are left out, and I think the natural meaning of the words is that section 211 is an enactment relating to railways. The word "enactment" is not the same as the word "Act." "Act" means the whole Act, but an "enactment" is an "Act" or a part of it, so that a section or part of an Act of Parliament might be an "enactment." In this case I think section 211 is an enactment relating to railways, and it must be applied to light railways, and I think the light railway must

be deemed to have been constructed under a special Act. For these reasons I think the decision of the magistrates is wrong and that the railway is entitled to the exemption.

DARLING, J.—I am of the same opinion. I think the case is a difficult one on both points. I do not propose to say anything about the second point, but only upon the point which arises on the construction of section 211 of the Public Health Act, 1875. Now as to that my view is, these appellants may say the roads in question are shared with other persons, and in respect of them they would not be rated. But they are rateable because they have the exclusive use of some land on which they have been permitted to lay down their lines and the necessary appurtenances. That railway they alone may use as a railway and other persons are forbidden so to use it. Therefore all that land for which the appellants are rateable, all that thing, whatever it may be for which they are rateable, is used only as a railway. It is true people may cross the line of railway, and even their carts may run along upon it, although not in the same way as the appellants', because they may not use the flange, but the kind of use by others of railways where there happens to be a level crossing as in the case of level crossings over such a railway as the London and North-Western Railway, where if you were to add the level crossings together you would find they made up a large portion of the length of the railway. You must read the word "only" as "only" by a railway company. In respect of those railways which have always been regarded as entitled to the exemption, I believe the old railway Acts empower people to use their own engines on the railway lines, and it was rather contemplated that people would use the railways just as motor-cars now make use of the roads, yet the railway was used only as a railway. For these reasons it appears to me that this light railway is entitled to the exemption conferred upon railways by the Public Health Act, 1875.

A. T. LAWRENCE, J.—I am of the same opinion. I think the exemption of section 211 applies. [His lordship read the description of the property rated as set out in the case.] Now, is that property used only as a railway? I think it is. It is quite true that persons pass over it in the exercise of their rights, but that does not prevent the lines being used in their character of a railway by the company. For that reason of exclusive use, they become rateable. The company would have the same right as the ordinary subject; but for that exclusive right they have to pay rates. It seems to me impossible to say, on the one hand, they have the exclusive right which makes them rateable, and on the other hand to say they have not the exclusive right to use that hereditament as a railway.

On the next question, whether it is constructed under an Act of Parliament, it seems to me that the construction contended for by the appellants, that section 12 of the Act of 1896 had the effect of making this order an Act of Parliament and making this structure a railway constructed under the powers of an Act of Parliament, is correct. And this section 211 is a general enactment. I am sure if the section instead of exempting had imposed a higher rate upon railways, it would have been impossible to say it was not a general enactment relating to railways. For these reasons the appeal must be allowed.

Appeal allowed with costs.

Solicitors for the appellants, *Ashurst, Morris, & Crisp.*

Solicitors for the respondent, *Sharpe, Parker, & Co.*, for *W. W. Greenhalgh*, Wakefield.

Privy Council.

(*On Appeal from the Supreme Court of Tasmania.*)
Dec. 4.

VAN DIEMEN'S LAND CO. v. MARINE BOARD OF TABLE CAPE. (*a.*)

Evidence—Deed of grant—Construction—Circumstances under which executed—Improper rejection of evidence—Acts of user before grant.

When the obvious intention under a deed of grant is to give a title to what has been taken and retained before the actual grant, acts of user before the grant are cogent evidence of the identity of what is granted, for they lead up to and explain what was intended to be conveyed.

This was an appeal from the Supreme Court of Tasmania.

The action was for trespass to land. The facts are given in their lordships' judgment.

Haldane, K.C., J. Eldon Bankes, K.C., and *H. B. Bompas*, for appellants.

Asquith, K.C., Dobbie, K.C. (Solicitor-General of Tasmania), and *Vaughan Hawkins*, for the respondents.

The judgment of their lordships (Earl of HALSBURY, L.C., Lords MACNAGHTEN, ROBERTSON, LINDLEY, and Sir FORD NORTH) was delivered by

Earl of HALSBURY, L.C. — The action out of which these appeals arise was an action of trespass practically to try the right to a part of the foreshore of Emu Bay in Bass's Straits. Their lordships are not able to acquiesce in the suggestion that the decision of this case has so wide and important a result as some of the learned judges seem to have supposed. Nevertheless, it is of course important to the parties in its immediate result and the consequences which follow from them.

The facts which lead up to the question in debate may be shortly summarized. An Act of Parliament was passed in the sixth year of King George the Fourth (6 Geo. 4, c. 39) for the purpose of encouraging the cultivation of waste lands in what was then the penal colony of Van Diemen's Land. It contemplated the granting of a charter to certain persons, and the appellant company was accordingly incorporated by charter dated the 10th of November, 1825. Subsequent legislation (10 & 11 Vict. c. 57) having authorized the grant to the company of tracts of land, the real question now in debate is whether the *locus in quo* of the alleged trespass is included in a grant, dated the 27th of July, 1848, made in pursuance of that legislation.

The action was tried before Mr. Justice Clark and a jury at Launceston in Tasmania, and a verdict was found for the defendants, the present respondents. The argument appears to have wandered over a very wide field, but the direction of the learned judge to the jury, which must have had great weight with them, was that the acts of user proved to have taken place over the *locus in quo* were of no importance, and in fact were not evidence at all, since they were acts which were antecedent in date to any grant made by the Crown. To understand the relevancy and importance of this direction it is only necessary to observe that both the Act 10 & 11 Vict. c. 57 and the subsequent grant recite that the company had taken possession of the lands intended to be granted and incurred expense in the improvement thereof, and

(*a.*) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

the grant is assumed to be of such a character that it neither expressly excludes nor expressly includes the *locus in quo*. It can hardly be doubted, in view of the recital to which reference has been made, that it was intended to authorize by the statute of Victoria the granting of a title to the company of lands of which they had taken possession and upon which they had expended money; neither can it be doubted that the grant itself, when made, was intended to confer a title to what the company had taken possession of, and so far from not being evidence, their lordships consider user was very cogent evidence of what was intended to be granted. It certainly was not evidence, as the learned judge points out, of possession against the Crown, neither was it evidence of a lost grant. The learned judge very satisfactorily disposes of both these suggestions, but it is difficult to understand why it was not evidence to identify the place the title of which the Crown intended to confirm to the company.

It is quite true that if the language of the grant itself were absolutely plain and unambiguous, no amount of user would prevail against the plain meaning of the words: see *North-Eastern Railway Co.* v. *Hastings*, [1900] A. C. 260, 48 W. R. Dig. 161. It is, however, impossible to contend that the language of this instrument can be so represented. The language is very wide, but when one finds such a recital as this: "the company have been authorized to take possession of several portions of land, and have ever since been and now continue in possession thereof, but no grant thereof has been made to the land company," when these are the circumstances under which the grant is actually made —why is it not evidence, and cogent evidence, when the taking possession of the particular piece of land is proved, and the continuance in possession before and after the grant is proved? The time when, and the circumstances under which, an instrument is made, supply the best and surest mode of expounding it, and when the obvious intention is to give a title to what has been taken and retained before the actual grant, it is manifest that what has been so taken and retained is cogent evidence of what is granted. When evidence of this character has been practically withdrawn from the jury, it is impossible to allow the verdict thus obtained to stand.

The circumstances under which modern user may be proved to explain a written instrument are treated of with great precision by the learned judges who advised the House of Lords in *Waterpark* v. *Fennell*, 7 H. L. Cas. 650.

The learned judge stated, and stated quite correctly, that you cannot say that acts of user were acts of user under a grant when they were done before the grant existed. It does not follow that such acts were not relevant to be proved when, as in this case, they lead up to and explain what is afterwards granted.

It would be a singular application of the maxim quoted by Coke, 2 Institutes 11, *contemporanea expositio est fortissima in lege*, to suggest that the proof of user must be confined to ancient documents, whatever the word "ancient" may be supposed to involve. The reason why the word is relied on is because the user is supposed to have continued, and thus to have brought us back to the contemporaneous exposition of the deed.

The contemporaneous exposition is not confined to user under the deed. All circumstances which can tend to show the intentions of the parties whether before or after the execution of the deed itself may be relevant, and in this case their lordships think are very relevant to the questions in debate.

Another direction given by the learned judge to the jury and calculated to mislead them was his direction in relation to the leases of some part of the land in question. He suggested, not very obscurely, that the lease of part of the jetty which was leased and which extended over the foreshore was only evidence of an easement, and that the lessor of such a structure need not own the land over which such a structure was erected. That such a division might in point of law exist is nothing to the purpose. There was no evidence of any such severance of interest, and the effect of such an observation was well calculated to mislead the jury, who ought to have been told that such evidence was clearly evidence of seisin in the *locus in quo*.

Their lordships do not think it desirable, as this is to be tried again, to deal more minutely with the facts of the case, though they think it right to say that, as to the question of lost grant, or possession against the Crown, they would have been prepared to affirm the judgments under appeal; but, reluctant as they have been to order a new trial where so much time has been spent and expense incurred already, and where so much learning and care have been bestowed upon the argument, they are unable to say that the question has been properly left to the jury. They will accordingly humbly advise his Majesty that the judgments of the Supreme Court ought to be discharged, and that there should be a new trial, and that the costs in the Supreme Court ought to abide the result of the new trial, The respondents will pay to the appellants the costs of these appeals.

Solicitors for appellants, *Bompas, Bischoff, Dodgson, Coxe, & Bompas.*

Solicitors for respondents, *Bircham & Co.*

High Court of Justice.

Chan. Div.
Farwell, J. } April 4, 5, 7.

ATTORNEY-GENERAL *v.* DE WINTON. (*a.*)

Corporation—Municipal corporation—Borrowing powers —Ultrà vires—*Interest on overdraft at bankers—Liability of borough treasurer—Municipal Corporations Act*, 1882 (45 & 46 *Vict. c.* 50), *ss.* 18-21, 25-28, 139-144—*Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 6, 189, 198, 209, 210, 233-237, 245-247, 265—*Public Authorities Protection Act*, 1893 (56 & 57 *Vict. c.* 61), *s.* 1.

A municipal corporation had overdrafts on various accounts at the bank beyond their statutory powers of borrowing. The defendant, who was the borough treasurer, and also the manager of the said bank, by the authority of the corporation, credited himself and debited the corporation with interest on such overdrafts at 4½ per cent., with quarterly rests.

Held, that the defendant was not entitled to credit himself or to debit any of the borough funds with interest on any of the overdrafts appearing in the accounts theretofore put in by him as treasurer since his appointment.

Held, also, that the borough were not necessary parties to the action.

Held, further, that though the Municipal Corporations Act, 1882, *has provided a remedy by* certiorari, *or an appeal against the rate, there is nothing in the Act to deprive the Attorney-General, at the relation of a party interested, of the power of obtaining by injunction an*

(*a.*) Reported by P. W. PEGG, Esq., Barrister-at-Law.

order to restrain the payment of money being made under an order of the borough council, for which order there was no legal warrant.

Tynemouth Corporation *v.* Attorney-General, [1899] *A. C.* 293, 47 *W. R. Dig.* 43, *followed.*

Witness action.

This was an action brought by the Attorney-General at the relation of C. F. E. Allen, and also by the relator, who was a burgess and town councillor of the borough of Tenby.

The defendant W. S. de Winton was the treasurer of the borough, and also the South Wales district manager of Lloyd's Bank (Limited).

The defendant was appointed treasurer on the 6th of July, 1903, the corporation at that date having an overdraft at the said bank beyond their statutory powers of borrowing, of £4,959 11s. 9d.

On the 23rd of July, 1903, the council of the said borough passed a resolution: "That Lloyd's Bank (Limited), at Haverfordwest, being the bankers of the corporation, be and they are hereby authorized to honour all cheques drawn on the treasurer, whether the account be in credit or overdrawn, signed by any three members of the town council for the time being, and countersigned by the town clerk, and to accept the indorsement of the said town clerk upon all cheques paid to the credit of the account, and that the authority be given under the common seal."

On the 18th of June, 1904, the overdraft had increased to £5,795, and at the date of the commencement of the action amounted to £3,707, but had since been discharged.

During the period between the defendant's appointment and the commencement of the action, the borough had accounts with the said bank of their borough fund under the Municipal Corporations Act, 1882, and of their district rates, and water rates under the Public Health Act, 1875, and of harbour and pier rates under private Acts and orders; all these accounts fluctuated from time to time, but were always overdrawn to some extent, and on all of them the defendant had debited the borough and credited himself with interest at 4½ per cent., with quarterly rests, the total amount of such interest for the period from the 23rd of July, 1903, to the 30th of June, 1904, was £215 5s. 6d.

On the 26th of September, 1904, the writ in this action was issued, claiming (1) a declaration that the payment made by the defendant as such treasurer, or charged against the said borough by the defendant in his accounts as such treasurer, as and by way of interest on certain overdrafts granted to the said borough by the defendant or by Lloyd's Bank (Limited) were illegal, and to the knowledge of the defendant beyond the powers of the corporation of Tenby, and a breach of trust; and (2) an injunction to restrain the defendant from any further payments out of the funds of the corporation of any further sums by way of interest upon any of the said overdrafts.

Upjohn, K.C., and *E. G. Palmer*, for the relator.—No imputation is made against the defendant; the action is to determine points of law only. The corporation defrayed the interest on their overdrafts from time to time by means of pier and harbour rents, rates and tolls, and this was illegal. The statutes affecting the case are, first, the general statutes—namely, the Municipal Corporations Act, 1882, ss. 18-21, 25-28, 139-144; the Public Health Act, 1875, ss. 189-198, 209, 210, 233-237, 245-247, 265; and the Local Loans Act, 1875; and, secondly, the private Acts—namely, the Improvement Act, 1838 (1 Vict. c. 13); the Pier and Harbour Orders Confirmation (No. 3) Act, 1897 (60 & 61 Vict. c. ccxlviii.); and the Pier and Harbour Orders Confirmation (No. 3) Act, 1902 (2 Ed. 7, c. cci.). A common law corporation may borrow by overdraft, but a corporation under the Municipal Corporations Act, 1882, cannot. [Counsel also referred to *Thomas* v. *Devonport Corporation*, 48 W. R. 89, [1900] 1 Q. B. 16; *Richter* v. *Hughes*, 2 B. & C. 499; *Reg.* v. *Reed*, 28 W. R. 787, 5 Q. B. D. 483; *Smith* v. *Southampton Corporation*, 50 W. R. 651, 87 L. T. 171; *Reg.* v. *Saunders*, 24 L. J. M. C. 45.] The treasurer is not a mere servant of the corporation, he is the custodian of the trust funds belonging to the borough. The corporation are bound to appoint him, he is a statutory officer with statutory duties. The corporation are not necessary parties: ord. 16, r. 4; *Barnes* v. *Addy*, 22 W. R. 505, L. R. 9 Ch. 244.

Macmorran, K.C., R. C. Glen and *Bethune*, for the defendant.—The treasurer is liable to be dismissed at any moment: Municipal Corporations Act, 1882, s. 18. He is an officer bound under the above statute to obey the orders of the corporation; his duty is not to the burgesses, but to the corporation. Reliance is also placed on the Public Health Act, 1875, s. 265, and the Public Authorities Protection Act, 1893, s. 1. The corporation ought to have been added as defendants. The accounts had been audited by the borough auditors, and submitted to and passed by the council, and if the payments were in fact illegal the proper remedy was not by injunction, but by *certiorari* under the Municipal Corporations Act, 1882, s. 141.

Counsel also referred to *Lawford* v. *Billericay Rural District Council*, 51 W. R. 630, [1903] 1 K. B. 772.

Cur. adv. vult.

FARWELL, J., in giving judgment, said: This is an action by the Attorney-General on the relation of a burgess and town councillor of the borough of Tenby against the defendant, who is the treasurer of the borough, an office to which he was appointed on the 6th of July, 1903, and the object of the action is to impeach the accounts of the defendant so far as they relate to payments for interest with which the defendant has credited himself and debited the borough funds, and to restrain similar charges in the future. The facts are not in dispute. When the defendant was appointed the borough had exhausted its borrowing powers, and had, in addition, an overdraft with its bankers of over £4,959, which had increased to £5,795 by the 18th of June, 1904. The writ in this action was issued on the 26th of September, 1904. During the period between the 6th of July, 1903, and the issue of the writ the borough had accounts of their borough fund under the Municipal Corporations Act, 1882, and of their district rates and water rates under the Public Health Act, 1875, and of harbour and pier rates under private Acts and Orders; all these accounts fluctuated from time to time, but were always overdrawn to some extent, and on all of them the defendant has debited the borough and credited himself with interest at 4½ per cent., with quarterly rests. The plaintiff does not ask for any order for payment; none of the sums have in fact been paid, but he asks for a declaration that they are improperly debited to the borough in the treasurer's account, and for an injunction to restrain similar debits in the future. The defendant takes the objection at the bar that the borough are necessary parties to the action. The suit is, no doubt, somewhat unusual, but no claim is made against the borough; they will not be bound by any decision in this action, and their interests are not likely to be prejudiced by any lack of information on the defendant's part, inasmuch as the town clerk happens to be the defendant's solicitor in the action.

If the plaintiff succeeds the borough benefits; if he fails it is no worse off than before. I therefore overrule this objection.

The defendant's next contention is that he is not personally liable, that the overdrafts and interest thereon were made and debited by the order of the borough, and that he merely acted as their servant. I am of opinion that this contention is not well founded. The question before me relates to the funds collected by and on behalf of the borough for public purposes under the Municipal Corporations Act and the Public Health Act and the private Harbour Acts, and it has been settled, at any rate since Lord Cottenham's decision in *Attorney-General* v. *Aspinall*, 2 M. & C. 613, that property held for public purposes is held upon charitable trusts, and, to quote his words at p. 618: "If the property in question be subject to any public trust, and if the appropriation complained of be not consistent with such trust, but for purposes foreign to it, and if there be not, in the Municipal Corporations Act (now the Act of 1882), any provision taking from the court its ordinary jurisdiction in such cases, then it will follow that the Attorney-General has, under the circumstances stated, a right to file the information and to pray that the fund may be recalled, secured, and applied for the public, or, in other words, charitable purposes, to which it is by the Act devoted." I have recently had to consider this case in *Stevens* v. *Chown*, 49 W. R. 460, [1901] 1 Ch. 894, and I will merely say that I remain of the opinion there expressed, and all the more so because it has been approved by Lord Lindley in *Yorkshire Miners* v. *Howden*, [1905] A. C. 256. It is plain, therefore, that this court would have jurisdiction to restrain the borough from misapplying these funds on the ground of breach of trust: *Attorney-General* v. *Newcastle-on-Tyne*, 23 Q. B. D. 492, 38 W. R. Dig. 139. But the defendant is their treasurer, and knows that the moneys which he has credited to himself are trust moneys, and he is clearly amenable to the jurisdiction of the court, and cannot escape by pleading the wrongful orders of his employers. There is no question of repaying here; but even if there were, the defendant knew that this was a trust fund, and "those who know that a fund is a trust fund cannot take possession of that fund for their private benefit except at the risk of being liable to refund it in the event of the trust being broken by the payment": *per* Fry, J., in *Foxton* v. *Manchester*, 44 L. T. 406. 29 W. R. Dig. 14. But the treasurer is not a mere servant of the council; he owes a duty and stands in a fiduciary relation to the burgesses as a body; he is the treasurer of the borough (section 18); all payments to and out of the borough fund must be made to and by him (section 142); he has to account to three auditors, two appointed by the burgesses and one by the mayor (section 25), and although he holds office during the pleasure of the council only (section 18), this does not enable him to plead the orders of the council as an excuse for an unlawful act. In my opinion the observations of Erle, J., in *Reg.* v. *Saunders* with relation to a county treasurer, apply with equal force to a treasurer under the Municipal Corporations Act. "If an order be made on a county treasurer to pay expenses wholly disconnected with county matters, such an order is without jurisdiction, and one which the treasurer would be bound to disobey; and if the treasurer did pay it, it would be the duty of the quarter sessions not to allow the items of such expenses in the treasurer's account."

It was next contended by the defendant's counsel that the overdrafts were not illegal on some suggested analogy to the class of contracts that may bind a corporation, although not under seal; but the borrowing powers of the borough in this case are subject to statutory conditions, restrictions, and prohibitions, and these cannot be dispensed with; as Bayley, J., says in *Richter* v. *Hughes*, "the Act of Parliament therefore gives a special power, and that power ought to be strictly followed, and as it authorizes them to borrow a certain sum of money and afterwards by rates to pay the interest of the money borrowed, they have no right to borrow beyond the specified amount, or to raise rates to pay interest upon any higher sum": see *Wenlock* v. *River Dee Co.*, 10 App. Cas. 354. In the present case the borough has not merely overdrawn from time to time, but they have a normal floating debt, as appears from their resolution of the 23rd of July set out in the statement of claim, limited only by their creditors' willingness to advance. This case is to my mind indistinguishable in principle from the decision of the Divisional Court in *Smith* v. *Southampton Corporation*. In that case a borough council in their estimate for a general district rate for the borough included items which consisted of debts contracted in former years, and which had from year to year been carried to a "suspense account" opened for that purpose, and of a balance due for works executed in previous years. The council from time to time paid these old debts by money borrowed from their bank by overdrafts, but, so far as the ratepayers were concerned, the items remained unpaid so long as they appeared in the suspense account. The appellant appealed against the rate on the ground that it contained charges incurred more than six months before the making of the rate, and it was held that the rate was bad. The Lord Chief Justice, 87 L. T. Rep., at p. 175, says: "It was said by the corporation that they had borrowed from their bank, and that it was true their accounts were going from bad to worse, and that they were owing their bank more and more, but they contended that they had paid their tradesmen and had paid their principal debts, and that the whole had become a debt due to the bank, and that, therefore, it must only be assumed at the end of the given financial year that they owed the bank so much money, and that it was to meet that debt that they made this rate. It seems to me that if that argument were allowed to prevail, a public body would only have to arrange with their bankers to borrow money to pay their debts and so defeat the provisions of the Public Health Act altogether. I cannot think that argument is right." Then Channell, J., explains clearly the true ground on which a ratepayer is entitled to complain at p. 176: "The objection means that any particular ratepayer is entitled to say that the rating authority are charging him with a sum that ought to have been charged upon and paid by the ratepayers in previous years. To that extent it is a meritorious objection. The principle is that corporations and bodies of this kind are only entitled to charge present expenditure upon future ratepayers so far as they get borrowing powers through the machinery of various statutes. The effect of a borrowing power, of course, is to enable them to charge upon future ratepayers instalments or obligations arising out of their present expenditure, and the borrowing power is granted upon the supposition that the capital expenditure will benefit the future ratepayers." I can see no ground for holding the overdrafts in the present case to be lawful, still less for allowing the treasurer to credit himself at the expense of the borough funds with 4½ per cent. interest thereon with quarterly rests.

The next objection is that the Municipal Corporations Act, 1882, had provided the remedy—namely, by *certiorari*, or there could be an appeal against the rate. This is really disposed of by the

judgment in *Attorney-General* v. *Aspinall*, but the very point has been recently dealt with in the House of Lords in *Tynemouth Corporation* v. *Attorney-General*, [1899] A. C. 293, where Lord Morris says at p. 305: "It is said, however, that there is a special mode of testing the validity of all orders of the council by the provisions of section 141, sub-section 2, enabling any order to be removed into the Queen's Bench Division by *certiorari*, and that consequently this is the only mode of interfering with or controverting any order of the council for a payment, however illegal. I cannot adopt that view. While the Queen's Bench Division is given full authority over every order of the council, it is not enacted, or suggested in the enactment, that that is to be the sole remedy, nor is there anything to deprive the Attorney-General, at the relation of a party interested, of the power of obtaining by injunction an order to restrain the payment of money being made under an order of the council, for which order there was no legal warrant." The defendant's next contention is that the accounts have been audited under the same Act, and that the plaintiff cannot question such audit. My attention has not been called to any section making such audit finally binding and conclusive on the borough and the burgesses thereof, and it would be very unfortunate if there were any such, for the audit provided by the Municipal Corporations Act is quite ineffective. Under the Public Health Act, 1875, s. 247, the Legislature provided a system of audit which gives auditors extensive powers, including powers to surcharge, but section 246 exempts urban authorities who are the council of a borough from this liability, and the Municipal Corporations Act, 1882, s. 27, merely provides that the auditors shall audit the accounts, without more. They have no power to surcharge, and even if they ought, as Lord Russell says in *Thomas* v. *Devonport Corporation*, [1900] 1 Q. B. 16, to make public any illegal payments by report to the council and the burgesses, this is a duty of imperfect obligation; there is nothing to compel them to do so, and very little to induce them, and so far as I know they have not done anything of the sort in the present case. It is difficult to understand why the Legislature in 1882 should have authorized a system of auditing which is quite illusory when they had seven years before created an efficient method. I certainly see no reason for holding that such an audit as has been put in evidence in the present case, which does not even state that the books and vouchers are correct, but merely that "there is a total overdraft of £4,510 3s. 11d. on the 31st of March, 1904," is a bar to proceedings against the treasurer to disallow some of the items which go to make up that overdraft. The defendant suggested that he might retain, the items objected to, by way of remuneration, but no evidence has been given to show that the council have ever voted him any remuneration, and the court is not asked to make any order for payment, but merely to declare that certain items charged as interest on overdrafts are wrong. There is a subsidiary point that arises on the harbour account. It is said that the overdraft has been recognized by the provisional order of 1902, and I will assume that this is so. But the order merely directs a larger rate than had been formerly lawful to be raised for the purpose of discharging the overdraft. It made no provision for the payment of interest on it. Indeed, the council failed to obtain permission of the Local Government Board to borrow the money which would have enabled them to pay interest, and this provisional order is the best permission that they could obtain instead of it. It is plain that there is nothing in this order to justify the defendant in charging interest on the deficit. It is fair to the defendant to say that no imputation of personal misconduct is made against him; the litigation and the preliminary correspondence have been conducted on courteous and even friendly terms with a view to ascertaining legal rights.

I propose to make a declaration that the defendant is not entitled to credit himself or to debit any of the borough funds with interest on any of the overdrafts appearing in the accounts heretofore put in by him as treasurer since his appointment. If the defendant will state by his counsel at the bar that he will not make any similar charges in future, I will accept his statement in lieu of granting an injunction, and give liberty to apply instead. Although by his letters before action he has, in my opinion, threatened and intended to continue to do so in such a way as to justify an injunction, I see no reason to suppose that he will not abide by the decision of the court now it has been decided, and there would be a practical inconvenience in framing an injunction, because some restriction of the generality of the words in the declaration would be necessary in providing for the future. All overdrafts are in effect borrowings (*Cunliffe* v. *Blackburn Benefit Building Society*, 33 W. R. 309, 9 App. Cas. 857); but if the borrowers obtain further powers of borrowing in the future they may be in a position to obtain overdrafts within the limits of those powers for daily necessities as pointed out by Channell, J., in *Smith* v. *Southampton Corporation*, and this would have to be provided for by way of exception from the injunction. The defendant must pay the costs of the action. I suppose the defendant is willing to say he will abide by the declaration?

R. C. Glen.—I have no doubt the defendant will give the required undertaking, but he is at present in the country. Your lordship will probably grant time for us to communicate with him.

FARWELL, J.—Yes. I thought he would probably think it less offensive, perhaps, than having an injunction. I am quite willing to accept his undertaking.

Judgment for the plaintiff.

Solicitors, *Smith, Rendell, & Dods*, for *Lort Stokes, Tenby*; *Baker & Co.*

Chan. Div. } April 4, 5, 6, 11.
Joyce, J. }

BROOKES v. HANSEN. (*a*.)

Company — Prospectus — Non-disclosure — Misleading statements — Sub-purchaser — Companies Act, 1900 (63 & 64 *Vict. c.* 48), *s.* 10, *sub-section* 1 (f).

A company is not a sub-purchaser within the meaning of section 10, *sub-section* 1 (f), *of the Companies Act*, 1900, *unless it has to pay purchase-money to someone other than its own vendor, and the sub-section does not require a company to state in its prospectus the amount of any consideration paid, or to be paid, by anyone other than the company.*

Action.

This was an action by Henry Brookes, a shareholder in the South African Superaeration (Limited) against Viggo Hansen and the Right Honourable the Earl of Kintore, directors of the said company.

(*a*.) Reported by P. JOHN BOLAND, Esq., Barrister-at-Law.

claiming damages for loss sustained by him by reason of certain alleged untrue and misleading statements contained in the prospectus of the company and the suppression of material facts therefrom.

The company was incorporated on the 1st of June, 1901, under the Companies Acts, 1862 to 1900, with a nominal share capital of £125,000, divided into 125,000 shares of £1 each.

The prospectus of the company was issued on the 1st of June, 1901, inviting persons to subscribe for shares in the capital of the company. This prospectus stated, *inter alia*, that the company was formed to work and develop the superaeration system of dispensing aerated waters from bulk in Cape Colony, Natal, Orange River Colony, Transvaal, and Rhodesia, and to acquire the benefit of the applications already made for letters patent for those colonies in relation thereto, and the exclusive rights to the letters patent when granted. The prospectus also stated that these patent rights had been acquired by the company from the African Patent Rights (Limited) for a sum of £58,500 under a contract dated the 1st of June, 1901. The prospectus further mentioned a contract dated the 11th of May, 1901. This contract was in fact an agreement for the sale of these patent rights by a Mr. Wheeler to the African Patent Rights (Limited) for a sum of £15,000; the purchase-money payable under this contract was borrowed by the African Patent Rights (Limited) and was only paid to Wheeler on the 31st of May, 1901, the day before the incorporation of the company and the issue of the prospectus. None of these facts were mentioned in the prospectus. The plaintiff received a copy of the prospectus, and applied for and was allotted eighty shares in the company. These shares turned out to be worthless, and the plaintiff accordingly commenced this action. The main question to be decided was whether there had been a sufficient compliance with the requirements of section 10, sub-section 1 (*f*), of the Companies Act, 1900, which provides that every prospectus issued by or on behalf of a company must state "the names and addresses of the vendors of any property purchased or acquired by the company, or proposed so to be purchased or acquired, which is to be paid for wholly or partly out of the proceeds of the issue offered for subscription by the prospectus, or the purchase or acquisition of which has not been completed at the date of publication of the prospectus, and the amount payable in cash, shares, or debentures to the vendor, and where there is more than one separate vendor, or the company is a sub-purchaser, the amount so payable to each vendor."

Younger, K.C., and *Ricardo*, for the plaintiff.—As the money necessary to complete the contract of the 11th of May, 1901, was borrowed by the vendors, Wheeler was really paid out of the proceeds of the issue, and the company is a sub-purchaser within the meaning of the sub-section. In order, therefore, to comply with the requirements of the sub-section, the prospectus should have disclosed the amount payable to Wheeler under the contract of the 11th of May. This the prospectus failed to do. Where there is a noncompliance with the statute, as in this case, a shareholder has a right of action: *Finance and Issue (Limited)* v. *Canadian Produce Corporation (Limited)*, 53 W. R. 170, [1905] 1 Ch. 37.

Hughes, K.C., and *Holmes*, for the defendants.—If A. sells to B., and B., after paying A., sells to C., that is not a sub-purchase, but an independent sale and purchase. A man is not a vendor under this sub-section unless some part of the purchasing company's money is going to him. It was not necessary, therefore, in this case that the prospectus should set out the amount payable to Wheeler under the contract of the 11th of May in order to comply with the requirements of the sub-section. But even if this were not so, the plaintiff must prove that when he applied for these shares his mind was affected by the nondisclosure of the terms of this contract: *Macleay* v. *Tait*, *ante*, p. 365, [1906] A. C. 24.

JOYCE, J., in giving a considered judgment, said: The principal ground on which the plaintiff based his action was the nondisclosure in the company's prospectus of the price paid to their vendor by the African Patents Rights (Limited), who were the vendors to the company. This depended upon the true construction of section 10, sub-section 1 (*f*), of the Companies Act, 1900. Now, the prospectus contained a sufficient statement of the name and address of the vendors to the company and of the full amount payable to such vendors, no consideration being payable or paid by the company to anyone else on account of or in connection with the purchase. But the property sold had been purchased by the vendors not long previously from someone else, and the purchase-money payable to him had in fact been discharged only the day before the issue of the prospectus, when completion of this prior purchase took place pursuant to the terms of the contract between the parties, and such contract was in truth completed to all intents and purposes so far as was possible, having regard to the nature of the property, being the benefit of applications for patents in South Africa not then actually granted. When a company was the purchaser of property which at law as well as in equity belonged to the vendor, the sub-section required the publication of the name and address of the vendor and the amount of the consideration. There was no suggestion of any obligation to disclose the amount of the purchase-money, however small, paid by the vendor upon his acquisition, however recent. A company was not a sub-purchaser for the purposes of this sub-section unless it had to pay purchase-money to someone other than its own vendor—*e.g.*, the vendor or person from whom such immediate vendor purchased. The sub-section did not require a statement in a company's prospectus of the amount of any consideration, cash, shares, or debentures paid or to be paid by anyone other than the company. Upon the facts and documents in the present case it did not appear that this sub-section required any statement to be made of the amount of purchase-money actually paid and discharged by the company's vendors before the issue of the prospectus to the person or persons from whom the company's vendors had bought the property, and the fact that the company's vendors borrowed the money for the purpose of making such payment was immaterial. The company was not a sub-purchaser within the sub-section. Moreover, all the consideration payable by it was disclosed. There had been no failure in this case to comply with the provisions of this sub-section. The action therefore failed, and must be dismissed with costs.

Judgment for the defendants.

Solicitor for the plaintiffs, *Joseph Davis*.

Solicitors for the defendants, *Ingle, Holmes, Sons, & Pott*.

Chan. Div. Warrington, J. March 31; April 3.

In re EARL OF EGMONT'S SETTLED ESTATES. LEFROY *v.* EARL OF EGMONT. (*a.*)

Settled land—Scheme for improvements—Approval of trustees—Discretion of trustees—Power of tenant for life—Settled Land Act, 1882 (45 & 46 *Vict.* c. 38), *ss.* 25, 26.

A settlement of real estate expressly added certain works or purposes of improvements to those mentioned in section 25 *of the Settled Land Act,* 1882, *for which capital money might be used, and expressly authorized capital money to be raised for improvements as well as for the other purposes mentioned in section* 18. *The trustees having already approved of schemes submitted to them by the tenant for life under section* 26, *which had involved outlay of money, and would involve in the future further outlay, and having been asked by the tenant for life to approve of a further scheme, applied by summons to the court for directions whether, before deciding to approve or withhold their approval from such schemes, they might properly have regard to* (a) *the number of previous schemes and the amount of capital already expended or liable to be called for thereunder;* (b) *the general connection between the improvements mentioned in the scheme proposed for their approval with improvements contained in schemes already sanctioned, or the general policy which is being pursued by the tenant for life in improving the property;* (c) *the proportion between the probable cost of the improvements mentioned in the proposed scheme and the probable increased annual value of the estate;* (d) *the amount of capital moneys in their hands and the relation between such amount and the value of the estate.*

Held, that the general policy of the improvement was a matter for the tenant for life and not for the trustees to decide on; and that, there being no difficulty in obtaining capital money, having regard to the power in the settlement, the trustees might properly approve of any scheme where they were satisfied (1) *that the improvement was within section* 25, *and* (2) *that the tenant for life was acting* bonâ fide; *and that they were not bound to take into consideration the various matters mentioned in the summons.*

Originating summons.

This was a summons by the trustees for the purposes of the Settled Land Acts of a settlement of the 15th of August, 1889, of the estates of the Earl of Egmont for the directions of the court as to the circumstances which they should take into account in considering schemes for improvement of the estates submitted to them by the tenant for life for their approval.

By the limitations declared by the settlement and in the events which had happened certain lands and hereditaments stood limited by way of legal limitations to the use of the Earl of Egmont during his life or until he should become a bankrupt or do any act depriving himself of his right to receive the rents and profits, and after his death to the use of his brother C. J. Perceval as tenant for life, and after his death to the use of his first and other sons successively in tail male, with remainders over.

And by the said indenture of settlement it was agreed and declared (among other things) that the trustees for the time being were to be the trustees of the settlement for the purposes of the Settled Land Act, 1882, and any amending Acts, and for the purpose mentioned in section 42 of the Conveyancing and Law of Property Act, 1881, and "Fourthly, for the like purpose"—the purposes of the Settled Land Act—"section 25 of the Act last aforesaid"—the Settled Land Act, 1882—"shall be read and take effect as if in addition to the works or purposes of improvements therein enumerated there were inserted therein the words 'rebuilding, reparation, or permanent improvement, or additions of or to building of any description, whether used or occupied for residential, farm, or other purposes'"; and, "Fifthly, for the like purpose, section 18 of the Act last aforesaid shall be read and acted upon as if the words 'or for improvements' were inserted in that section immediately after the word 'partition' therein."

The defendant, Lord Egmont, succeeded to the title and to the estates in 1897.

The estates subject to the settlement at the time of the summons comprised (among other property) a mansion-house, park, and land known as the Cowdray Park Estate, consisting of some 16,000 acres, and capital moneys liable to be invested in land of more than £250,000 in amount.

The earl had submitted various schemes for the improvement of the estate to the trustees which they had approved of, and which had been partly carried out, and in connection with which further sums, amounting to some £11,000, might become payable, and had to be provided for. He had again, shortly before the summons, submitted a further scheme for additional works of reparation and improvement which it was estimated would involve an outlay of between £4,000 and £5,000. And the trustees were informed by Lord Egmont's advisers that schemes of the same kind in reference to the Cowdray Park Estate would from time to time be submitted to them for their approval by Lord Egmont.

There was uncertainity as to who were the persons entitled in remainder after the present earl, and the residence of the probable claimants was believed to be abroad, but was unknown, and the trustees were unable to communicate with them.

Under these circumstances the trustees desired to have the directions of the court for their present and future guidance, and they took out this summons against the tenant for life asking whether, upon the true construction of the settlement and the Settled Land Acts, 1882 to 1890, before deciding to approve or withhold their approval from schemes for the execution of improvements falling within the powers of the Settled Land Acts as extended by the settlement, they might properly have regard to all or any of the following matters: (*a*) The number of previous schemes and the amount of capital already expended or liable to be called for thereunder; (*b*) the general connection between the improvements mentioned in the scheme proposed for their approval with improvements contained in schemes already sanctioned or the general policy which is being pursued by the tenant for life in improving the property; (*c*) the proportion between the probable cost of the improvements mentioned in the proposed scheme and the probable increased annual value of the estate; and (*d*) the amount of capital moneys in their hands, and the relation between such amount and the value of the estate.

Rowden, K.C., and *R. J. Parker,* for the trustees.—The function of the trustees is not merely to consider whether the improvement is one authorized by the Settled Land Act, 1882, ss. 25 and 26. They have a further discretion to approve or not of the scheme put forward by the tenant for life. This is shown by the observations of Byrne, J., in *In re Duke of Norfolk's Parliamentary Estates,* 48 W. R., p. 329, [1900] 1 Ch., p. 467, cited with approval by Farwell, J., in *In re Keck's Settled Estates,* 52 W. R., p. 363, [1904] 2 Ch., p. 27. It seems clear that the approval

(*a.*) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

of the trustees which is required by section 26 means something more than seeing whether the proposal of the tenant for life is within the terms of the Act. It is intended to afford protection to the remaindermen: see observations of Lindley, L.J., in *In re Millard's Settled Estates*, 41 W. R. 577, [1893] 3 Ch., p. 120. This implies a discretion in the trustees. And Chitty, J., in *Clarke* v. *Thornton*, 35 W. R., p. 603, 35 Ch. D., p. 313, speaks of the exercise of the approval of the trustees as a "discretionary trust."

They also referred to *In re Marquis of Bristol's Settled Estates*, 42 W. R. 46, [1893] 3 Ch. 161, and *In re Calverley's Settled Estates*, 52 W. R. 206, [1904] 1 Ch. 159.

H. Terrell, K C., and *A. F. Petersen*, for the Earl of Egmont.—It is for the tenant for life to determine the general policy to be pursued in improving the estate. All the trustees have to do is to decide whether the improvement proposed comes within sections 25 and 26. All the cases cited are consistent with this view. It is clear that the surveyor acting under section 26 (2) (ii.) could not, if satisfied with the execution of the improvement, have refused his certificate upon the ground that the whole improvement was mistaken; and the trustees are allowed to act upon his certificate. The tenant for life has a wide discretion, and should not only consider the estate, but the welfare of the people living on it: per Bowen, L.J., in *In re Marquis of Ailesbury's Settled Estates*, 40 W. R., p. 248, [1892] 1 Ch., p. 542.

WARRINGTON, J.—The question I have to decide is, shortly, whether or not the trustees of the settlement may properly inquire under section 26 of the Act into the entire policy pursued by the tenant for life with reference to the improvement of the settled estates. This question has never arisen directly in the courts, although the Settled Land Act has been in operation more than twenty-three years. There are to be found only certain remarks made by judges in certain decided cases on other questions arising under the Act which throw some light on what, without having had the matter argued before them, these judges thought was the proper construction of this section. The settlement in this case contains a provision which adds to the works or purposes of improvements enumerated in section 25 of the Act, an item of very wide application, having regard to the word "reparation," which has been held, as I understand, by Byrne, J., to authorize the tenant for life to treat as an improvement any repairs which are not simply decorative repairs. And by the addition made to section 18 by the settlement the tenant for life can get improvements executed, although there may be no capital moneys in the hands of the trustees, by determining under that section that moneys shall be raised by mortgage of the estate. Next, the definition of land must be considered. Land which is the subject of the settlement is by section 2 (3) called "settled land"; and when it is referred to in relation to the settlement it is called "the settled land," by which are meant quite separate things. If land is spoken of without reference to the settlement itself it is simply called "settled land." By section 21 capital money arising under the Act shall be invested or applied (amongst other modes), (iii.) in payment for any improvement authorized by the Act. By section 22, sub-section 1, the capital money in order to its being invested or applied as aforesaid shall be paid either to the trustees of the settlement or into court at the option of the tenant for life; and by sub-section 2, the investment or other application by the trustees shall be made according to the direction of the tenant for life. It is therefore the tenant for life who directs not only the investment, but the dealing with the funds, which is described in section 21 as their "application," in payment for any improvement. Section 25 defines improvements authorized by the Act as the making or execution on or in connection with, and for the benefit—not of "the settled land," but of "settled land"—that is, according to the definition in section 2 (3), for the benefit of land the subject of the settlement. The controversy in this case turns on section 26. [His lordship read sub-section 1 of that section.] Therefore the direction of the tenant for life as to the application of capital money given under section 22 would be of no avail, and would have no effect upon the trustees if the application which he was directing was in payment for something which was not an improvement authorized by the Act. The tenant for life has therefore to satisfy the trustees that what he is proposing is such an improvement. Now, the trustees have not to approve the improvement itself, but a scheme for the execution of the improvement. It is, therefore, for the tenant for life to select and decide on what he wishes to have done, and for the trustees to approve the mode in which that shall be carried into effect. Then by sub-section 2, where capital money is in the hands of trustees after a scheme—that is, a scheme for the execution of the works—is approved by them, they may apply that money in payment of any work or operation comprised in the improvement, on—taking it shortly—(i.) a certificate of the land commissioners certifying that the work has been executed, and that a particular sum ought to be paid in consideration thereof; or on (ii.) a like certificate of a competent engineer or able practical surveyor. These are merely modes of ascertaining that the scheme has been carried out, and that the money is properly payable by the trustees. There is a third alternative—namely, (iii.) on order of the court directing or authorizing the trustees to apply a specified portion of the purchase-money. Under that third sub-clause it was held in *In re Keck's Settlement* that the court had not to perform the function of an engineer or surveyor, and merely see whether the work had been carried out, but had to repeat over again what has, and in that case had, to be done by the trustees—namely, to consider the scheme. A good deal of controversy has turned upon the remarks made by Farwell, J., in that case in reference to what the court will pay attention to in considering a scheme. Now, it is to be observed that by sub-section 3 of section 26 powers are given to the court in dealing with the scheme—that is, the scheme for the execution of the improvement—of either allowing or disallowing expenditure much wider than those given to the trustees. Therefore, in my view, and apart from authority, having regard to section 26 alone, and comparing it with the other sections forming the *fasciculus* of sections relating to improvements, the duty of trustees is confined to seeing that the improvement proposed is really an improvement authorized by the Act—that is to say, that it is for the benefit of some land comprised in the settlement; and further, to seeing that the scheme for the execution of that improvement is a proper scheme for carrying out that improvement; and, in this connection, they would incidentally be justified in satisfying themselves that in preparing and submitting the scheme for their approval the tenant for life was acting under competent skilled advice in reference to the execution of the improvement. One has also in every case where the proposal of a tenant for life is being considered to consider section 53. The trustees therefore must consider whether or not what the tenant for life is proposing is outside his position as a tenant for life acting with regard to the interests of all parties, and deemed to be in the position of a trustee

for them. My view, therefore, is—putting it concisely—that the general policy of the tenant for life as to the improvements he may propose is not a matter with which the trustees are concerned. Now, looking at the matters mentioned in the summons on the above assumption, the matters mentioned as (*a*), cannot be material in this case where the tenant for life has unlimited power to provide money for improvements. If a scheme were submitted to the trustees for which there were no capital moneys in hand, the questions would arise which were determined in *In re Millard's Settled Estates* and *In re Duke of Norfolk's Parliamentary Estates*. But except in such a case it seems to me that the trustees have nothing to do with the amount of money which has been expended or the amount of money which they have in their hands. Again, the matter mentioned in (*b*), is not one which the trustees have to consider, but is a matter for the tenant for life, who is intended by the Act to have the control of the management of the settled estate. As regards the matter (*c*), it is possible that in some modified form it might be taken into account in considering whether the scheme is or is not for the benefit of settled land. But beyond that I do not think it is the duty of the trustees to consider it. As regards matter (*d*), in this case, at all events, I do not think that the trustees should take it into account because of the powers of raising money given to the tenant for life.

Next, is there anything in any of the authorities which have been cited which prevents me coming to the conclusion I have expressed on the construction of the Act itself? The two earlier authorities of *In re Millard's Settled Estate* and *In re Marquis of Bristol's Settled Estate* really do not help at all. *In re Keck's Settled Estate* throws most light on the case. It was there decided that where an application is made under section 26 for an order directing the trustees to apply capital money in payment for the improvements, the court is entitled and bound to consider if such expenditure is proper for the improvement. The scheme there had been approved by the trustees and the work had been done. Farwell, J., in that case read a passage from the judgment of Byrne, J., in *In re Duke of Norfolk's Parliamentary Estates*, as follows: "The scheme of the Act is to give wide powers to the tenant for life and to give powers of consent to trustees upon the footing that they will act fairly in the exercise of their respective powers, and that neither trustees nor the court will sanction schemes which are improvident or which will unduly fetter any discretion which ought to be exercised at a later date, and there is always the safeguard that tenants for life joining in improvident schemes, or not acting with a due regard to the interest of the remainderman, are running the risk of the possible establishment of a personal liability against themselves." That, of course, is a liability under section 53. It has been said on behalf of the trustees that the expressions "an improvident scheme," "consent of the trustees being required," "the tenant for life is putting forward improvements which, though honest, are so utterly wrongheaded that they ought not to be sanctioned," used by Farwell, J., and Byrne, J., in those cases, show that these learned judges thought that the trustees had a discretion to exercise much wider than that which I have come to the conclusion is vested in them. But when these expressions are considered with reference to the points argued in those cases they cannot be carried so far as suggested, and they are satisfied if the discretion of the trustees is confined, as I propose to confine it—namely, to considering, first, whether the scheme is for the benefit of the settled land; secondly, whether the scheme for the execution of the improvements is a proper scheme; and thirdly, whether in proposing the scheme the tenant for life is acting within the restrictions imposed upon him by section 53. I propose therefore to make the following order: "Declare that the trustees may properly approve any scheme where they are satisfied (1) That the improvement is within the 25th section of the Act as enlarged by the settlement; and (2) that the tenant for life is acting *bonâ fide*; and on obtaining advice as to the improvement proposed, the amount to be expended thereon, and the method of execution thereof; and that they are not bound to take into consideration the various matters mentioned in the summons."

Solicitors, *Littledale & Lefroy; Nash, Field, & Co.*

K. B. Div.
(Lord Alverstone, L.C.J., and Lawrance and Ridley, JJ.) — Dec. 19.

LAIRD (*Appellant*) *v.* DOBELL AND ANOTHER (*Respondents*). (*a*.)

Sale of goods—Feeding stuff—Sale—Causing or permitting invoice to be given false in material particular—Guilty knowledge—Fertilizers and Feeding Stuffs Act, 1893 (56 & 57 *Vict. c.* 56), *s.* 3, *sub-section* 1 (b).

It is not necessary that there should be guilty knowledge in order to constitute an offence under section 3, *sub-section* 1 (b), *of the Fertilizers and Feeding Stuffs Act*, 1893.

Korten *v.* West Sussex County Council, 72 *L. J. K. B.* 515, 51 *W. R. Dig.* 173, *followed.*

Case stated by justices.

An information was preferred by the appellant against the respondents, charging them with having sold to one Davies, as food for cattle, five tons of finest Galveston decorticated cotton seed cake meal, being an article manufactured in the United Kingdom or imported from abroad, and with having unlawfully caused or permitted an invoice or description of the same to be given to the purchaser which was false in a material particular to the prejudice of the purchaser, in that it described the article as containing 58 per cent. of oil and albuminoids, whereas in truth and in fact the said articles only contained 51 per cent. of oil and albuminoids, and also unlawfully did abet, counsel, or procure the commission of the said offence contrary to section 3, sub-section 1 (*b*), of the Fertilizers and Feeding Stuffs Act, 1893.

At the hearing of the information it was proved that in answer to a letter from Davies the respondents wrote to him quoting a price for the meal, "guaranteed 58 per cent. oil and albuminoids."

The appellant, who was chief inspector of the Weights and Measures Department of the Cheshire County Council, took an average sample of the meal supplied to Davies by the respondents, and the analysis showed that it contained only 51 per cent. of oil and albuminoids.

One of the respondents gave evidence before the justices, and stated that the meal formed part of a consignment of 200 tons, and that when it arrived samples were taken under the direction of the respondents and forwarded to their analyst for analysis, and that they received from him a certificate certifying that the samples contained over 60 per cent. of oil and albuminoids. The witness had invoiced and sold at 58 per cent. believing it to be a

(*a*.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

true statement, and that he had no idea of making by a false description an additional profit which would be a mere trifle. He further deposed that he relied entirely upon the analysis and had sold the meal to Davies upon such analysis.

The analyst employed by the respondents was called, and deposed that the samples analyzed by him contained 60·27 per cent of oil and albuminoids.

The justices were of opinion that the alleged offence had not been proved, as they considered that no evidence had been given that the respondents knowingly supplied meal not of the quality demanded, or were aware that the meal was not of the quality guaranteed, and that the remedy was a civil action by the purchaser in a county court, and they accordingly dismissed the information and summons.

The question for the court was whether the justices came to a correct decision in point of law.

Bankes, K.C., and *Trevor Lloyd*, for the appellant.

W. F. Taylor, K.C., and *F. E. Smith*, for the respondents.

Lord ALVERSTONE, L.C.J.—This is undoubtedly a hard case, because the respondents before sending out the description of the goods had the stuff analyzed, and the statement made by them was based on the result of that analysis. But these facts do not in law constitute a defence to the charge under section 3, sub-section 1 (*b*), of the Fertilizers and Feeding Stuffs Act, 1893, which enacts that "if any person who sells any article for use as a fertilizer of the soil or as a food for cattle commits any of the following offences—namely: . . . (*b*) causes or permits any invoice or description of the article sold by him to be false in any material particular to the prejudice of the purchaser . . . he shall without prejudice to any civil liability be liable on summary conviction" to a penalty. In *Korten* v. *West Sussex County Council*, 72 L. J. K. B. 515, 51 W. R. Dig. 173, Wills, J., and myself (Channell, J. *dissentiente*) held that a person who causes or permits the invoice or description of the article sold to be false in any material particular—although he may have no personal knowledge of the falsity, is nevertheless guilty of an offence under that section. In my opinion the view we then expressed is correct, and it certainly is supported by sub-section 3 of section 3, which enables a person convicted under sub-section 1 to recover damages from his vendor and to include in the damages the amount of the fine and the costs. Moreover, if it be necessary to prove guilty knowledge, I can see no distinction between the words "causes" and "permit" in sub-section 1 (*b*). I think the object with which those words were used was to protect the purchaser where the description of the article sold was false in fact, though not false to the knowledge of the vendor.

If that is the right construction of the section, then it makes no difference in law that the respondents before giving the description of the article sold had caused it to be analyzed. It is not disputed that the stuff sold to Davies was not in accordance with the description, and the case must therefore go back to the justices to convict.

LAWRANCE, J.—I am of the same opinion.

RIDLEY, J.—I am not prepared to differ, but I am not sure how I should have decided this case but for the previous decision.

Appeal allowed.

Solicitors for the appellant, *Busk, Mellor, & Norris*, for *Cooke*, Winsford.

Solicitors for the respondents, *North, Kirk, & Co.*, Liverpool.

K. B. Div. (Channell, J.) — Dec. 15.

YOUNG *v.* KINGSTON-ON-THAMES, SURBITON, AND NEW MALDEN JOINT BURIALS COMMITTEE. (*a.*)

Burial-ground—Erection of monument—Right of incumbent to fees in respect of—Burial Act, 1900 (63 & 64 *Vict. c.* 15), *s.* 3, *sub-section* 4 (1).

By the Burials Act, 1900, *s.* 3, *sub-section* 4, *it is enacted that "no fee shall be payable to any incumbent in respect of any right of exclusive burial, or the erection of a monument, or any other matter whatsoever, in any burial-ground maintained by a burial authority except for services rendered him," but a proviso to the section preserved the rights of incumbents in "burial-grounds . . . laid out and used before the passing of this Act."*

Held, that the above proviso did not apply to additional land which had been purchased by the local authority for the purpose of being added to the existing burial-ground, and which had been, previous to the passing of the Act, laid out as a burial-ground, but in which no burials had in fact taken place till subsequent to the passing of the Act, and that the incumbent was not therefore entitled to the fees claimed by him in respect of the erection of monuments on the additional land.

Action before Channell, J., without a jury.

The plaintiff's claim was for a declaration that as vicar of the parish of All Saints, Kingston-on-Thames, he was entitled in respect of the erection of monuments in any part of the defendants' burial-ground to such fees as were payable to him as such vicar in respect of the erection of monuments in the said burial-ground before the passing of the Burial Act, 1900, and that it was the duty of the defendants to collect such fees and pay them to the plaintiff.

The following statement of facts had been agreed upon by the parties:

"The plaintiff is the vicar of All Saints', Kingston-upon-Thames He was instituted and inducted into the vicarage in 1877.

"At the time of the formation of the burial board hereinafter mentioned the ecclesiastical parish of All Saints formed part of the then civil parish of Kingston-on-Thames, the residue of the area of such civil parish being then divided into several ecclesiastical parishes which had at one time been included in the ecclesiastical parish of All Saints, Kingston-on-Thames, but which had been separated therefrom under the provisions of the Church Building Acts and New Parishes Act, and which from the time of such separations respectively had been separate and distinct ecclesiastical parishes.

"There was at the time of the formation of the board a consecrated churchyard surrounding the parish church of All Saints, and a detached consecrated graveyard known as the 'New Burial ground,' which was provided as an extension of the churchyard. The vicar of All Saints was entitled to receive, and did receive before the formation of the board, certain sums or fees in respect of burials and in respect of the erection of monuments, gravestones, and tablets in the churchyard and extension, and also in respect of rights of burial in vaults in the churchyard and extension.

"In 1854 a burial board was formed for the old civil parish of Kingston-on-Thames under the provisions of the Burial Acts then in force, and a site of about seventeen acres of ground was purchased by the board for the purpose of providing a burial-ground for the parish.

"A portion of this site was laid out and enclosed

(*a.*) Reported by ALAN HOGG, Esq., Barrister-at-Law.

by walls and railings and was used for burials. This portion was divided into consecrated and unconsecrated parts in the manner sanctioned by the Home Secretary.

"Shortly after this burial-ground was acquired and appropriated for burials the churchyard of All Saints and the extension were closed for burials by Order in Council.

"Under the provisions of section 33 of the Burial Act, 1852, as extended by the Burial Act, 1853, the vicar of All Saints for the time being became entitled to receive certain fees or sums of money for burials, and in respect of monuments, gravestones, and tablets erected in the consecrated part of the burial-ground provided by the burial board, and in respect of vaults and rights of burial in the consecrated part, in lieu of the fees or sums which he would have been entitled to on the grant of the like rights in the churchyard and extension. Between 1854 and 1893 additional portions of the seventeen acres acquired by the burial board were from time to time enclosed and added to the consecrated and unconsecrated parts of the burial-ground in the manner sanctioned by the Home Secretary until the whole area of seventeen acres was included in the burial-ground. The whole of the area of the seventeen acres was used or available for burials; the area was bounded on the south by a stream, on the east and west by brick walls erected by the burial board, and on the north by a road. No distinction was ever made between the various consecrated parts of the said seventeen acres as regards the right of the vicar of All Saints to receive the before-mentioned fees or sums, and as regards the receipt thereof by the burial board and the payment over thereof to him. In 1893 the board purchased eight acres of land adjoining their burial-ground of seventeen acres and put up a notice board stating thereon that the ground had been acquired for, and was intended to be used for, burial purposes. These eight acres adjoined the seventeen acres on the west side, but were separated from them by the western wall of the burial ground. Under the provisions of the Local Government Act, 1894, the old civil parish of Kingston-on-Thames was divided into and became four civil parishes—namely, Kingston-on-Thames, Surbiton, New Malden, and Coombe—and all the property, powers, duties, and liabilities of the burial board were transferred to the defendants, and the two areas consisting of seventeen acres and eight acres respectively became by operation of law vested in the defendants.

"In 1899 the wall forming the western boundary of the seventeen acres was lowered by the defendants to within one foot of the ground on the side of the seventeen acres, which was higher than the eight acres by about three feet, and communication between the old and new portions of the cemetery was effected by means of a flight of steps at one point for pedestrians, and a slope for a carriage-way at another point, and the defendants laid out and adapted the eight acres for burial purposes, so that the area of eight acres might be used for burials when actually required. No portion of the eight acres was required or used for burials until November, 1902.

The additional area of eight acres was divided into consecrated and unconsecrated parts in manner sanctioned by the Home Secretary. Such sanction was given on the 13th of June, 1900. The consecrated part was consecrated on the 13th of October, 1900. The first burial in the area comprised in the eight acres in November, 1902, was in the consecrated portion.

"The defendants from the time of the transfer to them of the property, powers, duties, and liabilities of the burial board up to the time of the passing of the Burial Act, 1900, have paid over to the vicar of All Saints for the time being the before-mentioned fees or sums in respect af the consecrated portions of the area of seventeen acres. They also admit the right of the plaintiff as such vicar to continue to receive the like fees or sums since the passing of the Burial Act, 1900, in respect of monuments and other matters arising in the consecrated part of the seventeen acres, and to have such fees or sums collected by the defendants and paid over to him, and the defendants have continued to collect and to pay over such fees or sums to the plaintiff since the passing of that Act. But having regard to the provisions of section 3, sub-section 4, of that Act they have retained in hand the before-mentioned fees for the erection of monuments, gravestones, and tablets pending a judicial decision as to whether or not such fees are by law payable to the plaintiff."

By the Burial Act, 1900 (63 & 64 Vict. c. 15), s. 3, sub-section 4, "Subject to the provisions of this section no fee shall be payable to any incumbent of a parish in respect of any right of exclusive burial, or the erection of a monument, or any other matter whatsoever, in any burial-ground maintained by a burial authority, except for services rendered by him, and this enactment shall apply to any such fee which is by law or custom payable to the churchwarden of any parish or to trustees or other persons for any parochial purpose, or for the discharge of any debt or liability in like manner as it applies to fees payable to an incumbent. Provided as follows: (1) Where at the passing of this Act fees other than for services rendered are payable in respect of any matter arising in any burial-ground attached to or used for the purposes of a parish, and laid out or used before the passing of this Act, the like fees shall continue to be paid during the incumbency of the person who, at the passing of this Act, is the incumbent of the parish, or during a period of fifteen years, whichever is longer, or if the fees are not paid to the incumbent, or to any person claiming through or under him, then during the said period of fifteen years, and shall be applicable to the like purposes as heretofore, and the burial authority shall collect and pay these fees in like manner as the fees to be paid for services rendered."

A. B. Kempe, for the plaintiff.—The eight acres were an addition to the burial-ground and they form part of that ground. The eight acres together with the seventeen acres form one burial-ground which was laid out and used before the Act of 1900, and it therefore falls within the operation of the proviso to section 3, sub-section 4, of the Act of 1900, and the fact that no burial had actually taken place within the eight acres makes no difference.

He cited *In re Ponsford and Newport District School Board*, [1894] 1 Ch. 454.

Lewis Thomas, for the defendants.—The plaintiff could not have got fees in respect of the eight acres previous to 1900 because it had not then been used as a burial-ground. The eight acres and the seventeen acres in fact constitute two separate burial-grounds.

Kempe replied.

CHANNELL, J.—The question raised by this case is one of some difficulty, because I suppose that facts exactly like these could not have been contemplated when the Act was drafted. The plaintiff's claim is in form for a declaration as to his rights to fees in respect of the erection of monuments in any part of the defendants' burial-ground, but what I have really to consider is whether the plaintiff would be entitled to a fee in respect of a monument erected in the consecrated portion of the eight acres of ground. It is

agreed that unless the case comes within the first proviso to section 3, sub-section 4, of the Burial Act, 1900, the plaintiff cannot succeed. The question is not whether the proviso gives the plaintiff the right to the fees, but whether it preserves it to him, for the Act obviously intended to preserve for a limited time the rights of incumbents, and a test is laid down as to the state of things which must have existed previously to the passing of this Act in order that these vested rights may be preserved. Further, the rights intended to be preserved are, as it seems to me, rights which are vested in an incumbent in respect of a particular locality—namely, a burial-ground, formerly called a churchyard—and not in respect of his office as an incumbent. The question which I have to determine is what land it is in respect of which it was intended to preserve these vested rights. The difficult words in the proviso are: "Attached to or used for the purposes of a parish and laid out and used before the passing of this Act." Can I say that a monument erected in the consecrated part of the eight acres is in a burial-ground which was "used before the passing of this Act"? I think there is great difficulty in so holding, because it would follow that whenever within fifteen years after the passing of the Act of 1900, an addition is made to an existing burial-ground the incumbent would be given fees in respect of that addition. I do not think that can have been intended. The words "and used" were introduced, as I think, for the express purpose of limiting the vested rights to rights on land actually used in some substantial sense before the passing of this Act. I think, therefore, that for the purposes of this section the eight acres must be treated as a separate burial-ground from the seventeen acres. The plaintiff had, I think, at the time this Act was passed no vested rights within the meaning of the proviso to sub-section 4.

It is not without considerable doubt that I have come to the conclusion that my judgment must be for the defendants.

Judgment for defendants.

Solicitors for the plaintiff, *Day & Son.*

Solicitors for the defendants, *Durham, Carter, & Durham.*

Court of Appeal.

From K. B. Div. (Vaughan Williams, Stirling, and Moulton, L.JJ.) — May 3.

STUCKEY AND OTHERS *v.* HOOKE. (*a.*)

Factory Acts—Underground bakehouse—Certificate of local authority—Expenses of structural alterations—Apportionment—Landlord and tenant—Covenant to pay outgoings—Right of action—Factory and Workshop Act, 1901 (1 *Ed.* 7, *c.* 22), *s.* 101, *sub-section* 8.

Where a local authority refuses to certify, under section 101, *sub-section* 2, *of the Factory and Workshop Act,* 1901, *that an underground bakehouse is suitable to be used as such, unless certain structural alterations are made, by sub-section* 8 *of that section a court of summary jurisdiction is appointed the sole tribunal to determine whether the owner ought to bear the whole or any part of the expenses of the alterations, and for that purpose to apportion the expenses between the owner and the occupier; and where the owner has made the alterations, he has no right of action against the occupier to recover from him the expenses thereof under a covenant in a lease whereby the occupier has agreed to pay all "outgoings."*

Horner *v.* Franklin, [1905] 1 *K. B.* 479, 53 *W. R. Dig.* 41, *followed.*

Goldstein *v.* Hollingsworth, [1904] 2 *K. B.* 578, 53 *W. R. Dig.* 59, *and* Morris *v.* Beal, [1904] 2 *K. B.* 585, 53 *W. R. Dig.* 60, *distinguished.*

Appeal from a judgment of Warrington, J.

By a lease dated the 24th of March, 1886, the plaintiffs' predecessors in title demised a house and premises (now situate in the metropolitan borough of Islington), which were used as a baker's shop with an underground bakehouse, for the term of twenty-one years from the 24th of June, 1888, at the yearly rent of £65; and the lessee covenanted with the lessor that he would "during the said term bear, pay, and discharge the main drainage and sewers rate and all other Parliamentary and parochial rates and taxes, and all burdens, duties, assessments, outgoings, and impositions whatsoever which now or at any time or times during the said term shall be rated, taxed, charged, assessed, or imposed on the said premises hereby demised, or any part thereof, or upon the landlord or tenant in respect thereof, or of the rent hereby reserved (landlord's property tax only excepted); and that he the said lessee shall and will from time to time and at all times during the said term at his own proper costs and charges well and sufficiently repair, uphold, support, sustain, amend, maintain, pave, purge, scour, cleanse, preserve, and keep in good and substantial repair and condition" the demised premises.

The defendant, before the year 1903, became the assignee of the term comprised in the lease, and occupied and used the underground bakehouse as such. In 1903 the Islington Borough Council refused to certify, under section 101, sub-section 2, of the Factory and Workshop Act, 1901, that the underground bakehouse was suitable for the purpose of being used as such, unless structural alterations were made. The plaintiffs and the defendant were unable to agree as to the apportionment of the expenses of the structural alterations necessary to obtain the certificate, and the defendant accordingly laid an information before a metropolitan magistrate under section 101, sub-section 8, of the Act, and obtained a summons calling upon the plaintiffs to show cause why the cost of the structural alterations should not be borne by them, or in the alternative why the lease should not be determined. The parties appeared before the magistrate, who ordered that the estimated expenses of the agreed structural alterations—namely, £200—should be apportioned as follows: Three-fourths to be paid by the plaintiffs and one-fourth by the defendant. The plaintiffs submitted plans of the proposed alterations to the defendant and demanded from the defendant the £50, and executed the work at a cost of £170 10s. 1d.

The plaintiffs brought this action to recover the £170 10s. 1d. from the defendant under the covenant in the lease, and in the alternative £50 as money paid by them for and at the request of the defendant. The defendant admitted that he owed the £50, and paid this amount into court.

Warrington, J., held, upon the authority of *Goldstein* v. *Hollingsworth*, [1904] 2 K. B. 578, 53 W. R. Dig. 59, and *Morris* v. *Beal*, [1904] 2 K. B. 585, 53 W. R. Dig. 60, that the defendant was liable under the covenant in the lease to pay the whole of the expenses, and he gave judgment for the plaintiffs for the amount claimed, giving credit for the £50 paid into court.

The defendant appealed.

Danckwerts, K.C., and *D. M. Kerly,* for the defendant.—The case is governed by the decision of this

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

court in *Horner* v. *Franklin*, [1905] 1 K. B. 479, 53 W. R. Dig. 41. There the lessees of a factory covenanted to pay "outgoings" of every description, and the landlord expended money in complying with the requirements of the local authority under section 7, sub-section 2, of the Factory and Workshop Act, 1901, providing proper means of escape in case of fire, and it was held that the landlord could not recover the sums so expended from the lessees by action, but that his only remedy was under section 7, sub-section 2, by application to the county court. It was further held that in determining what was just and equitable the county court judge must take into consideration the terms of the tenancy expressed or implied. That sub-section is now reproduced in section 14, sub-sections 2, 3, and 4, of the Factory and Workshop Act, 1901. The present case comes within section 101 of the Act of 1901, and sub-section 8 of that section is similar to section 14, sub-section 4, except that a court of summary jurisdiction is the tribunal to determine the question, and not a county court, and there is an express provision that in determining what is just and equitable, regard must be had to the terms of any contract between the parties, and power is given to the court at the request of the occupier to determine the lease. Section 101, sub-section 8, therefore excludes the jurisdiction of any court other than a court of summary jurisdiction, which is appointed the sole statutory tribunal to determine the question. *Goldstein* v. *Hollingsworth*, and *Morris* v. *Beal*, upon which Warrington, J., relied, are not in point. They are decisions upon cases stated by magistrates, and the question in each case was whether the magistrate was right in making the order which he did. The magistrate clearly had jurisdiction, and the Divisional Court was exercising an appellate jurisdiction. If, however, those cases or the reasoning in them are inconsistent with *Horner* v. *Franklin*, they ought not to be followed. [*Monk* v. *Arnold*, 50 W. R. 667, [1902] 1 K. B. 761, was also referred to.] Further, there was no obligation on the tenant to incur these expenses, and therefore they were not outgoings "rated, taxed, charged, assessed, or imposed" within the covenant, and the plaintiffs could not recover them from the defendant; and again, that the plaintiffs by appearing before the magistrate and acting upon the order and executing the works and applying to the defendant for the £50, could not now say that the order was wrong or a nullity.

J. E. Bankes, K.C., and *R. Cunningham Glen*, for the plaintiffs.—There is a great difference between section 14 and section 101 of the Act of 1901. In the former section the expense is placed upon the owner unless he can show that the occupier ought to bear or contribute to it. The owner had to incur the expense or cease using the building as a factory, which he could not do if he had let it to a tenant as a factory. In the latter section the expense is placed upon the occupier unless he can show that the owner ought to bear the whole or any part of it. It was optional to the defendant to continue using the premises as an underground bakehouse, but if he did decide to use them as such he must comply with the requirements of the local authority. The landlord, having executed the necessary works, can recover the expenses thereof from the tenant under his covenant: *Foulgar* v. *Arding*, 50 W. R. 417, [1902] 1 K. B. 700. The magistrate having regard to the tenant's covenant, could only make an order that the tenant should bear the whole of the expenses, because if he made an order that the landlord should bear part of the expenses the latter could at once recover the amount so paid from the tenant under the covenant, as was pointed out in *Goldstein* v. *Hollingworth*.

VAUGHAN WILLIAMS, L.J.—In my opinion this appeal must be allowed. As I understand the judgment of Warrington, J., he decided as he did because he thought that the decisions in *Goldstein* v. *Hollingsworth* and *Morris* v. *Beal* compelled him to do so. I cannot agree with that. It seems to me to be plain that, so far as the judgment in the former case is concerned, it did not assert that the High Court had, as a court sitting to try causes, any jurisdiction in the matter. It came before the Divisional Court upon a case stated by a magistrate, and the court assumed that the magistrate had jurisdiction in the matter, and the only question was whether he had decided the matter rightly. The court did not send the case back to the magistrate because they were of opinion that, having regard to the covenant by the lessee, the magistrate was right in saying that the lessee should bear the whole of the expenses. That decision is not in any way conclusive of the question now before us. In these circumstances we have to consider whether there is jurisdiction in the High Court to hear and determine the dispute in this case between the parties, or whether the effect of the legislation has not been to make the court of summary jurisdiction, by virtue of section 101, sub-section 8, of the Factory and Workshop Act, 1901, the statutory tribunal by which the questions must be decided. In *Horner* v. *Franklin* this court so decided under section 7, sub-section 2, of the Factory and Workshop Act, 1891, and I cannot see any reason why that decision in principle does not apply to the present case. It was said in argument that Romer, L.J., in the last passage in his judgment in that case, reserved the question whether the cases of *Goldstein* v. *Hollingsworth* and *Morris* v. *Beal* were consistent with the case of *Horner* v. *Franklin*. I agree; but Romer, L.J., did not mean to leave open any question as to the principle of our decision in *Horner* v. *Franklin*. He merely meant to say that he was not sure that those cases were inconsistent with the decision in *Horner* v. *Franklin* that the High Court had no jurisdiction in the matter, but that he reserved the right to consider the reasoning upon which those decisions were based. I have looked carefully at both those cases. In *Morris* v. *Beal* all the learned judges who were parties to that decision said that they were only following *Goldstein* v. *Hollingsworth*, and I need therefore only look at the latter case, and as I have already said there is nothing in the decision in that case which is inconsistent with the decision in *Horner* v. *Franklin*. Why, then, does not the decision in *Horner* v. *Franklin* apply here? It is said that the section under which it was decided is different from the section applicable to this case. It is no doubt a different section, but in what respects are the two sections different? There is first of all a difference in the party making the application. Under the section applicable to this case the occupier has to make the application; under the other section the owner has to make it. But that difference is not material. There is also a difference in the tribunal to which the application is to be made—in one case a county court and in the other a court of summary jurisdiction; but that again is an immaterial difference. The only other difference is that in section 101, sub-section 8, the words "regard being had to the terms of any contract between the parties" are inserted, whereas they did not occur in section 7, sub-section 2, of the Factory and Workshop Act, 1891, nor do they occur in the corresponding section (section 14, sub-section 4) of the Act of 1901. But that is exactly what this court said in *Horner* v. *Franklin* that the county court judge ought to do, even without express words to that effect in the section, and therefore that difference is not a real one.

That being so, it seems to me that there is no reason why this case is not governed by our decision in *Horner* v. *Franklin*. I think it is. That renders it unnecessary to deal with the other two points raised, but as at present advised, if the plaintiffs could have successfully got over the decision in *Horner* v. *Franklin*, I think that they would have had some difficulty in meeting those points.

STIRLING, L.J.—I agree.

MOULTON, L.J.—I am of the same opinion, and I only wish to add a few words. Section 101, subsection 8. of the Factory and Workshop Act, 1901, in my opinion, makes the court of summary jurisdiction the statutory arbitrator to decide how the expense of these structural alterations should be borne. The Act imposes a burden upon those who wish to continue the user of an underground bakehouse, and it was impossible at the time of the passing of the Act to say how that would affect those interested in the bakehouse. The Legislature accordingly adopted the sensible course of appointing an arbitrator to decide how the expenses of any structural alterations should be borne as between the owner and the occupier, and made his decision final. In arriving at his decision the arbitrator has to take into consideration as part, and only as part, of the circumstances of the case the terms of the contract between the parties. The question for the arbitrator is, what is just and equitable under the circumstances of the case, one of those circumstances being the terms of the contract between the parties. I desire also to say that I share the doubt which was expressed in *Horner* v. *Franklin* whether expenses of this kind come within the word "outgoings" as used in this covenant.

Appeal allowed.

Solicitors for the plaintiffs, *Gellatly & Son.*

Solicitors for the defendant, *Young & Sons.*

From K. B. Div. (Vaughan Williams, Stirling, and Moulton, L.JJ.) — May 3.

WAITE *v.* JENNINGS. (*a.*)

Landlord and tenant—Lease—Covenant not to assign without lessor's consent—Condition to lessor's consent—Covenant by assignee to pay rent during residue of term—Validity of covenant—Action by lessor against assignee—"Fine or sum of money in the nature of a fine payable for or in respect of such consent"—Conveyancing and Law of Property Act, 1892 (55 & 56 *Vict. c.* 13), *s.* 3.

A lease contained a covenant by the lessee not to assign the demised premises without the consent of the lessors, such consent not to be unreasonably withheld. The lessee, being desirous to assign, applied to the lessors for the necessary consent. The lessors required as a condition to their consent that the assignee should covenant that he would pay the rent reserved during the remainder of the lease. A licence to assign was accordingly granted by the lessors in the form of an indenture, to which the assignee was a party, and which contained a covenant by the assignee that he would pay the rent reserved by the lease during the residue of the term. In an action by the lessors against the assignee under the covenant to recover rent which accrued due after a subsequent assignment,

Held, that section 3 *of the Conveyancing Act,* 1892, *afforded no defence to the action; for, even if the covenant was for the payment of a "fine or sum of money in the nature of a fine," the effect of the section was not to make such a payment illegal, but merely to read into the lease as between the parties to the lease a proviso that no such sum should be payable, and the assignee was not in a position to complain of a breach of that proviso.*

Semble, per Vaughan Williams *and* Stirling L.JJ., *that the covenant was not a covenant for the payment of a "fine or sum of money in the nature of a fine" within the meaning of section* 3 *of the Conveyancing Act,* 1892.

Appeal by the defendant from the judgment of Darling, J., at the trial of an action without a jury.

The action was brought to recover £28 15s., a quarter's rent of certain licensed premises known as the Burlington Hotel at Brighton.

The plaintiff, who was the freeholder, had mortgaged the premises, and on the 29th of October, 1895, he and his mortgagee granted a lease of the premises to Leon Perrot for twenty-one years, at the rent of £115. The lease contained a covenant by the lessee that he would not assign the demised premises without the consent of the lessors, such consent not to be unreasonably or capriciously withheld.

In 1902 the mortgage was vested in John Dear, and the lease was vested in one Chater, who had mortgaged by way of sub-lease to Bass, Ratcliff, & Gretton (Limited). Chater and his mortgagees desired to assign the lease to the defendant, and they applied to the plaintiff and Dear for the necessary consent. The plaintiff and Dear required as a condition to their consent that the defendant should covenant that he would pay the rent reserved during the remainder of the lease.

By an indenture dated the 9th of June, 1902, between Dear of the first part, the plaintiff of the second part, Bass, Ratcliff, & Gretton (Limited) of the third part, and the defendant of the fourth part, Dear and the plaintiff granted to Bass, Ratcliff, & Gretton (Limited) licence to assign the demised premises to the defendant for the residue of the term, and the defendant thereby covenanted that he would at all times during the residue of the term duly pay the rent reserved by and perform and observe all the covenants, agreements, and provisions contained in the lease and on the part of the lessee to be performed and observed. The premises were accordingly assigned to the defendant, and the defendant subsequently with the consent of the lessors, assigned to one Escott.

The quarter's rent for which the action was brought was rent which accrued due at a date after the assignment to Escott.

The defence was that the covenant by the defendant for the payment of rent during the remainder of the term was unenforceable—first, because there was no consideration for it, and, secondly, because it was a provision for a payment in the nature of a fine within the meaning of section 3 of the Conveyancing Act, 1892.

Section 3 of the Conveyancing Act, 1892, is as follows: "In all leases containing a covenant, condition, or agreement against assigning, underletting, or parting with the possession, or disposing of the land or property leased without licence or consent, such covenant, condition, or agreement shall, unless the lease contains an expressed provision to the contrary, be deemed to be subject to a proviso to the effect that no fine or sum of money in the nature of a fine shall be payable for or in respect of such licence or consent; but this proviso shall not preclude the right to require the payment of a reasonable sum in respect of any legal or other expense incurred in relation to such licence or consent."

(*a.*) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

Darling, J., gave judgment for the plaintiff.
The defendant appealed.

Buckmaster, K.C. (*W. de B. Herbert* with him), for the defendant.—This covenant is bad, for it provides for the payment of a fine or for a consideration in the nature of a fine, which is imposed by the lessors as a condition to their giving their consent to the assignment. Such a covenant is intended to be prohibited by section 3 of the Conveyancing Act, 1892. This covenant is not made conditional on the lessee making default in payment of rent. It is an absolute covenant by the defendant, the assignee, and under it the lessors could call on him to pay the rent for the remainder of the term. This is not a case of a mere security, as in *In re Cosh's Contract*, 45 W. R. 117. [1897] 1 Ch. 9.

T. H. Carson, K.C. (*J. D. Crawford* with him), for the plaintiff.—This covenant does not provide for the payment of a fine or a sum of money in the nature of a fine within the meaning of section 3 of the Conveyancing Act, 1892. It merely makes the defendant a surety, and it gives him the usual rights of sureties. Secondly, the section does not make the taking of a fine illegal. It imports into leases a statutory bargain to this extent—that it reads into every lease a particular proviso unless the lease itself contains an express provision to the contrary. The parties to any lease may contract themselves out of the statutory bargain.

VAUGHAN WILLIAMS, L.J.—This is an appeal from the judgment of Darling, J. The facts of the case are not in dispute, and it is not necessary for me to restate them. I will merely deal with the point of law which has been raised in this case, and on which my judgment must turn. The question arises with regard to a licence to assign a lease, a licence which was granted by the lessor and his mortgagee for the contemplated assignment of the demised premises by an assignee of the original tenant to another person as a subsequent assignee. The licence in question is dated the 9th of June, 1902, and is in the form of an indenture made between John Dear of the first part, William Waite of the second part, who were the original lessor and his mortgagee, Bass, Ratcliff, & Gretton (Limited), in whom the lease was then represented to be vested, of the third part, and Arthur Lewis Jennings, the proposed assignee, of the fourth part. The indenture witnesses that John Dear and William Waite grant to Bass, Ratcliff, & Gretton (Limited) licence to assign the demised premises to Arthur Lewis Jennings for the residue of the term, and at the end of the indenture we find this clause: "And this indenture also witnesseth that in consideration of the aforesaid licence and of the premises the said Arthur Lewis Jennings for himself, his executors administrators and permitted assigns doth hereby covenant with the said John Dear and William Waite respectively that he, the said Arthur Lewis Jennings, will, as from the 25th day of March, 1902, and at all times during the residue of the said term of twenty-one years, duly pay the rent reserved by and perform and observe all the covenants, agreements, and provisions contained in the said recited indenture of lease, and on the part of the lessee, his executors, administrators, and assigns, to be performed and observed, but without prejudice to the liability of the lessee, his executors, administrators, and assigns, under or by virtue of the said indenture of lease and the covenants provisions, and conditions therein contained." This action is brought to recover one quarter's rent of the rent so covenanted to be paid by Jennings—viz., £28 15s. It will be observed that this covenant is not a covenant which will cease to be in operation if Jennings parts with his interest in the premises by assignment, but is a covenant which will continue in operation for the residue of the term. The defence set up in answer to the action is a defence based on section 3 of the Conveyancing Act, 1892. That section provides that "In all leases containing a covenant, condition, or agreement against assigning, underletting, or parting with the possession or disposing of the land or property leased without licence or consent, such covenant, condition, or agreement shall, unless the lease contains an expressed provision to the contrary, be deemed to be subject to a proviso to the effect that no fine or sum of money in the nature of a fine shall be payable for or in respect of such licence or consent." Our attention was called to a provision in the Conveyancing Act, 1881, section 2 (ix), which is as follows: "Rent includes yearly or other rent, toll, duty, royalty, or other reservation, by the acre, the ton, or otherwise; and fine includes premium or fore-gift, and any payment, consideration, or benefit in the nature of a fine, premium, or fore-gift." It is argued that the covenant in question is unenforceable, because the payment for which it provides falls within the words "fine or sum of money in the nature of a fine" in section 3 of the Conveyancing Act, 1892; and the definition of "fine" which I have quoted was relied on in support of this argument. But in my judgment the rent here covenanted to be paid does not fall within the words of section 3 of the Act of 1892 read in the light of the definition. In my judgment this is a covenant to secure the rent, and not a covenant for anything over and above the rent. But although this is my opinion, I desire only to express it as an opinion, because it is not essential to my judgment in this case that I should determine that point. And, indeed, it is not desirable that I should determine it, for the reason that we are not all agreed on it. But even supposing the sum here covenanted to be paid was a "fine or sum of money in the nature of a fine" within the meaning of section 3 of the Act of 1892, yet it would not, in my judgment, be possible for the defendant to rely on that section as a defence to this action. The effect of the section is not to make a payment of this kind an illegal payment. The effect of it is that, as between the parties to the case, the lease is to be deemed to be subject to a proviso that no such payment shall be payable. It may well be that, as between the parties to the original lease, the lessee would have been entitled to disregard the absence of a licence if the lessors refused to grant their licence except on payment of a fine. That, however, does not affect persons in the position of the parties in this case, the defendant here being the assignee, and not having been a party to the original lease. Under these circumstances, it seems to me to be impossible to make out that the nature of this covenant, coupled with the provisions of section 3 of the Act of 1892, constitute a defence to this action. I therefore think that the appeal must be dismissed.

STIRLING, L.J.—I am of the same opinion. Section 3 of the Conveyancing Act, 1892, does not prohibit the taking of sums in the nature of a fine. What it does is to provide that, in the absence of an expressed provision to the contrary, a covenant against assigning without consent shall be deemed to be subject to a proviso to the effect that no sum of money in the nature of a fine should be payable for or in respect of such consent. In the present case the lease does not contain any expressed provision to the contrary. Suppose that on a proposed assignment the lessor had, nevertheless, taken a fine from the proposed assignee. It does not seem to me that the taking of such a fine

would be illegal, or that the proposed assignee could recover it back on the ground of being an illegal payment. Of course it would be open to the person to whom the licence was granted, if the fine was demanded of him, to pay it under protest, reserving his right to recover it back. But if a person who was *sui juris* paid without protest, I do not see how he could recover it back. Here, however, no such fine was paid, but the assignee entered into a personal covenant to pay the rent reserved by the lease and to perform certain covenants. He has since assigned the lease, and he is now sued for rent which accrued due after that assignment. Is the claim a valid one? It may be that the covenant was entered into without consideration. I assume that it was, but the absence of consideration is no defence to an action on a covenant. I am of opinion that there is no valid defence, and that the action is bound to succeed. That is sufficient to dispose of the case, but I wish to add that, as at present advised, I share the opinion expressed by my lord that this covenant is not a covenant for the payment of a fine.

MOULTON, L.J.—I am also of opinion that the defence is unsustainable. The case raises an important question under section 3 of the Conveyancing Act, 1892. The mischief aimed at by that section is one that is well known to lawyers. Leases are, in the absence of words expressing a contrary intention, assignable. It has accordingly become customary to insert in leases a covenant on the part of the lessee that he will not assign without the consent of the lessor, and there is usually added a proviso that such consent shall not be unreasonably withheld. Such a covenant in itself is one to which the Legislature could not object, as being one which affords a reasonable protection to the lessor. But the power to insert such a covenant, if unqualified, might be turned from a mere protection into a source of profit to the lessor. If the covenant were strictly interpreted, a lessee might find himself in the same position as old copyholders, who were subject to arbitrary fines on alienation. It was to counteract this that the section was passed. The effect of the section is to read into every lease containing a covenant against assigning without consent, unless the contrary is expressed, a proviso that no fine or sum of money in the nature of a fine shall be payable for such consent. The power of refusal is not to be made a source of profit to the lessor. I cannot believe that the section only applies to the payment of a sum of money. Looking at the definition of "fine" in the Act of 1881, which includes any consideration in the nature of a fine, I think that "fine or sum of money in the nature of a fine" in the section with which we are dealing means money or money's worth paid as the price of consent. Coming to this case, I ask myself whether we have here a consideration in the nature of a fine which is the price or condition of consent to alienation. I cannot feel any doubt that for the lessors to insist on the covenant in question was within the mischief aimed at by the section, and was a breach of the proviso which the section reads into the lease. But what is the effect of the legislation? It does not make such a covenant as the present a *malum prohibitum*; it reads into the lease this proviso in favour of the holder of the lease. It is in the power of the holder of the lease—that is, the intending assignor—to sue for a breach of the proviso so read into the lease. But any such breach is a wrong to the assignor only, and not to the assignee. So far as Jennings is concerned, it must be assumed that he took this covenant into consideration when he agreed to the price. We cannot listen to any complaint from him that there has been a breach of the proviso I therefore come to the conclusion that the defence is not sustainable.

Appeal dismissed.

Solicitors for the plaintiff, *Charles A. Bannister & Reynolds.*

Solicitors for the defendant, *Carthew & Wheeler.*

From Chan. Div. (Collins, M.R., and Romer and Cozens-Hardy, L.JJ.) — March 30.

In re JUDD AND POLAND AND SKELCHER'S CONTRACT. (*a.*)

Vendor and purchaser—Conditions of sale—Trust for sale—Leaseholds—Sale in lots—Sale by way of underlease—Trustee Act, 1893 (56 & 57 *Vict. c.* 53), *s.* 13.

Trustees for sale of leasehold properties comprised in one lease may sell the same by lots, and may, in the event of only one lot being sold, carry out the sale by granting an underlease for the residue of the term less one day at an apportioned rent.

In re Walker and Oakshott's Contract, 50 *W. R.* 41, [1901] 2 *Ch.* 383, *overruled on this point.*

This was an appeal from a decision of Warrington, J., allowing an objection to title taken by a purchaser on a summons under the Vendor and Purchaser Act, 1874, that trustees for sale, who had put up to auction several houses comprised in the lease in several lots, were not entitled to complete the sale by means of an underlease of each lot for the whole of the term, less one day, at an apportioned rent.

The facts were as follow: John Kempster, who died in 1887, devised and bequeathed the whole of his residuary real and personal estate to trustees upon trust for his wife for life and after her death upon trust for sale and investment as therein mentioned.

In June, 1905, the trustees of the will put up for sale by public auction, with other property of the testator, five leasehold houses, Nos. 40, 41, 42, 43, and 44, Lorrimore-square, in five separate lots, being lots 13, 14, 15, 16, and 17, subject to certain printed particulars and conditions of sale.

Lot 13, No. 40, Lorrimore-square, was stated in the particulars of sale to be "held with lots 14, 15, 16, and 17 under a lease for ninety-two and a-half years (less ten days) from the 25th of March, 1853, at an entire ground-rent of £28 per annum, of which £5 will be apportioned to this lot."

There was a similar statement and apportionment of rent with reference to lots 14, 15, 16, and 17, except that £8 was the rent apportioned for lot 17.

The fifth condition of sale provided that the title to lots 13, 14, 15, 16, and 17 should commence "with the lease (being an underlease) dated the 30th of December, 1853, under which these lots are held."

The eleventh condition provided that as lots 13, 14, 15, 16, and 17 were all held under this same lease at an entire rent of £28, such rent should be apportioned between those lots in the sums mentioned in the particulars; that if all these lots were sold at the present sale the purchaser of the largest in value of such lots, or in the event of equality of purchase-money the purchaser of the first lot should take an assignment of the lease, upon trust to execute an underlease to the respective purchasers of the other lots of their respective lots for the whole term, less one day, at the said apportioned rents, and under and subject to covenants by the respective underlesses and con-

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

ditions corresponding, so far as applicable, with the covenants by the lessee and conditions contained in the original lease; but that if any of these lots remained unsold "the vendors will grant to the purchaser or respective purchasers of the lot or lots sold such an underlease as aforesaid of each of the lots sold. The vendors being trustees will not enter into any covenants in the assignments or any underleases to be granted by them under this condition except the usual covenant against incumbrances, with the addition in any underlease of the usual restricted covenant for quiet enjoyment and an acknowledgment for production of the original lease."

Lot 13 was the only one of these five lots sold at the auction. When the abstract of title was delivered the purchaser took the objection that the trust for sale in John Kempster's will did not authorize the vendors to grant an underlease of any part of the testator's property; as this objection was insisted upon, the vendors took out a summons under the Vendor and Purchaser Act, 1874, asking for a declaration that the purchaser's objection was not a valid objection, and that a good title had been shown in accordance with the contract.

This summons was heard by Warrington, J., on the 3rd of August, 1905, when he considered the case covered by *In re Walker and Oakshott's Contract*, 50 W. R. 41, [1901] 2 Ch. 383, and he accordingly allowed the purchaser's objection and dismissed the summons with costs, ordering the contract to be rescinded and the deposit returned, as was done in *In re Walker and Oakshott's Contract*.

The vendors appealed.

Levett, K.C., and *G. Welby King*, for the appellants.—The transaction in question is not really the grant of an underlease, but is a sale carried out by a well-known conveyancer's expedient for the purpose: *Still* v. *Webb*, 45 W. R. 170, [1897] 1 Ch. 144; Davidson's Conveyancing Precedents (4th ed.), vol. 1, p. 701; Key & Elphinstone's Conveyancing Precedents (8th ed.), vol. 1, p. 293; Dart's Vendors and Purchasers (7th ed.), p. 191. We submit that *In re Walker and Oakshott's Contract*, 50 W. R. 41, [1901] 2 Ch. 383, which Warrington, J., followed, ought to be overruled.

P. O. Lawrence, K.C., and *E. S. Ford*, for the purchaser.—This is not a sale, but an underlease, which is inconsistent with the trust for sale: *Evans* v. *Jackson*, 8 Sim. 217; *Oceanic Steam Navigation Co.* v. *Sutherberry*, 29 W. R. 113, 16 Ch. D. 236.

No reply was called for.

COLLINS, M.R.—Romer, L.J., will deliver the judgment in this case.

ROMER, L.J.—In this case the trustees for sale of certain leasehold property, which comprises several houses, sold in exercise of their trust by public auction those houses in several lots. The conditions of sale provided that if all the lots were sold at the sale the purchaser of the most valuable lot, or in the event of equality of purchase-money, the purchaser of the first lot, in order of sale, should take an assignment of the leasehold property as a whole, and then should grant underleases to the purchasers of their respective lots for the term of the original lease less one day at the apportioned rents, which according to the conditions of sale had been apportioned as between the different purchasers. Now, stopping there, I do not suppose it can be said that there is any objection to that condition of sale, and if all the lots had been sold, and the purchasers of the different lots had completed according to those conditions, no objection could have been taken to any of the sales. But in a case of this kind it is necessary for the trustee who is selling in lots to consider what is to be done in case all the lots are not sold, and that some time may elapse before the sale of the whole of the lots can be completed, and what has to be done with regard to the case of a purchaser of any one lot by public auction. The condition of sale applicable to that state of things in the present case was the usual (to my mind) and well-known condition — viz., that should any of the lots remain unsold at the present auction, "the vendors will grant to the purchaser or respective purchasers of the lot or lots sold such an underlease as aforesaid of the lot sold." That is to say, the vendors purported to carry out the sale by auction in lots as best they could; so far as the lots actually sold were concerned they purported to complete that transaction, and then delayed to a future time, as was necessary, the completion of the sale of the remainder of the leaseholds. The question is, is that last condition invalid and not within the powers of trustees for sale to insert as a condition in the sale by them? In my opinion, there is no sufficient reason for holding it is not within their powers. The trust for sale in the present case was in the ordinary form, but under the Trustee Act of 1893, s. 13, it is provided that upon a trust for sale the trustee may sell either together or in lots all or any part of the property by public auction or by private contract subject to any such conditions respecting title or evidence of title or other matter as the trustee thinks fit. These are very general words, and I should be loth to cut down their generality. The only necessity for doing so would be this, that trustees must not, of course, in availing themselves of the provisions of the Act, do anything that would be unreasonable on the part of trustees for sale.

Now, seeing that such conditions of sale as I have mentioned are at the present day ordinary and usual conditions of sale, well known to conveyancers for the purpose of carrying out a sale of properties all comprised under one lease when selling by lots, it appears to me that it ought not to be said that the trustees are acting improperly or beyond the powers conferred upon them by the statute when they use such conditions as these. It is not as if there was any extra liability cast upon the trust estate by their doing so. I might almost say if they do not sell by means of such conditions as these I do not know on what other conditions they could possibly sell. I do not mean to say they might not have other conditions, but I am not aware of any other conditions that would be so convenient to the trust estate or which would cast less responsibility upon the trust estate. The trustees were using conditions of sale which to my mind were best adapted to carry out the trusts, and these conditions were within their powers. In any case, when only one lot is sold, whether they sold under conditions such as we have here, or under any other conditions allowing for an assignment with cross powers of distress, or otherwise, of the lots sold, so long as the trustees retain the rest of the property that had not been sold, so long the liability to the landlords continued. In substance the same liability existed whether they had carried out the sale of the one lot by means of absolute assignment, or whether they did it by means of underlease as in the present case. The only objection that can be made to the conditions of sale in the present case as to an underlease being granted direct by the trustees for sale, when only one lot is sold at the auction, is that in form it is an underlease, and it is said that underleases are not justified. I may take it that an underlease in substance is not justified, but where an underlease is a pure conveyancer's expedient, a method of conveyancing for carrying out a sale,

then I cannot see there is any valid objection to it, especially as I have pointed out that this conveyancer's expedient is the best known method of carrying out such a sale, and the best for the trust estate. As Stirling, J., pointed out in the case of *Still* v. *Webb* with regard to such an underlease as I am now considering: "Is it a lease? In a sense no doubt it is a lease, but in truth it is a sale. It is described as a sale in the conditions of sale, and it is so described in the plaintiff's bill of costs. It is a sale carried out by an underlease, which is a well-known conveyancer's expedient where the property sold is held with other property under one lease to avoid an apportionment of the rent about which there might be a difficulty with the superior landlord." That, in my opinion, really disposes of this case. It is said that there is a hardship upon the purchaser; he may have a difficulty in proving on a subsequent sale by him that this underlease in form was a sale in substance. The answer is, the form of the conveyance would shew that. It would, if properly drawn, recite the contract for sale, the conditions of sale, and that it was carried out in this manner as part of the conditions of sale. It would show a sale effected and carried out by that mode of conveyance. It appears to me that there is no objection in substance to this sale, and that the vendors were right, and that the decision of Kekewich, J., which is in substance appealed from, in *In re Walker and Oakshott's Contract* cannot be upheld by this court. The reason given in that case is, as I have pointed out, based on a misapprehension as to what really is the liability of the trust estate in such a case as this, and for these reasons I think the appeal ought to be allowed.

COZENS-HARDY, L.J.—This appeal, though in form from Warrington, J., is really an appeal against the decision of Kekewich, J., in *In re Walker and Oakshott's Contract*. It seems to me it may really be disposed of on a very short and simple ground. The trustees who are authorized or directed to sell may sell in the manner pointed out by section 13 of the Trustee Act, 1893. They may sell in lots, and if they may sell in lots, they, it seems to me, may sell adopting the usual, the proper, I may also say the necessary, mode of selling the property.

In a case like this, where there is one leasehold which is split up into several lots, I have asked in vain for an answer to the question, How else can the trustees sell one lot and one lot only if there is no bidder for the remaining lots of the property comprised in the lease? In the language of Stirling, J. (as he then was), this condition simply adopts what is a well-known conveyancer's expedient, and I think it is a fallacy to say that because trustees for sale are not authorized to grant a lease that they have not power in a case like this to carry out the sale by means of that which is a mere piece of machinery—viz., the grant of an underlease with a nominal reversion, which is something wholly distinct from what I have in the course of the argument ventured to call a real underlease. Nor am I pressed with the difficulty which a purchaser from the present purchaser may be said to have; I think that would be entirely met by the conveyance being so framed as to show that the property was put up for sale, this lot having a rent apportioned to it, and that for the purpose of carrying out the sale of the said lot the underlease was granted for the whole term less one day. For these reasons, with great respect to Kekewich, J., I think his judgment in *In re Walker and Oakshott's Contract* ought not to be supported, and this appeal must be allowed with the usual consequences.

Solicitors, *C. C. Algar; J. Gamble.*

High Court of Justice.

Chan. Div. } April 24, 26.
Buckley, J. }

In re WRIGHT.
WHITWORTH *v.* WRIGHT. (*a.*)

Will—Appointment—Remoteness—Doctrine of election.

Persons taking a settled fund as in default of appointment in consequence of the appointment purported to be made by the will of the appointor being void for remoteness, and also having bequeathed to them by the same will other property belonging to the testatrix, are not put to their election between the settled fund and the property of the testatrix bequeathed to them, but are entitled to retain both without making compensation.

A testatrix having a power of appointment by will over certain settled property, and also being possessed of property of her own, devised and bequeathed her real and residuary personal estate, and all real and personal estate over which she had power of appointment by will, to trustees upon trust for sale, and to hold £10,000, part of the proceeds of sale, upon certain trusts, and the residue of the proceeds of sale upon other trusts. Some of the trusts were, as regards the settled property, void for remoteness.

Held, that the persons taking in default of appointment, who were also beneficiaries of the testatrix's own property, were not put to their election between the two properties.

Held, also, that the £10,000 must be considered as taken proportionately out of the settled property and the property belonging to the testatrix, according to their respective values.

In re Oliver's Settlement, 53 *W. R.* 215, [1905] 1 *Ch.* 191, *and* In re Beale's Settlement, 53 *W. R.* 216, [1905] 1 *Ch.* 256, *followed.*

Tompkyns *v.* Blane, 28 *Beav.* 422, *and* In re Bradshaw, [1902] 1 *Ch.* 436, *not followed.*

Originating summons.

The principal question for determination in this summons was whether persons were put to their election where a testatrix had made to them an appointment, which was void for remoteness, of certain property under a power, and had in the same will validly given them other property which was her own

By his will dated the 16th of July, 1851, after appointing trustees and executors, and subject to an annuity to his wife, John Whitworth gave his real and personal estate to his trustees, and directed them to cause a valuation to be made thereof and to divide the same into as many shares as (in the event which happened) there should be children of the testator, and he directed his trustees to invest one equal half part of the share of each daughter in trust for such daughter during her life for her separate use, "and after her decease in trust for the benefit of any child or children or other issue of any such daughter (born in her lifetime) as she shall (notwithstanding coverture) at any time or times by deed or will appoint, and subject thereto in trust for such child or children of any such daughter as shall attain the age of twenty-one years, or (being a daughter or daughters) attain that age or marry, if more than one in equal shares."

The testator died in August, 1861, entitled to real and personal estate of large value. He left a widow and five children, of whom Mary Whitworth (afterwards Mary Wright) was one.

The share of Mary Whitworth having been valued, certain real property, consisting of a farm and a house,

(*a.*) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

and certain personal property were appropriated in respect of her part of the share.

By settlements of the 11th of April, 1871, this real and personal property was conveyed and assigned to trustees in trust as regards the real property for sale and to hold the proceeds and the personal property upon trust for Mary Whitworth for life, for her separate use without power of anticipation, and after her death "for the benefit of any child or children or other issue of the said Mary Whitworth (born in her lifetime) as the said Mary Whitworth shall (notwithstanding coverture) at any time or times by deed or will appoint, and subject thereto in trust for all such child or children of the said Mary Whitworth as shall attain the age of twenty-one years, or being a daughter or daughters attain that age or marry, if more than one in equal shares." And if there should be no such child, in trust for the executors, administrators, and assigns of Mary Whitworth.

By a deed of the 24th of April, 1871, certain trust funds belonging absolutely to Mary Whitworth, of the value of £4,000, were directed to be held by the trustees of the settlement of the 11th of April, 1871, upon trust for Mary Whitworth for life for her separate use without power of anticipation; and after her decease, subject to a life estate to any husband, if she so directed, upon trust "for the benefit of such child or children of the said Mary Whitworth, and in such proportions and manner and at such times as the said Mary Whitworth (notwithstanding coverture) shall by deed or will appoint, and subject thereto" for her children who should attain twenty-one years, or being a daughter should marry under that age with lawful consent, in equal shares; and in default of such children upon trust to transfer the fund to such persons as Mary Whitworth should (notwithstanding coverture) appoint, and in default of appointment to transfer the fund to certain of her brothers or their children as mentioned.

Mary Whitworth was married to John Hodgson Wright in October, 1872. In September 1882 certain preference stock belonging to Mary Whitworth absolutely was settled to be held by the trustees of the settlement of the 24th of April, 1871, upon the trusts of that settlement. By her will, made in 1903, Mary Wright, after appointing executors and bequeathing legacies and an annuity of £100, devised and bequeathed her real estate and the residue of her personal estate, and all real and personal estate over which she had a power of appointment by will, to her trustees upon trust for sale and conversion, and after payment of certain expenses and debts and the annuity, and after setting aside a fund to answer the annuity the trustees were to stand possessed of the residue of the proceeds of sale and also of the fund set apart to answer the annuity, subject to the same annuity, upon trust for investment and upon trust as to £10,000, part thereof (thereinafter called "Francis Whitworth Wright Trust Fund") upon the trusts thereinafter mentioned. And as to the residue of the moneys and the fund set apart to satisfy the annuity of £100 (thereinafter called "my residuary trust fund"), upon trust for Francis Whitworth Wright and the testatrix's daughters Ethel Wright, Mary Evelyn Wright, and Hilda Wright in equal shares as tenants in common. And as to the Francis Whitworth Wright Trust Fund, upon trust when Francis W. Wright should attain twenty-one years to pay the income to him until he attained the age of twenty-five years, and then to pay the income to him during his life; and after his decease upon trust for his children who being sons should attain the age of twenty-one years, or being daughters should attain that age or marry under that age, in equal shares. And if he should not have any such child he should have power to appoint one moiety of the income to any wife surviving him for life, and subject thereto his fund was to be held upon trust for the other children of the testatrix in equal shares, the shares of the daughters to be held upon the same trusts as the original shares. And as to the share of Francis W. Wright in the residuary trust fund, upon trust to pay the same to him on his attaining the age of twenty-five years. And as to the shares of Ethel Wright, Mary E. Wright, and Hilda Wright in the same fund, upon trust to pay the income of each share to the daughter for life for her separate use without power of anticipation, and after her decease to hold the share for her children, who being sons should attain the age of twenty-one years, or being daughters should attain that age or marry under that age, in equal shares. And in case any of the daughters should not have any such children, the daughter should have power to appoint by will after her decease one moiety of her share to any husband surviving for his life, and subject thereto the share of the daughter was to be held for the other children of the testatrix in equal shares, the shares of the daughters to be held upon the same trusts as their original shares.

The testatrix died in August, 1905. She had no power of appointment except that vested in her by the will of John Whitworth and the settlements mentioned above. All her four children were born before the 20th of September, 1882, the date of the last settlement. Only one, Mary Evelyn, had married, and she had only one child, the defendant Hilda M. Wilson, who was born in 1904.

In addition to the property settled by the will of John Whitworth and the indentures of settlement, Mary Wright had at her death unsettled property of considerable amount.

Various questions having arisen in the carrying out of the trusts of the wills and settlements, the surviving trustee of the will of John Whitworth, and two of the trustees of the will of Mary Wright, and the surviving trustee of the indentures of settlement—one of the plaintiffs being the trustee of both wills and also one of the trustees of each of the settlements—took out this summons in the matters of the estate of Mary Wright, the will of John Whitworth, and of the settlements of 1871, asking (amongst other things) whether any case of election arose as against the children of Mary Wright as between the settled funds respectively and the residue of the estate, so as to make it necessary for such children respectively to elect whether they would make good the purported settlements of the appointed funds respectively out of their respective shares of the testatrix's estate, or whether they would retain their shares in the estate and give up the appointed funds, or *vice versâ*.

Gatey, for the trustees.

G. P. Walker, for the children of Mary Wright.—The appointments to the children of F. W. Wright, Ethel Wright, Mary E. Wright, and Hilda Wright are void for remoteness, and consequently the settled property goes as in default of appointment to those persons as the children of Mary Wright equally. The property, however, which belonged to the testatrix, Mary Wright, will go to her grandchildren according to the terms of the will. No case of election arises. To put the persons taking in default of appointment to their election would be to allow the rule against perpetuities to be evaded: *In re Oliver's Settlement*, 53 W. R. 215, [1905] 1 Ch. 191; *In re Beale's Settlement*, 53 W. R. 216, [1905] 1 Ch. 256; *In re Handcock's Trusts*, 23 L. R. Ir. 34. It is submitted that *In re Bradshaw*,

[1902] 1 Ch. 436, 50 W. R. Dig. 138, was wrongly decided.

Gilbart Smith, for Hilda M. Wilson.—I submit that *In re Bradshaw* was rightly decided, and that the children of Mary Wright are put to their election either to settle the settled property which they take as in default of appointment in accordance with the purported appointment of the testatrix, or to make compensation to the disappointed appointees out of the interests in the testatrix's own property given them by her will. The case falls within the ordinary principles upon which the doctrine of election is founded—namely, that the testatrix has given her own property to donees upon the implied condition that they will carry out her wishes with regard to the settled property. The rule against perpetuities is not infringed. The persons taking in default of appointment need not give effect to the purported appointment unless they choose to do so. If, however, they do so, they resettle the property as absolute owners of it, just as is constantly done where real estates are settled from generation to generation in families. The case of *Tompkyns* v. *Blane*, 28 Beav. 423, which decided in a case of the same kind as this that the parties were put to their election, was not cited to the learned judges who decided *In re Oliver's Settlement* and *In re Beale's Settlement*.

Cur. adv. vult.

BUCKLEY, J.—I deferred the delivery of my judgment in this case out of respect to Kekewich, J., in order that I might consider with deliberation his judgment in *In re Bradshaw*, and look into the previous authorities upon the question. Having done so, I find myself unable to follow the learned judge's decision. I agree with Farwell, J., in *In re Oliver's Settlement* and with Warrington, J., in *In re Beale's Settlement*. I concur in the reasoning and the conclusions of Farwell, J., in *In re Oliver's Settlement*. By her will Mary Wright exercised powers given to her by the settlements of the 11th of April, 1871, and the 24th of April, 1871, so as to transgress the rule against perpetuities. As regards property the subject of those powers, the gift to Francis W. Wright payable at twenty-five and the interests given by Mary Wright to her grandchildren are gifts in breach of the rule against perpetuities, and are void. This follows from what I have said. There remains for argument the question (supposing that under these circumstances the question arises) whether the consequence of the gifts being void is that the funds as to which the gift in the will fails go as in default of appointment, or whether the prior absolute gift in the will prevails. I reserved this question for argument, if necessary. Mary Wright had properties other than those over which she had the above-mentioned powers—namely, property of her own, and property hers by way of power under the settlement of 1882. At the date of the settlement of 1882 all her four children were lives in being. No question of perpetuity arises in respect of these two classes of property. By her will Mary Wright throws all property, both that which was hers and that over which she had powers, into one fund, and out of the proceeds of conversion of that fund directs the payment of her funeral and testamentary expenses and debts and an annuity of £100 a year to her father-in-law, Henry Wright. These are gifts which could not come out of the property over which she had a power, and I think must be taken to have been given out of the property which was hers. She then gives the residue of the fund and the amount set apart to answer the annuity upon trusts for investment, and the trustees are to stand possessed as to £10,000 upon certain trusts for her son Francis, and as to the residue upon trust for Francis and his three sisters in equal shares as tenants in common, with certain further provisions for settling her children's shares. As regards some part of the property these trusts are good, and as regards other part they are bad, as infringing the rule against perpetuities. For determining the portion of the fund as to which the trusts are valid and the portion as to which the trusts are invalid, I think that a rateable proportion must be attributed to each having regard to the values of the respective properties, and that this applies as much to the £10,000 as to the residue. There is no gift of £10,000 as a separate legacy. It is a sum to be taken out of the general fund, and it must be taken rateably out of the property included in the settlements of 1871 and the other properties according to their respective values. The above, I think, furnishes the materials for answering all the questions in the summons subject to the question upon which I said that I would hear argument.

I shall declare to the effect that the trusts as regards the gifts to Francis W. Wright at twenty-five and to the grandchildren of Mary Wright are in breach of the rule against perpetuities and are void, that there is no consequent election, and that as to the proportion included in the settlements of 1871 and the other properties there is to be a rateable proportion as between the two, and that the trusts will fail or succeed as regards those rateable proportions. That applies to the £10,000 as well as to the residue.

Solicitors, *Walker & Rowe*, for *Frederick Walker & Son*, Halifax.

Chan. Div.
Swinfen Eady, J. } March 29.

PHILLIPS v. RAIL. (a.)

Will — Construction — Miscopying — Omission in will supplied by inference.

Where upon the construction of a will it is clear that words have been omitted from the will, owing to its having been miscopied, the court will supply the necessary words, where it can be inferred from other parts of the will what the testator intended should be inserted.

Dictum *of* Knight-Bruce, L.J., *in* Key *v.* Key, 4 *De G. M. & G.* 73, *approved.*

Adjourned summons.

By his will, dated the 15th of March, 1855, the testator William Rail the elder thereby gave and devised (subject to certain annuities or rent-charges) certain freehold hereditaments therein mentioned unto and to the use of his son Samuel James Rail and his assigns for and during his life, with remainder to his sons and daughters in tail, as therein mentioned, the two last limitations being expressed as follows: "And in case there shall be but one other or remaining daughter, then as to the part or share of the daughter or daughters so failing of lawful issue, to the use of such only remaining daughter and the heirs of her body; and in case there shall be but one daughter of the body of my said son Samuel James Rail, then to the use of such one or only daughter and the heirs of her body, and in default of such issue to the use of my own right heirs for ever."

And the testator thereby gave and devised (subject to certain annuities, rent-charges, and legacies) certain freehold hereditaments therein mentioned unto and to

(a.) Reported by P. W. PEGG, Esq., Barrister-at-Law.

the use of his son William Rail the younger and his assigns for and during his life, with remainder to his sons and daughters in tail, as therein mentioned, the last two limitations being expressed as follows: "And in case there shall be but one other or remaining daughter, then as to the part or share of the daughter or daughters so failing of lawful issue to the use of such only remaining daughter and the heirs of her body, and in case there shall be but one daughter of the body of my said son William Rail to the use of my own right heirs for ever."

There then followed a residuary devise and bequest to the testator's sons, the said Samuel James Rail and William Rail, in equal shares as tenants in common, and the testator appointed the said Samuel James Rail and William Rail the executors thereof.

The testator died on the 7th of March, 1866.

The testator's son and heir-at-law, the said Samuel James Rail, died on the 5th of March, 1903, without ever having been married, and having by his will, dated the 23rd of February, 1899, appointed the plaintiffs Thomas Phillips and Ernest Bullmore the executors and trustees thereof.

The testator's son, the said William Rail the younger, died on the 2nd of December, 1904, without ever having had any children, and having by his will, dated the 30th of March, 1903, appointed his wife, the defendant Mary Caroline Rail, the sole executrix thereof, and devised all his real and personal estate to her absolutely.

The devise to Samuel James Rail and his issue was in the ordinary form, but in the devise to William Rail the younger and his issue, although the limitations were obviously intended to be the same, *mutatis mutandis*, as in the devise to Samuel James Rail and his issue, there was a gift over to the testator's own right heirs in case there should be but one daughter of the body of William Rail the younger.

Under these circumstances an originating summons was taken out by the said Thomas Phillips and Ernest Bullmore, the personal representatives of the said Samuel James Rail, against the said Mary Caroline Rail, the personal representative of the said William Rail the younger, for the determination of the following questions: (1) That it may be determined whether upon the true construction of the will of the said William Rail the elder, the real estate thereby devised to the use of the said William Rail the younger for his life with remainders over passed on the death of the said William Rail the younger without his ever having had issue to the plaintiffs as claiming through the said Samuel James Rail as heir-at-law of the said William Rail the elder, or whether such real estate thereupon passed under the residuary gift contained in the said will of the said William Rail the elder.

Macnaghten, K.C., and *Austen-Cartmell*, for the plaintiffs.—The point is whether the plaintiffs take the whole, under the gift to the testator's own right heirs, or only half under the residuary gift. In the gift to the daughters of William Rail there is a slip; it is not intelligible, and it ought to be struck out or amended by inserting the same words as in the gift to Samuel James Rail. In the devise to Samuel James Rail the provisions are in the ordinary form, and it is peculiar that in the case of William Rail, the testator should break off in the middle of the devise. There is a gift to an only daughter, and the testator could not have intended to take it away three lines after: *Abbott* v. *Middleton*, 4 W. R. 69, 7 H. L. Cas. 68; *Luxford* v. *Cheeke*, 3 Lev. 125; *Newburgh* v. *Newburgh*, Sugden's Law of Property, 196, 206, and 207; *Doe* v. *Micklem*, 6 East 486. Adopting the rule laid down by the House of Lords in *Abbott* v. *Middleton*, there is here a repugnance, for there is a gift to an only daughter and a gift over if he leaves an only daughter. Taking the will as a whole, the testator must have intended to give the property to one daughter if there was only one, and if there were no children of such daughter, then to the testator's own right heirs: *Mellor* v. *Daintree*, 33 Ch. D. 198; *Sweeting* v. *Prideaux*, 24 W. R. 776, 2 Ch. D. 413; *Key* v. *Key*, 4 D. M. & G. 73; *In re Redfern*, 25 W. R. 902. 6 Ch. D. 133. In cases of this description the courts have taken into consideration that the will is obviously miscopied: *In re Dayrell*, [1904] 2 Ch. 496. In the present case the limitations were carefully framed, but there are several miscopyings showing the carelessness with which this will has been compared.

Eve, K.C., and *Romer*, for the defendant.—If the will is read as it stands it is impossible to say that the event has not happened which brings into effect the remainder to the testator's own right heirs: *Key* v. *Key*, 4 D. G. M. & G. 73. The words of this will are capable of being construed, and are perfectly intelligible, and a strict construction ought to put on them. It was not a mere copying of the provisions of the limitations to Samuel; there are verbal dissimilarities. The plaintiffs are asking not only for the addition of words, but also for the exclusion of words. There is nothing on the face of the will to show what the testator intended, it is only because he has previously used somewhat similar words in the devise to Samuel that the court is asked to insert them, in the devise to William. There is no ambiguity except when you look at the previous gift.

SWINFEN EADY, J., in giving judgment, said: This will is a conveyancer's will, and it is obvious that it has been copied in a blundering manner. In the earlier parts of the will the words used are apt to effect the purpose desired. When it came to be copied for execution it was miscopied. [His lordship then read the two last limitations in the devise to Samuel and the ultimate limitations in the devise to William, as above set forth.]

When a gift is vested the court does not divest it, unless there are very clear words. On reading the whole will, it appears that the intention of the testator was, after the gift of an estate tail to his son, and in default of issue of any daughter of the latter, to give a remainder to his own right heirs. It is a remainder after the determination of all previous estates. It is not a remainder over if there is one daughter. If you look at the devise to Samuel, it is not difficult to see what has happened. It is manifest that the copyist has left out a line in copying. Reading the will as a whole, and giving effect to the testator's intention as expressed in the will, the remainder is to the right heirs of the testator in default of the previous estates tail.

As Knight-Bruce, L.J., says in *Key* v. *Key*: "In common with all men, I must acknowledge that there are many cases upon the construction of documents in which the spirit is strong enough to overcome the letter; cases in which it is impossible for a reasonable being, upon a careful perusal of an instrument, not to be satisfied from its contents that a literal, a strict, or an ordinary interpretation given to particular passages would disappoint and defeat the intention with which the instrument, read as a whole, persuades and convinces him that it was framed. A man so convinced is authorized and bound to construe the writing accordingly."

This passage is applicable to the present case, as is also the case of *Abbott* v. *Middleton*, and the judgment of Joyce, J., in *In re Dayrell*.

I declare that the will confers a remainder in fee simple on the right heirs of the testator on the failure of the estates previously given, therefore the plaintiffs,

as the devisees of Samuel, are now entitled. No order as to costs.

Solicitors, *Robbins, Billing, & Co.*, for *Bullmore*, Falmouth; *Rawle, Johnstone, & Co.*, for *Jenkins*, Penryn.

K. B. Div.
(Lord Alverstone, L.C.J., and Lawrance and Ridley, JJ.) Dec. 20, 21.

BOYLE *v.* SMITH. (*a.*)

Licensing law—Sale of beer—Sale of beer in unlicensed place—Liability of master for illegal act of servant—Licensing Act, 1872 (35 & 36 *Vict.* c. 94).

The respondent, who held an off-licence for the sale of beer at his brewery premises, employed a drayman to deliver beer. The drayman had no authority to sell beer, but only to deliver it, and he had been expressly forbidden to sell beer. The drayman, however, sold and delivered beer in the street contrary to the above orders.

Held, that the respondent was not liable to be convicted under section 3 of the Licensing Act, 1872, *for selling by retail intoxicating liquor at a place where he was not authorized to do so, as the drayman had no authority at all to sell beer.*

Case stated under the Summary Jurisdiction Acts by a metropolitan police magistrate.

Five summonses were issued against the respondent upon an information by the appellant for unlawfully, upon five different days, selling beer at a place where he was not authorized by his licence to sell the same, contrary to section 3 of the Licensing Act, 1872.

All the summonses were heard together, and at the hearing the following facts were admitted and proved: A licence had been granted to the respondent authorizing him to sell beer by retail for consumption off the premises of the Southwark Park Brewery, under which licence he was entitled to sell beer by retail at those premises only. Upon each of the five days mentioned in the summonses the respondent's drayman, Deeth, was in a street in charge of a van belonging to the respondent containing crates of bottled beer from the brewery, and upon each of those days Deeth sold and delivered in the street out of the crates beer by retail to two persons, who had not ordered any beer from the said brewery, whose names in no way appeared as customers or otherwise in the books of the brewery, who were strangers to Deeth, and who there and then in the street paid Deeth for the beer. The respondent had given orders to all his draymen not to deliver beer unless an order for the beer had been previously given at the brewery, and he took every care to prevent any beer being sent out which had not been so ordered. A notice was posted in the respondent's office, where all the employees could see it, to the following effect:

"Important Notice. — Draymen are especially cautioned not to deliver to any person or persons unless the orders for same have been previously given by customers or sent or taken to the brewery. To deliver beer unless an order is first given as above is illegal."

Each drayman was required to keep a book for his own use upon his round containing the names of the customers on his round. A notice was posted up at the brewery as follows: "Notice to draymen.—Sale of beer to private customers.—Every drayman must keep a book for each day's delivery, having the name, number of house, street or road, where any beer is delivered or about to be delivered, and the book must be produced immediately when stopped and asked for by any excise officer. All draymen must strictly carry out this order." A book was kept at the brewery shewing exactly the beer sent out, and the particular customers to whom the beer was to be delivered in accordance with the orders received. A special clerk checked the load on the dray before it went out. The beer was sold almost entirely for cash on delivery by the drayman, who was authorized to receive cash on delivery, and was required at the end of each day to bring back to the brewery all beer undelivered by him, and a proper amount of money for the beer which he had delivered during the day, so that the amount of beer and money brought back should tally with the amount and value of beer booked out. Occasionally customers, when called upon by the drayman for the purpose of delivering beer to them, were found by him to have left the address at which he had previously delivered beer, so that out of the load of beer taken out from the brewery the drayman would from time to time have some beer in his van which he had been unable to deliver. It was the duty of the drayman in those circumstances to bring back such beer to the brewery, and to strike out from his round-book the name of the customer for whom it had been intended.

The magistrate dismissed the summons upon the ground that the respondent was not responsible for the acts of the drayman Deeth.

It appeared from the case that, after the summonses against the respondent had been dismissed, summonses were issued against Deeth, charging him with offences under section 3 of the Licensing Act, 1872, and he was convicted and fined.

The question for the opinion of the court was whether, upon the above facts, the decision of the magistrate was correct in point of law.

By section 3 of the Licensing Act, 1872 (35 & 36 Vict. c. 94), "no person shall sell or expose for sale by retail any intoxicating liquor without being duly licensed to sell the same or at any place where he is not authorized by his licence to sell the same. Any person selling or exposing for sale by retail any intoxicating liquor which he is not licensed to sell by retail, or selling or exposing for sale any intoxicating liquor at any place where he is not authorized by his licence shall be subject to the following penalties . . ."

Danckwerts, K.C., for the appellant.—The master is here responsible for the act of his servant. This was not a casual act, but the beer was sold by the servant in the course of his employment for his master.

Counsel cited *Williamson* v. *Norris*, [1899] 1 Q. B. 7; *Dyer* v. *Munday*, 43 W. R. 440, [1895] 1 Q. B. 742; and *Bird* v. *Evans*, 21 Q. B. D. 249.

H. C. Biron, for the respondent.—The respondent here, as the magistrate finds, took every precaution to prevent the improper sale of beer, and he is not responsible for the illegal sale The drayman's duty was not to sell beer, but to deliver it, and therefore his illegal act was not within the scope of his employment.

He cited *Newman* v. *Jones*, 17 Q. B. D. 132, 134 W. R. Dig. 105,

Danckwerts, K.C., replied.

Lord ALVERSTONE, L.C.J.—This is a case stated by a police magistrate upon a prosecution for selling beer contrary to the provisions of section 3 of the Licensing Act, 1872, on five separate days in a certain street. The only question before us is in respect of those sales to persons in the street. It raises a question, in my opinion, not entirely covered by any of the

(*a.*) Reported by ALAN HOGG, Esq., Barrister-at-Law.

authorities which have been cited. There is a group of sections in the Act of 1872, under the heading "Offences Against Public Order," sections 12-18, under which it has been decided that a licensee is liable to a penalty, in one case for the conduct of a servant in charge of the premises in permitting gaming (*Bond* v. *Evans*, 21 Q. B. D. 249, distinguishing *Somerset* v. *Hart*, 12 Q. B. D. 360); in another for an illegal sale of beer by his servant within the general scope of his employment though contrary to the licensee's express orders: *Commissioners of Police* v. *Cartman*, [1896] 1 Q. B. 655. I may refer also by way of illustration to *Emary* v. *Nolloth*, [1903] 2 K. B. 264, where it was held that a licensee who was himself in charge of the premises at the time was not liable for an illegal sale to a child by his servant against the licensee's express orders. It has been urged upon us on behalf of the appellant that *Williamson* v. *Norris* decided that a servant could not be prosecuted for a sale contrary to the provisions of section 3, and that it followed that the master must be liable; but in that case the only decision was that a sale by a servant by his master's order was not a sale by the master himself within section 3. In my opinion if a servant having no authority to sell at all, chooses to make a sale, he, not being a licensed person, is liable to penalties under section 3. The question we have to decide is whether the respondent is liable for the conduct of his drayman. In my opinion the magistrate has taken a correct view of the law, and the respondent is not liable. It cannot, I think, be contended that he is liable because the drayman whom he has sent out to only deliver beer to customers sells beer contrary to his orders. This is not a case of delegated authority within the class of cases of which *Bond* v. *Evans* and *Commissioner of Police* v. *Cartman* are examples. The business must be carried on in this way, for it cannot be contended that the respondent ought to go out and deliver all the beer himself. It seems to me, the fact being that the drayman had no authority at all to do that which he did, and was expressly forbidden to do it, there was not a sale by the master contrary to section 3. The appeal must therefore be dismissed.

LAWRANCE, J.—I am of the same opinion. The duties of the drayman was to deliver beer to customers who had ordered it, and if for any reason he could not deliver, then to bring it back to the brewery, and he had express orders not to deliver beer to anybody else. It is quite true that if the drayman was acting within the general scope of his employment in selling beer it would be no answer for the master to say he had expressly forbidden him to do so. In the present case, however, the drayman was employed only to deliver beer and not to sell beer, and therefore the respondent cannot be made liable for what his servant did.

RIDLEY, J., concurred.

Solicitors for the appellant, *Maitlands, Peckham, & Co.*

Solicitors for the respondent, *Skewes-Cox, Nash, & Co.*

K. B. Div.
(Lord Alverstone, L.C.J., and Lawrance and Ridley, JJ.) Dec. 20.

LOWERY *v.* HALLARD. (*a.*)

Adulteration—Food and drugs—Sample—Division into three parts—Sale of Food and Drugs Act, 1875 (38 & 39 *Vict. c.* 63).

When an article is purchased for analysis under the Sale of Food and Drugs Act, 1875, *each of the three parts into which it is divided pursuant to section* 14 *of the Act must be sufficient for the purpose of analysis.*

Case stated by justices of Cheshire.

At a petty sessions held at Birkenhead an information preferred by the respondent against the appellant under the Sale of Foods and Drugs Acts, 1875 and 1899, charging that the appellant on the 11th of November, 1904, at Hoylake, by James Barry, her servant, unlawfully sold to the respondent a certain article of food—to wit, brandy—which was adulterated with spirit not derived from the grape, and which was not of the nature, substance, and quality of the article demanded by the purchaser, was heard and determined by the justices, and the appellant was ordered to pay a fine.

On the 11th of November, 1904, the respondent purchased from the appellant's firm half a pint of brandy. The respondent divided the brandy into three parts as required by section 14 of the Act, and delivered one of the parts to the appellant. He sent another part to the public analyst, and retained the third part, which was afterwards sent to the Government laboratory. The part sent to the public analyst weighed five ounces, the part retained by the respondent about three ounces, and the part delivered to the appellant about two and a-half ounces.

The public analyst analyzed the part sent to him and gave a certificate stating that the sample was adulterated with proof spirit derived from some source other than the grape. For the appellant an analytical chemist was called, who stated that the part given to the appellant had been sent to him for analysis, but that he had refused to analyze it as it contained less than three ounces. On behalf of the respondent the public analyst stated that he could not make a complete analysis with less than five ounces. For the appellant it was contended that the sample ought to have been divided into three equal parts, and as that had not been done there had been no compliance with section 14 of the Act.

The justices held that the section had been sufficiently complied with and overruled the objection. The question (among others) for the opinion of the court was, whether the conviction was wrong upon the ground that the sample of brandy was divided into three unequal parts as above stated.

Pickford, K.C. (*Cuthbert Smith* with him), for the appellant.—Section 14 was not properly complied with, and the conviction is therefore wrong. The sample must, under section 14, be divided into three equal parts, or at any rate each part ought to be sufficient for the purpose of analysis.

He cited *Barnes* v. *Chipp*, 3 Ex. D. 176, 26 W. R. 685; *Mason* v. *Cowdary*, [1900] 2 Q. B. 419, 48 W. R. Dig. 8; *Smith* v. *Savage*, 53 W. R. 477 [1905] 2 K. B. 88.

Bankes, K.C. (*Leslie Scott* with him), for the respondent.—It may often be impossible to divide the article into three equal parts or into three parts each of which is sufficient for analysis. That is not the right construction of section 14. The question is one for the justices, and they may refuse to convict if they are satisfied that the divided parts are insufficient for analysis. There is no such finding in the present case.

Lord ALVERSTONE, L.C.J.—This is an important case. In my opinion the provisions of this Act would be impaired if we took the view contended for by the respondent. Here half-a-pint of brandy was purchased from the appellant by the respondent, who divided it

(*a.*) Reported by ALAN HOGG, Esq., Barrister-at-Law.

into three parts—five ounces were sent to the public analyst; three ounces were retained for comparison; and about two but less than two and a-half were given to the seller. The main point is whether each of the three parts into which the sample is divided must be sufficient to enable what has been called, I think correctly, a checking analysis to be made. Now, section 14 of the Act of 1875 provides that the person purchasing any article with the intention of submitting the same to analysis shall notify to the seller his intention to have the same analyzed by the public analyst and that notification has been held to be in the strictest sense a condition precedent to the right to institute a prosecution. Then the section says that the purchaser shall divide the article into three parts, each part to be marked and sealed or fastened up, and shall, if required to do so, deliver one part to the seller, and shall retain one part for future comparison, and shall submit the third part, if he deems it right to have it analyzed, to the public analyst. It is contended for the respondent that it is not a condition precedent that the other two parts should be of equal value for the purpose of analysis as that which is submitted to the public analyst. In my opinion the provisions of section 14 are conclusive against that contention, and I think that even a superficial consideration of those provisions is sufficient to show that each of the three parts must at least afford substantially the same facilities for analysis. I do not, of course, mean that they must be all mathematically equal, but in my judgment there is no good ground for the argument that the section is satisfied if the part which is submitted to the public analyst for the purpose of founding a prosecution alone affords sufficient facilities for analysis. The subsequent provisions of the Act confirm me in that view. Section 20 provides that when the public analyst has analyzed the portion which has been sent to him, and has given his certificate, from which it may appear that an offence has been committed, the person causing the analysis to be made may take proceedings. Then section 21 says that at the hearing the part retained by the purchaser shall be produced, and section 22 as amended by section 21 of the Act of 1899 provides that the justices before whom the complaint is made shall, at the request of either party, or without such request, if they think fit, cause the article—that is, the portion retained by the purchaser, and produced in court, to be sent for analysis to the Commissioners of Inland Revenue. Either party, therefore, has an absolute right to have that analysis. Then we must consider the third portion, which, if required, is to be delivered to the seller. It would be little less than a farce if that part were not sufficient for the purpose of analysis on the part of the seller. The whole scheme of the Act therefore seems to show that the sufficiency for the purposes of analysis of these two portions which are retained is a condition precedent to the prosecution of the proceedings. One good reason why this should be so is that, under section 21, the justices may act upon the production of the certificate of the public analyst without any further evidence. It is therefore most important that there should be a proper opportunity of checking or correcting any analysis made by the public analyst. I have therefore come to the conclusion, not that the three parts into which the article is divided must be mathematically equal or identical in every respect, but that each part must at least be sufficient for the subsequent purposes contemplated by the statute—that is, for analysis by a Government analyst or by an analyst on behalf of the seller.

It is really not disputed in this case that two of the parts did not fulfil that purpose; the part given to the seller and the part retained for comparison were not sufficient for the purpose of analysis. I entertain no doubt that in order to found a prosecution the person purchasing an article with a view to analysis must so divide the article that each of the three parts may be sufficient for analysis. If the contrary were held, the Act would in my opinion be open to grave objection. It seems clear from the statement of the case that the justices came to the conclusion that it was not necessary that the other two parts should fulfil the same conditions as the part sent to the public analyst, and that being so the conviction ought not to stand. With regard to the suggestion made by counsel for the prosecution, that there may be cases in which it is impossible to divide the article into three sufficient parts, I can only say that I have heard very many of these cases, and have never heard that suggestion made before, and that if that be so, it is a matter for the Legislature to deal with. I am of opinion, therefore, that this conviction must be quashed.

LAWRANCE and RIDLEY, JJ., concurred.

Solicitors for the appellant, *A. B. Sanders*, for *Thompson, Hughes, & Mathison*, Birkenhead.

Solicitors for the respondent, *Pritchard, Englefield, & Co.*, for *Holden & Cotton*, Birkenhead.

House of Lords.

From C. A. (England). March 26.

PAQUIN (LIMITED) v. BEAUCLERK. (a.)

Married woman—Purchase of goods—Liability—"Contract otherwise than as agent"—Married Women's Property Act, 1893 (56 & 57 *Vict.* c. 63), *s.* 1.

In order that a contract entered into by a married woman may bind her separate property under the Married Women's Property Act, 1893, *it must affirmatively be shown that she entered into the contract otherwise than as agent.*

In 1903 *a married woman, while living with her husband, bought from a tradesman certain articles of dress suitable to her position and with the consent of her husband. She had made previous purchases and paid for them with her own cheques, and on the occasion in question was debited with the amount charged as "Mrs. H.," but was without any separate property of her own.*

Held (Lords Robertson *and* Atkinson *dissenting*), *that there was no evidence that she contracted "otherwise than as agent" within the meaning of section* 1 *of the Married Women's Property Act*, 1893, *and therefore that she was not liable.*

Decision of the Court of Appeal *affirmed.*

Appeal from an order of the Court of Appeal (Collins, M.R., and Mathew and Cozens-Hardy, L.JJ.), which had reversed a judgment of Lawrance, J.

The facts are given in the judgments.

R. Isaacs, K.C., M. Lush, K.C., and *A. W. Groser*, for the appellants.—The respondent must prove affirmatively that the appellants knew that she was a married woman and looked to her husband for payment: Married Women's Property Acts, 1882 and 1893 (45 & 46 Vict. c. 75 and 56 & 57 Vict. c. 63). The decisions upon the earlier Act were *Palliser* v.

(a.) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

Gurney, 35 W. R. 760, 19 Q. B. D. 519; *Stogdon* v. *Lee*, 39 W. R. 467, [1891] 1 Q. B. 661; and *Scott* v. *Morley*, 36 W. R. 67, 20 Q. B. D. 120. The Act of 1893 shifts the onus of proof on to the married woman to show that she was contracting as agent, and here there is no evidence.

Debenham v. *Mellon*, 29 W. R. 141, 6 App. Cas. 24, was referred to.

Eldon Bankes, K.C., and *Norman Craig*, for the respondent.—The appellants have failed to show that the respondent was contracting "otherwise than as an agent" within the Act of 1893: see *Jewsbury* v. *Newbold*, 26 L. J. Exch. 247; *Morel* v. *Westmorland*, 52 W. R. 353, [1904] A. C. 11.

Isaacs, K.C., replied.

Lord LOREBURN, L.C.—This is an action brought by a firm of dressmakers against a lady, who at all material times was a married woman living with her husband, to recover the price of certain articles of dress. The articles were ordered in the months of April, May, and June of 1903. When their dealings commenced nothing was said on either side to indicate upon whose credit they were to be supplied, whether that of the husband or of the wife. The plaintiffs debited the lady in the name of Mrs. E. Holden, evidently a mistake for Mrs. V. Holden, and were paid by her cheque for such goods as were paid for. They have never claimed against the husband. It is their custom to debit the lady who gives an order and to ask no questions. They are entitled to carry on their business in this way, but if they do so they must take their chance of the status of those with whom they deal, and of the consequences which the law affixes to that status. It will be convenient to state first what I understand to be the law applicable to the present case. At common law the general rule, with exceptions not material for the present purpose, is that a married woman is incapable of contracting on her own account and cannot be sued alone. But she might contract as agent for her husband. In equity a married woman possessed at the time of separate estate not subject to restraint against anticipation (I will call it free separate estate) could make contracts enforceable against her separate estate, but not enforceable against herself personally. Such being the state of law and equity, it is manifest that the present plaintiffs could not, apart from statute, have sued the defendant at law at all because she was a married woman. Nor could they have sued her in equity because, in fact, she had no separate estate. It was not argued that she had, and it could not have been argued, because all the evidence is that she had none. Accordingly, in order to succeed, the plaintiffs must rest their case upon statute. There are two Acts of Parliament which have been relied upon. One of them is the Married Women's Property Act of 1882. A portion of that Act has been repealed, but section 1, sub-section 2, remains, and under it a married woman can be sued as if she was a *feme sole*, and may also contract as such. But it has been held, properly, I think, that this right to contract only exists where the married woman has separate property at the time. So far, therefore, as the present case is concerned, the Act of 1882 does indeed authorize the action being brought against a defendant in her own name, but it does not give any effective remedy against her or entitle the plaintiffs to judgment as soon as it appears that she had no separate estate at the time of the alleged contract. The second Act relating to this subject is the Married Women's Property Act of 1893. The only chance of the plaintiffs is to bring their case within the Act of 1893. The Act of 1893 provided that all the present or future separate estate of a married woman should be available to answer every contract into which she might enter, where she entered into it "otherwise than as agent." It does not signify under this Act whether or not she had separate estate at the time. If she was acting as an agent, the Act of 1893 will not apply. If she was acting otherwise than as agent, then the Act will apply. I think it clear that the plaintiffs are entitled to succeed in the present case if Mrs. Holden ordered these goods on her own account, and equally clear that they must fail if she ordered them as agent of her husband. Mr. Isaacs argued that, in order to prove that she entered into the contract as an agent, a married woman must establish, not merely that she was, in fact, an agent for her husband, but also that the other contracting party knew it, and contracted with her on those terms. I cannot adopt that view. The Act of 1893 does not mean that a married woman's separate estate is to answer her contracts unless both parties to the contract deal on the footing that she is an agent. It means, in my opinion, that the separate estate is not to answer when, in fact, she entered into the contract as an agent. Before the Act was passed a tradesman could fix a husband with liability for a debt contracted by his wife if he could prove either express or implied authority from the husband. It was immaterial whether at the time the contract was made the tradesman knew that the wife had her husband's authority, or even knew that she was a married woman. The knowledge of the tradesman was immaterial. I think it equally immaterial under the Act of 1893.

It is now necessary to advert to the course of the trial. Evidence was given by the plaintiff's manager and also by the defendant, and a variety of issues were raised. They were embodied in five questions left by Lawrance, J., to the jury. The jury could not agree upon a verdict, and in the end the learned judge, in the hope of sparing the parties of the expense of a new trial, entered judgment for the plaintiffs. When the case came before the Court of Appeal that judgment was reversed upon the ground that there was no evidence of the defendant's having entered into a contract otherwise than as an agent. That was the substance of the decision, although some of the learned judges in the Court of Appeal expressed opinions and purported to arrive at findings upon the evidence, some of which seem to be appropriate rather for a jury than for a court. It was argued by Mr. Bankes that even if there had been some evidence that the defendant contracted otherwise than as an agent, the judges of the Court of Appeal would in this case have been at liberty under ord. 58, r. 4, to draw their own inferences of fact and to enter judgment accordingly. The proper construction of ord. 58, r. 4, has been the subject of criticism in *Millar* v. *Toulmin*, 34 W. R. 695, 17 Q. B. D. 603, and *Allcock* v. *Hall*, 39 W. R. 443, [1891] 1 Q. B. 444. In the latter case all the judges of the Court of Appeal concurred in the opinion that they were at liberty to draw inferences of fact and enter judgment in cases where no jury could properly find a different verdict. Obviously the Court of Appeal is not at liberty to usurp the province of a jury; yet, if the evidence be such that only one conclusion can properly be drawn, I agree that the court may enter judgment. The distinction between cases where there is no evidence, and those where there is some evidence, though not enough to be acted upon by any reasonable jury, is a fine distinction, and the power is not unattended by danger. But if cautiously exercised it cannot fail to be of value. In the present case I think that the Court of Appeal came to a sound conclusion. The only decisive question was whether the defendant made

this contract as agent for her husband. Or, to put the same thing in other words, had she his authority express or implied? In my opinion the evidence, which was uncontradicted and not impugned by cross-examination, leaves it beyond reasonable doubt that she did act with his authority. There was no evidence the other way. That is sufficient to dispose of the case. I desire to add that while agreeing with the Court of Appeal in this particular conclusion of fact, I think, as at present advised, that some of the inferences of fact which were drawn by the judges in the Court of Appeal were matters on which, as the evidence stands, a jury might reasonably have found either way.

Lord MACNAGHTEN.—I agree with the judgment which has just been delivered by the Lord Chancellor. The material facts and circumstances of the case are, I think, beyond controversy, and the question at issue, in my opinion, lies in a very narrow compass. A married woman had dealings with Paquin (Limited), who carry on a large business in Dover-street as milliners and dressmakers. She was introduced by an old customer. The manager apparently made some inquiries of one or more trade protection societies, and came to the conclusion that the lady might be supplied with goods on credit. On that footing she dealt with the firm and became a regular customer. The articles which she ordered were charged to her account. The bills were sent in to her and for a while she paid regularly by her own cheques. After about twelve months' time the lady's husband, who had been living for a good many years with vast show of wealth, was found to be utterly insolvent. He absconded, And then this action was brought against the lady for the balance remaining unpaid on her account. In answer to interrogatories the lady admitted that when she ordered the goods (referring, I presume, to the inception of the transaction) she did not state whether she ordered them on her own behalf or on behalf of any other person, and she admitted that she did not say that she was a married woman. In fact, as one would expect, she merely gave her married name and her address. The name and address were given correctly. The manager at the trial stated that he did not make any inquiries about the husband and that he "did not think about him." He said, too, that he had "considerable experience in giving credit to ladies in the West End," and that they "always treated a lady as a principal, not an agent." I see no reason to doubt the manager's statement. In such a case, to borrow the words of Bramwell, L.J., in *Debenham* v. *Mellon*, I may say: "I very much doubt whether the tradesman has any intention of trusting the husband. He hopes and expects that somehow the wife will get the money and pay for the goods without the husband knowing anything about the matter." The lady swore that she had no separate estate or separate income of any kind. She said that her husband from time to time paid money to an account which he allowed her to open with the London and County Bank for the purpose of defraying household expenses and other claims upon him and the bills for what she bought for her own use. She said that she had her husband's express authority for dealing with Paquin (Limited), and she added that the dresses which she bought were worn in her husband's presence. This evidence was not contradicted, nor was her testimony shaken in cross-examination. Now if this transaction had occurred just before the passing of the Married Women's Property Act, 1893, there cannot, I think, be the slightest doubt what the result of an action by the tradesman would have been. It must have been held that the lady entered into the contract as agent. The husband, and the husband alone, would have been liable. The lady would not have been liable either at law or in equity, and as she had no separate estate at the time she could not have been brought within the Married Women's Property Act, 1882: *Stogdon* v. *Lee*. It seems to me that after the passing of the Act of 1893 such a contract is still a contract of agency and nothing else. Whatever was necessary and sufficient before the Act to make a transaction entered into by a married woman a contract of agency is, I think, necessary and sufficient to make a transaction entered into under similar circumstances a contract of agency now. In order to exempt a married woman who is in fact an agent from the very serious consequences of a judgment against her in respect of future separate estate, when she has no separate property at the time, it is not required by the Act of 1893 that she should communicate to the person with whom she is dealing the fact that she is her husband's agent, or state that she is not acting on her own behalf, or declare that she is married and cohabiting with her husband, or confess that she has not a sixpence in the world which she can really call her own. It can hardly be expected that such domestic confidences should be whispered across the counter or imparted to some forewoman in the comparative privacy of an inner apartment. I cannot imagine that Parliament could have meant to impose on married women a task so novel and disagreeable, not to say so strange or so odious. The only object of the first section of the Act of 1893 was, I think, to correct or reverse the recent decision of the Court of Appeal in *Stogdon* v. *Lee*, and to repeal the provision in the Act of 1882 which threw upon a married woman the burden of showing that her contract did not bind her separate estate. There is really no hardship on the tradesman who deals with a married woman. He is under no obligation to give credit at all or to continue or extend the credit if credit is given. He may make any inquiry he pleases of the customer or of anybody else. If he chooses to trust a lady with unlimited credit when he is not sure of his ground, he has only himself to blame if anything should go wrong. The learned judge told the jury that the real question was whether the manager knew that the lady was a married woman. I venture to think that that question is not material. The only question, as it seems to me, is whether the contract was entered into by the lady "otherwise than as agent." That is a question of fact. Unless the affirmative is shown the Act does not apply. In the present case, inasmuch as it has been proved that the lady had her husband's express authority to act as his agent, and did so act, and it is not suggested that there was any misrepresentation on her part, I think that the view of the Court of Appeal is right. No jury, I think, could have properly come to any other conclusion on the evidence. I do not myself agree with all the inferences of fact drawn by Collins, M.R., and Mathew, L.J. I agree entirely with the judgment of Cozens-Hardy, L.J. I think that the appeal ought to be dismissed with costs.

Lord ROBERTSON.—In my opinion the law governing this case is the first section of the Married Women's Property Act, 1893, and I quote the words which state the new rule set up for married women's contracts: "Every contract hereafter entered into by a married woman, otherwise than as agent, shall be deemed to be a contract entered into with respect to and to bind her separate property, whether she is or is not possessed of or entitled to any separate property at

the time when she enters into such contract." The plain result of this enactment is that unless the respondent entered into this contract as agent for her husband she is liable to the appellant. Whether she entered into the contract as agent seems to me the only question in the case; and, the facts being perfectly free from dubiety, that question is one of law. The facts which are relevant are these: The lady was living with her husband; she had his authority to buy such articles as those in question, and he knew of their purchase, at least after it had been made. On the other hand, it is equally certain that the appellants did not know that the respondent had a husband living, or that she was living in cohabitation with him. The respondent manifested herself to the appellants merely as "Mrs. V. Holden," and that they had no further or other knowledge of her status. It is obvious that this name was entirely consistent with her being a widow or a separated married woman, and it was therefore insignificant on the question of agency. No circumstance or scintilla is suggested as raising a jury question whether the appellants did or did not in fact know that the respondent had a living husband and was living with him. In these circumstances, what the respondent relies on is the undisclosed fact that she had her husband's authority; and the question of law is whether this is enough to make the contract that of an agent. In my opinion it is not, and the point may, as I think, be subjected to a very simple test—did the appellants deal with the respondent as an agent? As already stated, they certainly did not, for they never heard of the existence of a husband. This being so, I find it legally impossible to hold that the respondent contracted as an agent, for unless both parties regarded the appellant as an agent she did not contract as agent. It seems to me that, *primâ facie*, every person who contracts contracts for himself or herself. The application of this to those who *de facto* hold the powers of agents is thus stated in Smith's Mercantile Law (10th ed.), p. 173: "If any agent contract without disclosing that he has any principal, he is himself the person *primâ facie* responsible." In the present case, where the respondent affected and purported to stand on her own feet *vis à vis* to the appellants, and did not apprise them of anything about herself to suggest agency, she must be held to have contracted personally. And the first section of the Act of 1893 places beyond dispute the capacity of a married woman to contract personally, and places the case of an agency in antithesis and exception to the primary case of contract—viz., personal contract. I have stated my views shortly, and I feel that it would be superfluous to protest the irrelevancy of several suggested topics. Thus, it is surely unnecessary to deprecate such phrases as that this lady contracted in her married name (as if she had the choice of two names, either of which she could truthfully give to a tradesman). Again, the question before the House being solely whether this lady is liable, it is nothing to the purpose to prove that an undisclosed principal might also be liable. The only hesitation which I feel about the case is whether it is permissible to withhold it from further trial by jury. But a careful examination of the evidence has satisfied me that there are no questions of fact remaining *in dubio*, and that the sharp question of law which I have discussed is decisive of the controversy. I am therefore for allowing the appeal, and finding the appellants entitled to judgment, with costs.

Lord ATKINSON.—I have had the advantage of reading the judgment of Lord Robertson, and I concur in it. I do not think that the first section of the Married Women's Property Act of 1893 protects, or was intended to protect, from liability a married woman who enters into a contract apparently as principal, though she may in fact be only agent for an undisclosed principal. If the other party to the contract should discover that she was in fact an agent for an undisclosed principal, he may, I think, sue the principal just as he could sue him if the married woman were a man or a *feme sole*, but if he should elect to sue her I do not think that she can escape liability on the plea that she was in fact agent, though at the time when the contract was entered into she neither disclosed that circumstance nor mentioned any facts from which the inference would naturally and reasonably be drawn. The liability of the husband on the wife's contract is governed by the general principles of the law of principal and agent. He cannot be held responsible for goods supplied to her unless he has expressly or impliedly authorized her to act as his agent or ratified the contract which she has professed to make on his behalf, or conducted himself in such a way that he would be estopped from denying that she was his agent. One mode by which this authority of the wife to act as the agent of the husband can be established is by proof of two facts—(1) that she is living with him; and (2) that the goods ordered or supplied are of such character and nature as are usually required in those departments of domestic life and economy which the wife ordinarily manages and controls. The tradesman who sues the husband for goods supplied on the order of the wife will, on proof of those two facts, though they may have only come to his knowledge after the contract was made or the goods supplied, have laid before a jury evidence which, if unexplained or unrebutted, would justify them in drawing the inference of fact that the wife had authority to act as the agent of the husband: see Thesiger, L.J.'s, judgment in *Debenham* v. *Mellon*. That inference may be rebutted in several well-known ways independently of any statute, and, amongst others, by evidence from which the jury might draw the inference of fact that the goods were supplied on the credit of the wife to the exclusion of the credit of the husband: *Bentley* v. *Griffin*, 5 Taunt. 356; *Jewsbury* v. *Newbold*. These last-mentioned matters, however proper for consideration in a suit against the husband, do not, I think, help much to solve the question in controversy in this appeal. In my view the question here is not what Mrs. Holden in fact was, but how and in what character did she professedly contract. *Primâ facie* every person who enters into a contract without disclosing that he or she as a principal contracts for himself or herself. The only facts indicating the nature of the defendant's position or her power or authority to contract, known to the plaintiff company when the contract now sued upon was entered into, which could, in my opinion, be regarded as evidence of any weight on the issues raised in this action are two: First, that the defendant when first introduced gave her name as Mrs. V. Holden or Mrs. E. Holden; and, second, the fact that subsequently she paid for wearing apparel supplied to her by cheques signed May Holden. The opening of the account in the plaintiff's books in the name of Mrs. Holden or Mrs. E. Holden, or the furnishing to her of bills in that name, are, as it has been said, "colourless transactions," not helping to a conclusion either way. The two first-mentioned facts cannot, I think, be regarded as amounting to a disclosure that the defendant had a principal, her husband, nor to a representation, express or implied, that she was contracting as agent on his behalf, and any finding of a jury that they amounted to either should necessarily, in my opinion,

be set aside, as having been made without evidence reasonably capable of supporting it. Nor do I think that these two facts amount to evidence from which a jury could legitimately draw the conclusion that the plaintiff company had constructive notice that the defendant was a married woman actually living with her husband, and was *primâ facie* contracting as his agent and pledging his credit. During the progress of the argument I entertained some doubt as to whether a new trial ought not to be directed; but on reconsideration I am of opinion that Mrs. Holden must, on the evidence, be held to have contracted otherwise than as agent. I have therefore come to the conclusion that there is no evidence on which a jury could properly find that this lady acted as agent for or on behalf of her husband, and therefore I am of opinion that the appeal should be allowed and judgment entered for the appellant.

Lord LOREBURN, L.C.—I find in the precedent of the *Eastern Steamship Co.* v. *Smith and Others*, [1891] A. C. 310, 40 W. R. Dig. 241, the record is as follows: "It being moved to reverse the judgment, the same was objected to; both were equal, two for affirming and two against. According to ancient rule of law *semper præsumitur pro negante*, the question for reversal was determined in the negative, therefore the judgment was affirmed and the appeal dismissed." Costs are never given in such a case. I propose, therefore, that that rule should be adopted in this case, unless your lordships think otherwise.

Judgment appealed from affirmed, and appeal dismissed.

Solicitors for the appellants, *Gery & Brooks.*

Solicitors for the respondent, *Lewis & Lewis.*

Court of Appeal.

From K. B. Div. (Vaughan Williams and Stirling, L.JJ.) — May 15.

MARTIN *v.* NADEL.
DRESDNER BANK, *Garnishees.* (*a.*)

Practice—Attachment of debts—Garnishee order—Discharge of garnishee—Foreign debtor—Foreign garnishee—Possibility of garnishee being sued by debtor in foreign court—Disregard by foreign court of garnishee order—Garnishee not discharged by payment—Ord. 45, *r.* 1.

In an action against a foreigner residing in Germany the plaintiff recovered judgment and obtained a garnishee order against German bankers, who were indebted to the judgment debtor.

Held, that, as the judgment debtor might sue the bankers in Germany for the debt due from them to him, and as the German court would not recognize payment under an English garnishee order as a defence to the action on the debt, the garnishee order ought not to have been made.

Appeal from an order of Sutton, J., making absolute a garnishee order *nisi.*

Judgment in the action having been given in favour of the plaintiff in the Court of Appeal, the defendant, Nadel, who was a German, resident in Berlin, appealed to the House of Lords.

(*a.*) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

It was necessary for him, in accordance with the usual practice, to give security for the costs of the appeal by recognizance to the amount of £500 and by either a bond for £200 or payment of that amount into the Security Fund Account of the House of Lords. He paid the £200, but, as he was a foreigner, there was difficulty about accepting his recognizance. He applied to the Dresdner Bank, a German bank in Berlin, which had a branch in London, and with their consent proposed their London branch as his substitute. On his advancing the sum of £500 to the bank at Berlin, the London branch entered into the required recognizance for £500.

The appeal to the House of Lords was dismissed with costs.

A sum of £300 was required out of the £500 towards the costs which the defendant became liable to pay. The result was that a balance of £200 remained due from the Dresdner Bank in Berlin to the defendant.

The plaintiff thereupon obtained a garnishee order *nisi* against the Dresdner Bank, under ord. 45, r. 1, to attach the sum of £200 to answer the judgment debt, and the garnishees not appearing upon summons, the order was made absolute under rule 3.

The garnishees appealed.

Montague Lush, K.C., and *Ralph Bankes*, for the garnishees.—This garnishee order ought not to have been made. The garnishees are out of the jurisdiction. The court will never order anyone to pay to A. a debt which he owes to B. unless such payment discharges him from his debt to B.: see ord. 45, r. 7, which says that payment by a garnishee under garnishee proceedings shall be a valid discharge to him as against the debtor. The German courts by their law do not recognize garnishee orders made in foreign countries. If Nadel sued the Dresdner Bank, as he might do, in Berlin to recover the debt owing from them to him, the bank could not rely on payment under this garnishee order, and would have no defence to the action. The court therefore cannot, or at any rate will not, allow this garnishee order to stand, because the bank if they obeyed it would not thereby be discharged. If the London branch of the Dresdner Bank is a separate entity from the bank itself, the judgment creditor fails to show any debt owing from the London branch to Nadel at all. If, on the other hand, they are the same, or the branch is a mere limb of the bank, then the garnishees are out of the jurisdiction.

They cited *Mayor, &c., of London* v. *London Joint Stock Bank*, 29 W. R. 870, 6 App. Cas. 393; *Roberts* v. *Death*, 30 W. R. 76, 8 Q. B. D. 319; *Wood* v. *Dunn*, 15 W. R. 180, 7 B. & S. 94.

Disturnal, for the judgment creditor.—No distinction need be drawn between the Dresdner Bank in Germany and its English branch. But it is no answer to the application for this garnishee order to suggest that some claim might be made against the garnishees in Germany notwithstanding payment. The recognizance was given in England in respect of an English action. The whole matter arises in England, and the case does not involve any consideration of foreign law. If the argument on the other side is correct, it would never be possible to obtain a garnishee order where the judgment debtor was a foreigner, for the foreign judgment debtor might always sue in his own country to recover the debt owing to him. It was open to the garnishees to go before a master and dispute their liability under rule 4 of order 45.

VAUGHAN WILLIAMS, L.J.—This is an appeal from an order of Sutton, J., at chambers, an order in

garnishee proceedings made under ord. 45, r. 1. By it the garnishees, who are the present appellants, were ordered to pay to the judgment creditor £200, the debt due from them to the judgment debtor, or so much thereof as might be sufficient to satisfy the judgment debt. The question is whether that order was rightly made. With regard to the debt due from the garnishees to the judgment debtor, it was, as I understand, a debt contracted in Germany, and it was contracted under these circumstances. Nadel, the judgment debtor, being an appellant in the House of Lords, was required to provide security for the costs of his appeal—viz., £200 and a recognizance for £500. The £200 he paid into court, but as to the recognizance for £500 he was allowed to provide for that by getting a bondsman to act as his surety. That surety was the Dresdner Bank, and the Dresdner Bank, when they became surety, credited Nadel at their office in Berlin with £500, he having paid them that sum in Berlin. Nadel failed in his appeal to the House of Lords, and consequently money had to be paid under the bond of suretyship, not the whole of the sum for which the Dresdner Bank had become surety, but a part of it. The result is that a sum of money remains in the hands of the Dresdner Bank at Berlin, which they now hold as money had and received to the use of Nadel. That is the debt which is the subject of the garnishee order. The reason of its being possible to make the garnishee order in England is that the Dresdner Bank has a branch office in London. The question is whether under the circumstances the order ought to have been made. It is said against the making of it that if the Dresdner Bank are compelled under the order to pay Martin, the judgment creditor, the amount of the judgment debt, they will still remain liable to be sued in Berlin by Nadel for the whole amount of their debt to him, and will not be entitled to rely on any discharge by reason of the fact that they have been compelled in England to pay a portion of that debt to a creditor of Nadel under the garnishee order. There is no dispute between the parties as to the general proposition of law laid down in *Wood* v. *Dunn*, in the Exchequer Chamber, following the earlier case of *Allen* v. *Dundas*, 3 T. R. 125. That proposition was thus stated by Channell, B.: "The law will never compel a person to pay a sum of money a second time which he had paid once under the sanction of a court having competent jurisdiction." It is said here that to make this order will place the Dresdner Bank in the unfair position which these cases recognize that no one ought to be placed in, because, if the order were made, and the Dresdner Bank obeyed it, they might be compelled to pay a second time in Berlin. There was at first a little dispute on the question, but ultimately it was not disputed that the law of Germany was that the bank could not set up payment under the garnishee order as a defence to an action on the debt. But, even apart from the consideration whether the affidavits as to the German law on this question which have been read are sufficient, it seems to me to be plain that execution—and garnishee proceedings are execution—is *primâ facie* part of the *lex fori*, and that by the law of nations a court never recognizes an execution which has been effected in a foreign country by foreign law and has taken away any part of a man's property. So, according to international law, the Dresdner Bank could not set up in an action brought against them by Nadel in Berlin the fact that execution had been levied on this debt under a garnishee order in England. We have to say whether the court ought to refuse to make this order on the Dresdner Bank to pay in England, on the ground that after they have paid in England they may be compelled to pay a second time in Germany. I do not desire my judgment to proceed on the fact that here the debt was contracted in Germany, and that *primâ facie* the contract would be governed by German law. I am going to apply ord. 45, r. 1, which says that "The court or a judge may, upon the *ex parte* application of any person who has obtained a judgment or order for the recovery or payment of money, either before or after any oral examination of the debtor liable under such judgment or order, and upon affidavit by himself or his solicitor stating that the judgment has been recovered, or the order made, and that it is still unsatisfied, and to what amount, and that any other person is indebted to such debtor, and is within the jurisdiction, order that all debts owing or accruing from such third person (hereinafter called the garnishee) to such debtor shall be attached to answer the judgment or order; and by the same or any subsequent order it may be ordered that the garnishee shall appear before the court or a judge . . . to show cause why he should not pay to the person who has obtained such judgment or order the sum due from him to such debtor." In my opinion the execution creditor has not under that rule a right to an order *ex debito justitiæ*. The case of *Roberts* v. *Death* in principle decides this, that the court ought not to make an order for payment or execution against a garnishee in a case where it is inequitable to do so. That shows that there is no right *ex debito justitiæ*. There the equity was not the equity of the garnishee, but the equity of *cestuis que trustent*, who were behind the garnishee, and who came forward and took objection to the making of the order. Although there is no express provision in the rules enabling *cestuis que trustent* to come forward and object, the court refused to make the order, on the ground that it had a discretion, and that in that particular case it would be inequitable to make an order. I am unable to cite any authority which covers the present case, or which deals generally with the case where the garnishee is prevented from getting a discharge and remains under an obligation to pay a second time; but, dealing with the matter on principle and in accordance with my own view of what is equitable, I think that this order, which would leave the garnishees after they had obeyed it still liable to be sued for the full amount of the debt, one which is inequitable, and which ought not to have been made. The appeal will therefore be allowed.

STIRLING, L.J., concurred.

Appeal allowed.

Solicitors for the judgment creditor, *Barnett & Shirer*.

Solicitors for the garnishees, *Oppenheimer & Southern*.

High Court of Justice.

Chan. Div. Buckley, J. — June 15.

In re ELLIS.
HARDCASTLE *v.* ELLIS. (*a.*)

Practice—Attachment—Four-day order—Order on two persons—Service on one—Construction—"After service of this order."

Two defendants were ordered to lodge a sum in court

(*a.*) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

"within four days after service of this order." The order was served on one defendant only, the other not being able to be found.

Held, that the words "after service" meant after service upon the person against whom the order was to be enforced, and that a writ of attachment might be issued against the defendant who had been served.

Motion.

This was a motion in a creditors' administration action for leave to issue a writ of attachment against one of the defendants.

The following order had been made in the action: "It is ordered that the defendants W. P. Ellis and P. E. Ellis do within four days after service of this order lodge in court, as described in the schedule hereto, £360 14s. 5d. appearing . . . to be due from them as executors of the late defendant Eliza Ellis." The order had been duly served upon the defendant P. E. Ellis, but not upon W. P. Ellis, who could not be found.

The evidence was that the defendants had sold a house forming part of the estate of the testatrix, and had received the proceeds of sale; that the defendant W. P. Ellis had subsequently gone abroad, and that the only address which he had left behind was "Poste Restante, General Post Office, Cape Town."

The money had not been paid into court. More than four days having elapsed since the service of the order upon P. E. Ellis, the plaintiffs moved for liberty to issue a writ of attachment against P. E. Ellis.

Buckmaster, K.C., and *H. Greenwood*, for the motion.—A question arises whether the order can be enforced against the defendant who has been served with it before the other defendant has been served. The order is in respect of a joint and several debt, and can be enforced against either of the defendants: *Evans* v. *Bear*, 23 W. R. 67, L. R. 10 Ch. 76. A writ of attachment is a process of execution, and is for the purposes of practice a "writ of execution": see ord. 42, r. 8. The object of the service of the order on a defendant is to give him an opportunity of obeying it. He must obey it if he can whether his co-defendant does so or not. If service on both defendants is necessary one of several defaulting trustees could always by keeping out of the way prevent the court enforcing its orders against any of them.

The respondent did not appear.

BUCKLEY, J.—The question is one of construction of the order. What do the words "after service of this order" mean? Do they mean after service of the order upon both the defendants, or after service upon the one against whom the order is sought to be enforced? I think that the latter is the right view, and that the service is sufficient.

Leave granted.

Solicitors, *Jaques & Co.*, for *Samuel Wright Morgan*, Bradford.

K. B. Div.
(Lord Alverstone, L.C.J., and Darling and Bray, JJ.) April 2.

GIEBLER v. MANNING. (a.)

Metropolis—Unsound meat—Proceedings—Consent of local authority to proceedings instituted by their inspector—Public Health (London) Act, 1891 (54 & 55 *Vict. c.* 76), *ss.* 47, 99 (4), 107 (3), 123.

A summons was taken out by a sanitary inspector of a borough council under section 47 *of the Public Health (London) Act*, 1891, *against a person for having on his premises unsound meat intended for sale for human food. It appeared on the face of the summons that the information was laid by and the summons issued to the respondent on behalf of the borough council, whereas in fact the inspector had not obtained the express consent of his council to issue the summons.*

Held, that the conviction was not bad ab initio, *as the words "on behalf of the borough council" could be rejected as surplusage, since a private individual could institute proceedings before justices under the above section.*

Allman *v.* Hardcastle, 89 *L. T.* 553, 52 *W. R. Dig.* 112, *considered and applied.*

Case stated by a Metropolitan police magistrate, before whom the appellant, Frederick Giebler, a butcher, carrying on business in King's-road, Fulham, had been convicted upon an information preferred by the respondent, a sanitary inspector appointed by the Fulham Borough Council under the Public Health (London) Act, 1891, s. 47, alleging that on the 23rd of March, 1905, the appellant did deposit for the purpose of sale, or of preparation for sale, or had in his possession or on his premises for that purpose, 5lbs. of meat, which was on that day lawfully seized by the respondent, the said meat appearing to him at the time of seizure to be unsound, unwholesome, and unfit for the food of man.

The meat was in due course of law adjudged by the magistrate to be unsound, &c., and ordered to be destroyed.

The respondent, before applying for the summons, did not report the facts to the Fulham Borough Council or any committee appointed by them. He never received any express authority, by resolution or in writing, general or special, from the council or any such committee, authorizing him to make complaints or take proceedings on their behalf.

It was contended on behalf of the appellant that under section 107 (3) of the Act, for the purposes of and as a condition precedent to prosecution on behalf of a sanitary authority by their sanitary inspector under section 47, it was necessary that the inspector should report the alleged offence to the authority, that the authority should consider such report, and direct or authorize their inspector to apply for a summons and act as prosecutor. No such report was made by the respondent, nor did the Fulham Borough Council or any committee thereof expressly direct or authorize the respondent to make the complaint and take proceedings.

The magistrate was of opinion that the reports required by section 107 (3) were confined to (*a*) nuisances discovered by the inspectors themselves under section 1, and other sections; (*b*) inquiries by them into complaints of nuisances and offences against the statute and statutory bye-laws made by individuals under (amongst other) sections 3 and 21. The offence in the present summons did not appear to fall into either class; but even if it did, the language of the section, "subject to the direction of the council," was capable at least of meaning such direction as it might choose to give. But however this might be, there was nothing in the language of section 107 (3), or, as regards committees, section 99 (4), compelling the authority to give directions in any particular form or manner, and the course adopted might well justify the respondent as resting on an implied direction and authority or on ratification.

W. Clarke Hall, for the appellant.—Before an inspector can institute a prosecution on behalf of a local authority he should report to the local authority and they should authorize him to apply for a summons and act as prosecutor against the alleged

(a.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

offender. No such report was made, nor did the borough council or any committee expressly authorize the respondent to make the complaint and take proceedings. The magistrate was wrong in holding that the reports required by section 107 (3) were confined (*a*) to nuisance discovered by the inspectors themselves under section 1 and other sections; (*b*) inquiries by them into complaints which were made as to nuisances and offences against the statute and against the statutory bye-laws by private individuals under (amongst others) sections 3 and 21, and as stated in evidence at the hearing these two classes of reports were always made, and as a fact consequent process was always applied for by the council's solicitor. The offence in the present instance does not appear to fall within either of those classes, but if it does the language of section 107 (3)—"subject to the direction of the sanitary authority or of a committee thereof"—is capable of meaning such direction as the council might deem it expedient to give, and here there was no direction at all. The question of authority is one of substance, because otherwise the local authority might not be held liable in costs if the prosecution failed.

Isle of Wight Ferry Co. v. *Ryde Commissioners*, 25 J. P. 454, was referred to.

Danckwerts, K.C., and *W. J. Jeeves*, for the respondent.—Even if the contention of the appellant that section 107 (3) makes it a condition precedent that the inspector should report and should have the express authority of the sanitary authority to prosecute, that would not affect the validity of the conviction, as anybody can institute proceedings under section 47 (2). Therefore the words "on behalf of the Fulham Borough Council" in the summons for the purpose of this case are quite immaterial. *Allman* v. *Hardcastle*, 89 L. T. 553, 52 W. R. Dig. 112, is directly in point.

They cited also *Worthington* v. *Kyne*, 3 L. G. R. 1098; *Reg.* v. *Stewart*, 44 W. R. 368, [1896] 1 Q. B. 300; *Back* v. *Holmes*, 57 L. J. M. C. 37, 36 W. R. Dig. 108; and *Cole* v. *Coulton*, 8 W. R 412, 29 L. J. M. C. 125.

Lord ALVERSTONE, L.C.J.—In my opinion this appeal fails, as the case is practically covered by authority. The really important question is whether an individual can take proceedings under section 47 (2). I agree that section 47 operates to give only certain powers to individuals and that for certain purposes the rights and duties of the sanitary inspector and medical officer are hedged in by provisions for the protection of the ratepayers and of the sanitary authority, who are or may be their principals. If the sanitary authority were going to delegate their power to take proceedings to a particular officer they must do so under section 123 by a resolution. If a committee was going to authorize someone on their behalf to make complaints they must do so in accordance with section 99 (4). Therefore, for the purpose of liability for costs and of the question whether any proceedings had been taken on behalf of the sanitary authority, those provisions become of very great importance. But the question here is whether a private individual could take proceedings under section 47 (2). Can it be contended that the only persons who could take proceedings under section 47 (2) are the medical officer of health or the sanitary inspector, or the council who authorized them? It was said that the right to take proceedings was limited by the opening words of the section, but that contention I think goes too far, in view of the object of the statute, which was intended to ensure food being wholesome and to prevent diseased food from being exposed for sale. If it was the intention of the Legislature to restrict the right of any individual to lay an information there ought to have been express words to that effect. For the reasons stated in *Back* v. *Holmes*, it is not open to argument that a private individual can not lay an information. It was said that in this case the information was laid by the respondent on behalf of the borough council, but on that point this case was covered by *Allman* v. *Hardcastle*, which decided that the words "on behalf of the borough council" in the summons could be rejected as surplusage. In that case it was held that any person might lay an information for the offence of exposing goods for sale upon or so as to hang over any footway so as to cause an obstruction within section 60 (7) of the Metropolitan Police Act. It follows, therefore, as the power to lay an information is not limited to the persons referred to in the earlier part of section 47 of the Act we are considering it can not be contended that because there are in the Act certain sections protecting the sanitary authority, these proceedings were bad *ab initio*. The case of *Isle of Wight Ferry Co.* v. *Ryde Commissioners* is a very different case from the present. That was a case of an alleged nuisance on a foreshore and involved very different considerations. The statute there in question (the Nuisances Removal Act, 1855) was not a statute of the character of the Public Health Acts, dealing with a matter of great public importance, and the point that a private individual could not take proceedings for a nuisance was not raised there, nor could it have been raised. The respondent in the present case is entitled as a private individual to lay an information and take out a summons, and the fact that the sanitary authority was protected as regards costs was not sufficient to enable the court to say that these proceedings ought not to have been instituted by him.

For these reasons I think the appeal fails and should be dismissed without costs.

DARLING, J.—I agree.

BRAY, J.—I concur.

Appeal dismissed, but without costs.

Solicitors for the appellant, *W. T. Ricketts & Son.*

Solicitor for the respondent, *R. M. Prescott.*

K. B. Div.
(Lord Alverstone, L.C.J., and Ridley and Darling, JJ.) March 7.

HORNSEY CORPORATION *v.* BIRBECK FREEHOLD BUILDING SOCIETY. (*a*.)

Local government—Making up street—Expenses—Owner residing outside district of local authority doing work—Power to charge such owner—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 150.

A local authority acting under section 150 *of the Public Health Act,* 1875, *and making up streets under that section, has no power to charge any part of the expense on frontagers who reside outside the boundary of the local authority.*

Case stated by justices.

The appellants were the local authority for the borough of Hornsey, and the respondents were the owners within the meaning of the Public Health Act, 1875, of the premises adjoining and abutting on the footpath on the north side of the Birbeck-road. The Birbeck-road is a highway not repairable by the inhabitants at large, and it runs east and west. The

(*a*.) Reported by ALAN HOGG, Esq., Barrister-at-Law.

boundary between the appellant's borough and the urban district of Friern Barnet was along the line of the kerb of the footpath on the north side of the Birbeck-road, so that the carriage-way and the footpath on the south side are in the appellant's borough, and the footpath on the north side is outside the appellant's borough and within the urban district of Friern Barnet.

In July, 1903, the appellants, purporting to act under the Public Health Act, 1875, served notice on the respondents, *inter alia*, requiring them to level, pave, metal, and flag, and make good the part of the Birbeck-road within the appellant's borough, and on their failing to do so carried out the work themselves and endeavoured to recover the apportioned cost from the respondents. About the same time the urban district council of Friern Barnet served notice on the respondents with regard to the footpath on the north side of the Birbeck-road, and executed the necessary works.

The respondents paid the amount apportioned on them in respect of those works, but refused to pay the amount apportioned on them by the appellants in respect of works in those parts of the Birbeck-road which lay within the appellants' borough, on the ground that their property lay outside the appellants' borough and was not under any liability for the maintenance of the road within the borough. There are soil and surface-water sewers running through that part of the Birbeck-road which is within the borough of Hornsey. These sewers form part of the main drainage system of that borough and are vested in the appellants. The houses on the south side of the road drain into those sewers, but the houses on the north side drain into a sewer running along that part of the road which is within the Friern Barnet urban district, and which has been recently constructed by the district council at the request and the cost of the owners of premises on the north side of the road. The justices dismissed the complaint but stated this case.

By the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 150: "Where any street (not being a highway repairable by the inhabitants at large), or the carriage-way, footway, or other part of such street is not sewered, levelled, paved, metalled, flagged, channelled, and made good . . . to the satisfaction of the urban authority, such authority may, by notice addressed to the respective owners or occupiers of the premises fronting, adjoining, or abutting on such parts thereof as may require to be sewered, levelled, paved, metalled, flagged, or channelled . . . require them to sewer, level, pave, metal, channel, or make good . . . the same within a time to be specified in such notice. . . . If such notice is not complied with, the urban authority may, if they think fit, execute the works mentioned . . . therein, and may recover in a summary manner the expenses incurred by them in so doing from the owners in default.

Macmorran, K.C. (*A. F. Jenkin* with him), for the appellants.—These premises abut on the road, and it makes no difference that they are outside the district of the particular local authority.

He cited *Wakefield Local Board* v. *Lee*, 1 Ex. D. 336, 25 W. R. Dig. 224; *London County Council* v. *Collins*, 3 Knight's Local Government Reports 1103.

A. Glen, K.C. (*Naldrett* with him), for the respondents.—A local authority cannot assess property outside the limits of the local jurisdiction. The respondents have no voice in deciding what is to be spent on the road. Special provision is made in the Public Health Acts whenever it is contended that one local authority shall charge another outside its own district (sections 48 and 191 of the Act of 1875; Act of 1878, ss. 16, 21, and 22).

He cited *Reg.* v. *Warner*, 27 L. J. M. C. 144; *Withington Local Board* v. *Corporation of Manchester*, 1 E. & E. 203.

Lord ALVERSTONE, L.C.J.—In my opinion this appeal fails. There are two or three broad considerations which guide us as to the meaning of the section. *Primâ facie* the powers and authorities of these statutory bodies are to be exercised within their own district. No doubt by express enactment or by necessary implication they may be given powers outside their districts, but the question is whether or not in this case the language is so plain that we ought to hold that, either by express enactment or reasonable implication, this authority had power to charge people outside its own district. No doubt there is some ground for saying that roads are made up largely for the benefit of people who live by the side of them. The Legislature has recognized that by requiring the making up of the roads not to be thrown as a burden upon the general body of ratepayers, but upon the particular individuals. To a certain extent that is qualified by the exception of the highways repairable by the inhabitants at large, but it still leaves the section with regard to all the other roads in full force. When the street is in a condition which is not to the satisfaction in certain respects of the local authority they may, by notice addressed to the respective owners or occupiers of the premises fronting on or adjoining or abutting on the road, require them to sewer, level, &c., within the time specified. Now, if that means individuals independently of the district in which their premises are situate, the contention of the appellants is right. But in my opinion there are other words which to a certain extent qualify that proposition. In the first place, the urban authority may do the work themselves and may recover the apportionment, which is to be settled by their surveyor, from the frontagers. Then the urban authority may by order declare the expenses so incurred to be private improvement expenses. These matters seem to me to be entirely in favour of the view that the local authority are dealing entirely with matters within their own district. If it were otherwise I do not quite see why the surveyor of the other district should have no share in the apportionment of the expenses.

So as to improvement expenses, the authority which is to take the necessary steps for recovering improvement expenses is the authority by whom the work has been done. So again, the plans are to be deposited in the office of the urban authority which does the work. To a certain extent that point might be met by the fact that notice is to be given to the frontagers, but still at the same time it supports the view that the section deals with things which are to be done within the district. Therefore, inasmuch as it lies upon the appellants to establish the right of the urban authority to charge people outside their own district, the language of the section is not, in my judgment, sufficient to give them this power by necessary implication, and it certainly does not do so by express enactment. I am a good deal impressed by the principle of the previous cases and the argument upon the other parts of this statute. With regard to *Reg.* v. *Warner*, the decision in that case, although it turned no doubt on the proviso to the section there in question, does indicate the broad principle that one district could not tax or charge the inhabitants of another. I have therefore come to the conclusion that the appellants have failed to satisfy us that they have a statutory power,

either expressed or implied, to tax the inhabitants of Friern Barnet, and this appeal must therefore be dismissed.

RIDLEY and DARLING, JJ., agreed.

Appeal dismissed.

Solicitors for the appellants, *L. J. Tatham.*

Solicitors for the respondents, *Rubinstein & Co.*

K. B. Div.
(Lord Alverstone, L.C.J., and Ridley and Darling, JJ.) March 6.

REX *v.* SOUTHAMPTON JUSTICES.
Ex parte FULLER, SMITH, & TURNER. (*a.*)

Licensing law—County borough—Licence—Renewal—Compensation authority—Refusal to renew licence—Appeal to quarter sessions of county—Licensing Act, 1904 (4 *Ed.* 7, *c.* 23), *s.* 8 (2).

The refusal by justices of a county borough, acting as the compensation authority under the Licensing Act, 1904, *to renew a licence subject to the payment of compensation is final, and no appeal therefore will lie from their decision to the quarter sessions of the county under section* 27 *of the Alehouse Act,* 1828.

Mandamus to justices of the county of Southampton to hear an appeal.

On the 21st of February, 1905, Edward Donkin, who was the licensed occupier of the York Inn, Southampton, of which Messrs. Fuller, Smith, & Turner, brewers, of Chiswick, were the owners, received a notice of objection to the renewal of his licence upon the ground that the licence was not required in the neighbourhood.

On the 2nd of March, 1905, he attended at the general annual licensing meeting held for the county borough and applied for the renewal of his licence. That application was referred to the whole body of justices acting in and for the county borough as the compensation authority. On the 25th of May, 1905, the compensation authority refused to renew, subject to payment of compensation. From this refusal Donkin and Fuller, Smith, & Turner appealed to quarter sessions for the county.

On the 27th of June, 1905, the quarter sessions refused to hear the appeal, on the ground that they had no jurisdiction to entertain it, whereupon the present rule was obtained at the instance of Fuller, Smith, & Turner.

Duke, K.C., and *J. A. Simon* showed cause.—Prior to the Licensing Act of 1904 the question of renewing licences was determined in boroughs by the whole body of the justices acting for the borough, and an appeal from their refusal to renew was given to quarter sessions of the county by section 27 of the Alehouse Act, 1828. By section 8 of the Act of 1904 the decision of the whole body of justices in a county borough is substituted for that of quarter sessions. It is therefore final. The county borough raises its own fund out of which compensation for extinquished licences is paid, and it was the intention of the Legislature that boroughs should have entire control of the way that fund was to be applied. In this particular respect the county borough was placed on the same footing as the county. This change does not affect the right of appeal from the refusal by the borough justices to renew on some ground other than "redundancy."

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

Pickford, K.C. (*S. H. Emmanuel* and *H. Brodrick* with him), in support of the rule.—If the appeal which previously existed under the Act of 1828, and which still exists as to other matters, is taken away in the case of a refusal to renew with compensation, it must be taken away either expressly or by necessary implication. But there is no provision in the new Act which abrogates the right of appeal either expressly or by implication. Although section 27 of the Act of 1828 gives a right of appeal to quarter sessions only to a person aggrieved by an act of a justice "done in or concerning the execution of this Act," nevertheless by section 10 of the Act of 1904, that Act is to be "construed as one with the Licensing Acts, 1828 to 1904," so that the words "this Act" in section 27 of the earlier Act must be read as including the Licensing Act of 1904. Section 8 of the new Act in substituting the whole body of justices in a county borough for the quarter sessions substituted a body from which an appeal would lie. It does not say that the whole body of justices shall be deemed to be for this purpose the quarter sessions. If the right to appeal is gone, the only way in which the correctness of the justices' decision in point of law can be questioned, is gone too, because they are not a court and have no power to state a special case: *Boulter* v. *Kent Justices*, 46 W. R. 114, [1897] A. C. 556. The Act of 1904 does not expressly take away this right of appeal, and to so hold would be to render the Act inconsistent with its own provisions.

Lord ALVERSTONE, L.C.J.—I am of opinion that this rule must be discharged. Before 1904 there existed a right of appeal to the quarter sessions from a refusal by the licensing authority of a county borough to renew a licence, the licensing authority for the purpose being the whole body of justices for the borough. The question is whether that right of appeal is taken away by the Act of 1904 so far as a refusal upon the ground that the licence is unnecessary. The broad scope of the Act of 1904 was to limit the ordinary jurisdiction of the licensing authority, who were to have the power to refuse the renewal of a licence only on certain specified grounds, the power to refuse a renewal upon any other ground being vested in the quarter sessions instead of in the justices of the licensing district. In other words, the Act conferred upon quarter sessions a new jurisdiction, not an appellate jurisdiction, but an original jurisdiction—namely, the right to refuse the renewal of a licence upon other grounds than those mentioned in the early part of section 1. A new jurisdiction was then given to the licensing justices of the district; they were to form an opinion on the question of the renewal of licences upon other grounds and make a report to quarter sessions, by whom, if considered expedient, the renewal might be refused. With regard to counties the enactment is pretty clear, and its broad feature is the new jurisdiction conferred upon the quarter sessions, who were once and for all to deal with the question of renewal, the preliminary condition being that these should have the report before them made by the justices of the licensing district. In working out the machinery to carry out that broad intention it is not unimportant to consider certain of the provisions of section 5 of the Act, from which it appears that not only was there a departure from the old appellate jurisdiction, but a power given to quarter sessions to delegate to a committee the discharge of some of their duties. In the same section—section 5—a clause was inserted that "the justices of a licensing district being a county borough shall exercise their powers under the Licensing Acts, 1828

to 1902, as to the renewal of licences through the borough licensing committee appointed under section 38 of the Licensing Act, 1872." So far, therefore, the Act proceeded to deal with counties and county boroughs on parallel lines. Reports had to be made by the justices of a licensing district in a county and by the licensing committee in a county borough. Then comes the section upon which the question in the case turns—section 8, sub-section 2—which is as follows: "This Act shall apply to a county borough as if it were a county, with the substitution for quarter sessions of the whole body of justices acting in and for the borough." And section 5 (4) provides that the "justices of the licensing district" upon whose reference and report the whole body of the borough justices are to act, shall in the case of a county borough mean the "borough licensing committee." That is what may be called a drafting clause, because it is doubtful whether it is always possible in reading the Act as a whole to substitute the whole body of justices for the quarter sessions; it is, therefore necessary to look at the broad scope of the enactment to see what is its intention. It seems to me that the intention was to substitute in a county borough the whole body of justices to perform the functions performed by quarter sessions in a county. That makes the scheme of the Act consistent. In each case—in the county and in the county borough—there is the consideration of the question by a superior body which is no longer an appellate body. I agree that, looking at the state of things before 1904, the Act of that year might well have been more clearly drafted. But looking at its general scope, the construction I am giving to it is the only one consistent with its purpose. As I have said, the intention was to put county boroughs in the same position as counties for the purpose of finally determining as to whether a renewal upon grounds other than the four mentioned in section 1 should be refused. That view is not inconsistant with other provisions of the Act which point to the question being dealt with locally, and it would be a departure from that principle if we were to hold in this matter an appeal lay from the whole body of justices in a county borough to the quarter sessions.

RIDLEY, J.—I am of the same opinion. I consider that it is more in accordance with the scheme of the Act of 1904 that there should be no appeal in such a case as the one we are considering. I agree with my lord in thinking that although the Act does not expressly take away the right of appeal given by section 27 of the Act of 1828, its general effect is to render such a right of appeal inconsistent with its own provisions.

DARLING, J.—I agree. This Act of Parliament starts, and for some way continues, as though it dealt with counties only, and provides that in the class of cases with which it was intended to deal the question of the renewal of licences should be referred by the justices of the licensing district to the quarter sessions of the county for decision. To this end the county was treated as excluding county boroughs, although it includes boroughs which are not county boroughs. Then by section 8 (2) it confers upon the whole body of justices in a county borough the same jurisdiction to decide questions of renewal as it confers upon quarter sessions in a county, and in my opinion it was intended to make the decisions of both bodies equally final. It was argued that whereas in the case of a county the quarter sessions have power to state a special case, in a county borough the justices, sitting as a licensing body, have no such power, and therefore the right of appeal on a question of law must be still existing against the decision of justices of a county borough. Though it is perhaps not necessary for me to decide that point, I may say I disagree with that contention. I think that the borough justices would have power to state a case. I think the intention of the Legislature was that they should, within the county borough, have the same powers as those the quarter sessions have within the county.

Rule discharged.

Solicitors for the prosecutors, *Godden, Son, & Holme*, for *Lamport, Bassitt, & Hiscock*, Southampton.

Solictors for the justices, *Robbins, Billing, & Co.*, for *H. Barber*, Winchester.

K. B. Div.
(Lord Alverstone, L.C.J., and Ridley and Darling, JJ.) — Feb. 14.

TOZELAND v. WEST HAM UNION. (a.)

Poor law — Guardians — Liability for negligence of servant to pauper inmate—Common employment.

The plaintiff, who was an inmate of the union workhouse belonging to the defendants, was ordered by the labour master to assist in an enlargement of the electric light installation which was being carried out under the order of their engineer, who was a permanent official of the workhouse. In the course of the work the plaintiff went on to some staging which collapsed, owing to its improper construction, and the plaintiff was thrown to the ground and sustained severe injuries. It was admitted that the engineer was responsible for the staging.

Held, that the plaintiff was not prevented by the doctrine of common employment from recovering, as he was bound to do the work, and had not voluntarily undertaken its risks.

Held, further, that the action was maintainable as the work was not being carried out by the defendants in the discharge of their administrative duties.

Appeal from the judge of the Bow County Court.

The action was brought to recover damages for personal injuries sustained by the negligence of the defendants' servants.

The facts of the case are as follows:

The plaintiff became an inmate of the West Ham Workhouse on the 19th of July, 1904, and was at first employed in the bakery and afterwards in gardening work. On the 28th of September, 1904, the installation of the electric light was being enlarged, and the assistant electrician, by name Byers, applied to the labour master for increased assistance, and the plaintiff was allotted to him for that purpose.

In the course of the work, the plaintiff, acting under Byers's orders, went upon a staging consisting of a scaffold-board, one end of which rested upon a pair of steps and the other upon one of the rungs of the ladder. The staging collapsed and the plaintiff received severe injuries, resulting in the amputation of his right leg. It was admitted that Baird, the engineer of the West Ham Infirmary, was responsible for the staging.

The county court judge found the staging was insecure and that Baird had been guilty of negligence, but he held that the doctrine of common employment applied and that the plaintiff was therefore prevented from recovering; he gave judgment for the defendants without costs, but assessed the damages at £100 in the event of the plaintiff being held entitled to recover.

The plaintiff appealed.

(a.) Reported by ALAN HOGG, Esq., Barrister-at-Law.

R. Wallace, K.C., Abinger, and *Angus Campbell*, for the appellant.

Avory, K.C., and *Stephen Lynch*, for the respondents.

The arguments sufficiently appear from the judgments.

Lord ALVERSTONE, L.C.J.—Upon the main question upon which the learned judge decided this case I have felt no doubt. His view, which is crisply and clearly put, is that the case should be decided upon the assumption that the plaintiff was a servant of the defendants, giving his services in return for board and lodging; and that in the circumstances of the case the defence of common employment afforded an answer to the action. With great respect for the opinion of the learned judge I am unable to take that view, which seems to overlook the broad consideration lying at the root of the doctrine of common employment, that the servant has the option of entering, or refusing to enter, into a contract of employment. It was conceded during the argument that the plaintiff was doing labour which he was compelled to do under the Poor Law Acts affecting the management of workhouses, and that a refusal on his part would or might have entailed penalties; it is only necessary to refer to 55 Geo. 3, c. 137, s. 5; 7 & 8 Vict. c. 101, s. 58; and 34 & 35 Vict. c. 108, s. 7, all which provide for penalties or punishments for refusal to do the prescribed work. We ought not to hesitate to apply the doctrine of common employment, if that defence has not been taken away by statutory enactment, and if the facts justify it, but it is essential to see the basis upon which that doctrine rests. That may be collected from a series of cases, to which I need only refer very shortly, in which the doctrine has been discussed. In *Priestly* v. *Fowler*, 3 M. & W. 1, at p. 6, Lord Abinger, C.B., in delivering the judgment of the court, said: "The servant is not bound to risk his safety in the service of his master, and may, if he thinks fit, decline any service in which he reasonably apprehends injury to himself; and in most of the cases in which danger may be incurred, if not all, he is just as likely to be acquainted with the probability and extent of it as the master."

In *Hutchinson* v. *York, Newcastle, and Berwick Railway Co.*, 5 Ex. 343, at p. 352, Alderson, B., laid down the principle thus: "The principle is that a servant, when he engages to serve a master, undertakes as between him and his master to run all the ordinary risks of the service, and this includes the risk of negligence on the part of a fellow servant whenever he is acting in discharge of his duty as servant of him who is the common master of both."

Lord Cairns, in *Wilson* v. *Merry*, L. R. 1 H. L. Sc. 326, at p. 332, puts it thus: "At all events, a servant may choose for himself between serving a master who does, and a master who does not, attend in person to his business. But what the master is, in my opinion, bound to his servant to do, in the event of his not personally superintending and directing the work, is to select proper and competent persons to do so, and to furnish them with adequate materials and resources for the work. When he has done this he has, in my opinion, done all that he is bound to do." In all these leading cases, therefore, the doctrine of common employment is based upon the consent of the servant to enter into the particular employment. The doctrine might, I think, apply to the case of a servant who consented to enter an employment which involved work of a miscellaneous character. But there must be something in the nature of a voluntary bargain on the part of the servant to run the risks of the employment, and not merely the doing of work by compulsion of law. *Smith* v. *Steele*, L. R. 10 Q. B. 125, is a more recent illustration of the principle; it is not an authority in the present case, for it must not be forgotten that in that case the particular workman, a pilot, was bound, under severe penalties, to go and perform the particular service; it was not a case of what I may call a general, but of a particular, compulsion.

The defendants' counsel met the difficulty by contending that the plaintiff need not have gone into the workhouse, and that he went in on the terms that he would give his labour in return for his sustenance. But I cannot agree with his contention that the language of the Act of Parliament shows that to be the basis of the relations between a pauper and the guardians. When a pauper goes into the workhouse he does not know what work he may be called upon to perform, and it seems to me an unjustifiable extension of the doctrine of common employment to say that for a man to go in a starving condition into the workhouse is equivalent to a contract on his part to do any work that he may be ordered to do as though he were a servant who could refuse to do it. The option or choice which the servant has to exercise must be an option or choice with reference to the work, and I cannot think that we are at liberty to disregard the compulsion of hunger, which drives a man into the workhouse, and to say that under such circumstances a man goes into it voluntarily in the sense in which a servant voluntarily enters an employment.

But the other question which was argued before us, that of the liability of poor law guardians for the negligence of their subordinate officers, presents to my mind a more serious difficulty, which has not been wholly removed during the arguments; the balance, however, of the reasoning leads me to the conclusion that the guardians are responsible. It is difficult in such cases to apply to public bodies who act by agents the ordinary rule of law as to the liability of a principal for the acts or omissions of an agent. From the decisions it seems that in some cases that rule ought to be applied, in others that it ought not, and the difficulty here is to decide whether the facts bring the case within the rule or not. Of the cases in which the rule ought to be applied *Levingston* v. *Lurgan Guardians*, Ir. R. 2 C. L. 202, and *Southampton and Itchen Bridge Co.* v. *Southampton Local Board*, 8 E. & B. 801, afford good illustrations. In general terms, the result of them is that if a public body is doing by their agents work connected with their ordinary ministerial or administrative duties, that body will be liable for injury resulting from the commission of a negligent act on the part of a subordinate. On the other hand there are cases of which *Breman* v. *Limerick Guardians*, 2 L. R. Ir. 42, is an example, where it has been held that, if the injury arises from the negligence or omission of a subordinate to comply with his instructions, he being a proper person for the post which he was appointed to fill, no action will lie against a public body such as a board of guardians. If in the present case there had been merely a breach by the labour master of his duties as labour master, or a breach of the instructions given by him, I should have felt great doubt whether the defendants were liable. The difficulty is to decide within which of the two classes of cases to which I have referred the present case falls, and that decision can only be arrived at upon a consideration of the particular facts of the case. Shortly put, the facts are, that the defendants decided to extend the electric light installation at the workhouse; they did not engage a contractor for the work, but did it themselves by their own servants, who in the course of the work erected this platform. By direction of the labour master the plaintiff was told to go and assist in the work, part of which consisted in holding up pipes

against the wall while standing on the platform; there was no improper act of the labour master in giving the direction, for he was merely finding work for the plaintiff as a pauper. The accident arose from the negligence of another employee who had improperly constructed the platform, or had allowed it to be improperly constructed, so that it was negligence in the ordinary sense of the word to allow the plaintiff to go upon it. These facts bring the case, in my opinion, within the class of case in which the guardians, having work to do as guardians, do it under circumstances in which a person to whom they owe a duty would have a right of action against them if injured through the negligence of a servant acting on their behalf. I have therefore come, though with considerable hesitation, to the conclusion that this action can be maintained.

I only desire to add, with regard to the argument on behalf of the defendants, that I must not be supposed to agree with the view that the distinction drawn between a servant and a volunteer is an exhaustive distinction. I think there may be cases of servants who would be entitled to recover in such an action, notwithstanding that others might be prevented from recovering by the operation of the doctrine of common employment, and similarly that some volunteers might maintain an action, although other volunteers would be debarred from recovering on the ground that they had merely interfered in the performance of a particular piece of work in which they had no interest and over which they had no control.

For the reasons I have given, I am of opinion that this appeal must be allowed and judgment entered for the plaintiff for £100, the amount at which the damages were provisionally assessed by the learned county court judge.

RIDLEY, J.—I agree on both points with the judgment of my lord. I do not think that the doctrine of common employment affords a defence to the action. The case is one in which the plaintiff was necessarily subject to the orders which might be given to him by the defendants' servants, and it was in doing work which he was ordered to do, and could not refuse to do, that he met with the accident. In the judgment in *Priestley* v. *Fowler* there are phrases used which have been already cited by my lord, and which seem to place great stress on the question whether the risk of the employment had been undertaken by the servant of his own free will, and the root of the principle underlying the doctrine of common employment is plainly shown to be that the servant has taken upon himself the risk of the negligence of his fellow servants in the course of their employment. The same principle is also clearly laid down in the passage cited by my lord from the judgment in *Hutchinson* v. *York, Newcastle, and Berwick Railway Co.*, which shows that the court was there dealing with a case where the servant had the option of refusing to enter the employment or of undertaking the particular work, and where, knowing the risks as well as his master knew them, he deliberately decided to run these risks. If we want an instance of a case where the facts are all the other way, one need look no farther than the present one, that of the workhouse pauper, who had no option of doing or refusing to do the work ordered; it is not open to him to say that he knows the risks of the employment and declines to take them upon himself. That being so, it seems to me that the argument on which so much reliance has been placed—namely, the doctrine of common employment, furnishes no defence to this action. Then it was contended that the plaintiff was only a volunteer, and in one sense that is true; he was a volunteer in so far as he got into the workhouse by his own voluntary act, but he was not a volunteer as to the work which he should do as an inmate, and the application of the doctrine of common employment must depend upon his voluntary consent to do that work; the doctrine cannot apply merely because at an antecedent period he voluntarily entered the workhouse.

It was further contended substantially that the action was against public policy, and that such an action was not maintainable against poor law guardians. No doubt there are limits to the liability of public officers in actions of tort; but the general rule, as applied in *Southampton and Itchen Bridge Co.* v. *Southampton Local Board*, is that they may be liable for negligence. The case of *Brennan* v. *Limerick Guardians*, where the alleged negligence was in not providing proper attendance on a patient in a fever hospital, is not binding on us, and is clearly not on all fours with the present case. Nor do I agree with the contention that the principle of that decision should be extended. The present case is more akin to *Levingston* v. *Lurgan Guardians*, in which an action was held to be maintainable against guardians for making a sewer and discharging sewage from the workhouse into a stream, to the use of which the plaintiff was entitled. I can see no reason of public policy why guardians should not be liable in an action of negligence; but I think that good reasons may be found why they should be.

DARLING, J.—I am of the same opinion. Dealing first with the question whether guardians of the poor can be made liable in an action of negligence, I must confess that it seems to me one of very considerable difficulty; that difficulty I feel equally with my lord, and I have come to the same conclusion at which he has arrived. I think that the rule of law is to be ascertained from the judgment in *Levinston* v. *Lurgan Guardians*, where Whiteside, C.J., says: "Upon the ultimate decisions in these two cases, *Mersey Docks Trustees* v. *Gibbs*, L. R. 1 H. L. 93, and *Coe* v. *Wise*, L. R. 1 Q. B. 711, it must, I think, be now taken as established—first, that unless the provisions of the Legislature, by express enactment or necessary implication, otherwise determine an action for such a wrong as that which is the subject of the present suit lies against a corporation, or public trustees acting gratuitously for public purposes; secondly, that they are not exempted by the Legislature from this liability because the legislative provisions which regulate them do not provide funds out of which the damages recovered against them in an action against them can be paid." It is true that in that case the injury to the plaintiff had been caused by the making of a sewer by the guardians, and that there is, of course, upon the facts, a broad distinction between that case and the present.

Then came the case of *Brennan* v. *Limerick Guardians*, in which the judgment of the court was delivered by Fitzgerald, J., who says: "The reasons I have expressed are sufficient to sustain our judgment, and are concurred in by my brethren; but I desire, further, to state my own impression that on other and wider grounds the action is not maintainable." Apparently, therefore, the grounds which the learned judge goes on to mention did not altogether commend themselves to the other members of the court, and it is these grounds (and it is this which I particularly wish to point out) which form the strongest part of the argument against the plaintiff in the present case. The learned judge proceeds thus: "If the present action can be maintained, why should not an action lie against the guardians at suit of each pauper for every supposed neglect of administrative

duty causing to the individual any real or fancied grievance? For example, for supplying food insufficient in quantity, or inferior in quality, or insufficient or inferior clothing or bedding, defective sanitary arrangement, or any other of the various neglects or omissions by which inmates of a workhouse may be prejudicially affected. If the real or supposed omissions of guardians are to be thus redressed, it would be difficult, if not impracticable, to administer the laws for relief of the destitute poor." It is to be noticed at this point that all the instances which are put by Fitzgerald, J., are strictly confined to cases of omission to perform certain statutory duties. In the earlier part of the judgment, with which the other members of the court agreed, he says: "We are of opinion that the plaint is bad in substance, in not stating any duty which the statute law imposed on the defendants; and on the contrary alleging a duty which the law did not impose on them, and resting the supposed right of action on a breach of that duty." And further on he says: "Their duty was to take order for the relief of the poor according to the orders, general or special, of of the poor law commissioners . . . The action might as properly be brought against the commissioners as against the guardians." Looking at the present case, can anybody say that this action might as properly be brought against the modern equivalent of the commissioners—that is, against the Local Government Board, as against the guardians? It seems impossible to me to so contend. The complaint here is not that the doing of an act imposed upon the defendants by statute or by the Local Government Board led to the plaintiff's injury. The defendants were extending the existing installation of electric light in the workhouse, they were at liberty to employ a contractor for that purpose, but they preferred to use the inmates to do it. I do not suggest that there was anything improper in doing so; on the contrary, I think it was a reasonable course to take. They had the power to order the inmates to perform certain kinds of labour which they (the guardians) might select, and they ordered the plaintiff to assist a person who was putting in this electric light installation; in the doing of the work that other person did something which the learned judge finds to have been negligent, the direct result of which was the injury to the plaintiff. In my opinion this case is quite distinguishable from *Brennan* v. *Limerick Guardians*, and has a much greater resemblance to *Levingston* v. *Lurgan Guardians*, in which the action was held to be maintainable. With considerable hesitation, therefore, I think that this action will lie against the guardians.

Then comes the point upon which the learned county court judge decided this case in favour of the defendants. He held that the plaintiff must be regarded as a fellow-workman of the man who was negligent, and that, therefore, the doctrine of common employment applied to prevent his maintaining this action. I do not think that this was the correct view, for a reason which is, I think, somewhat different from that given by the other members of this court, and which at any rate I would prefer to express in my own language. In my opinion the doctrine of common employment is based upon the existence of a contract between the servant and the employer; if the servant is in a position to choose whether he will or will not run the risk, then (and this is the foundation of the argument) the doctrine *volenti non fit injuria* applies. But a pauper is not in a position to choose whether he will run the risk, or to choose what sort of labour the guardians shall put him to. At the most, when he is ordered to do some particular task, he can say, "My poverty, but not my will, consents." In that way, therefore, I think that the doctrine *volenti non fit injuria* cannot apply to the case of a pauper employed upon a workhouse task, and the very foundation of the doctrine of common employment fails; there is no common employment, for there is no contract with the guardians at all.

If that is so, there is only one way in which the defendants can hope to escape from the position, and that was taken by their counsel when he put forward the argument that the plaintiff had entered the workhouse willingly. That really amounts almost to setting up the doctrine of the *contrat social* of Rousseau, that all the rights, all the obligations, and all the disabilities of all the inhabitants of the world were regulated by an implied contract to which everyone was a party. If that theory could be supported, no doubt there would be a contract between the plaintiff and his fellow-paupers and the guardians. But that doctrine has for long been discredited, and I think that in the absence of an actual contract, express or necessarily implied, between the pauper and the guardians the doctrine of common employment has no application to the present case, and that there must be judgment for the plaintiff.

Solicitors for plaintiff, *Philbrick & Co.*, for *Haynes, Robinson, & Co.*, Bow.

Solicitor for defendants, *Hillearys*.

High Court of Justice.

Chan. Div. Swinfen Eady, J. — May 10.

In re WALLIS AND GROUT'S CONTRACT. (*a.*)

Vendor and purchaser—Title—Recital twenty years old—Vendor and Purchaser Act, 1874 (37 & 38 *Vict. c.* 78), *ss.* 1, 2.

In 1906 *a vendor made an open contract to sell a freehold house. The abstract commenced with a conveyance dated June*, 1882, *which recited a mortgage dated May*, 1878, *and contained an acknowledgment of the right to production of deeds set out in a schedule. The first deed was dated the* 31*st of August*, 1877.

Held, that the purchaser was entitled to a forty years' title.

Bolton *v.* London School Board, 26 *W. R.* 549, *considered.*

Originating summons.

This was a vendor and purchaser summons by the purchaser for an order that the purchaser was entitled to delivery by the vendor at her own expense of an abstract of the vendor's title to real estate for a period of forty years immediately prior to the contract.

On the 23rd of January, 1906, the vendor, Margaret Wallis, made an open contract to sell a freehold house to the purchaser for £260.

The abstract of the title commenced with a conveyance by a mortgagee and mortgagor to Charles Wallis on the 2nd of June, 1882.

This conveyance recited that by an indenture dated the 9th of May, 1878, made between the mortgagor, D. T. Baker, and the mortgagee, of "the hereditaments hereinafter described and intended to be hereby conveyed were with other hereditaments granted unto and to the use of the mortgagee, his heirs and assigns, for ever, for the purpose of securing the repayment to the mortgagee, his executors, administrators, or

(*a.*) Reported by PAUL STRICKLAND, Esq., Barrister-at-Law.

assigns, of the sum of £700 and interest thereon as therein mentioned."

The mortgagor gave an acknowledgment of the right of the purchaser Charles Wallis to production, and an undertaking for safe custody of the following documents mentioned in a schedule:

Conveyance of the 31st of August, 1877, Pritchett to the mortgagor.

A mortgage of the 24th of June, 1878, between the mortgagor of the first part, Paterson and Burn of the second part, and J. Faulding, W. F. Faulding, and A. J. Faulding of the third part.

A release of the 27th of May, 1882, between J. Faulding, W. F. Faulding, and A. J. Faulding of the one part, and the mortgagor of the other part.

The recited mortgage of the 9th of May, 1878.

The mortgagee acknowledged the right of the purchaser to production of the recited mortgage of the 9th of May, 1878.

The vendor, Margaret Wallis, was the widow and sole executrix of Charles Wallis, who died on the 15th of May, 1905. The freehold house in question was devised to her.

Crossfield, for the purchaser.

J. G. Wood, for the vendor.

SWINFEN EADY, J., in giving judgment, said: The contract was an open contract, and the abstract began in 1882. [He referred to the conveyance and the schedule.] The vendor refused to deduce a title before 1882. Why is the purchaser not entitled to see the deeds mentioned in the schedule, which relate to dealings with the property? The case of *Bolton* v. *London School Board*, 26 W. R. 549, 7 Ch. D. 766, did not apply. Even if this case were the same as *Bolton* v. *London School Board*, I should have grave difficulty in following it. According to the language of the Vendor and Purchaser Act, 1874, ss. 1, 2, the vendor was bound to furnish a forty years' title. [He referred to Williams on Vendors and Purchasers, vol. 1, p. 109n.] The order will be that the purchaser offering to accept a title commencing with the deed of the 31st of August, 1877, the vendor is entitled to an abstract of such title.

Solicitors, *William Moryan Lloyd*; *Pettitt & Valentine*.

Chan. Div.
Swinfen Eady, J. } May 10.

In re PERTH ELECTRIC TRAMWAYS (LIMITED). LYONS *v.* TRAMWAYS SYNDICATE (LIMITED). (*a.*)

Company—Debentures—Issue—Deposit of blank debentures to secure loan.

A company borrowed money on the security of debenture bonds. The bonds were signed and sealed and left blank as to the date and name and were deposited with a bank. The loan was paid off and the debentures returned.

Held, that the transaction with the bank amounted to an issue, and that the company were not in a position to re-issue the debentures.

Special case.

The Perth Electric Tramways (Limited) had by a trust deed assigned property to trustees to secure 500 debentures of £100 each.

The directors passed a resolution to borrow £2,000 on the security of twenty-one debentures. Such debentures were signed and sealed and deposited with the company's bankers, the Union Bank of Scotland. The debentures were in blank, *i.e.* without any name or date, and they were not registered in the name of the bank.

The debentures were in the form set out in the schedule to the trust deed. Each debenture was to be under seal and to be issued to a person to be specified therein as a creditor for £100, and as the person to whom or to other the registered holder thereof payment was to be made by the company. The names, addresses, and descriptions of the registered holders were to be entered in a register which was to be kept by the company.

The loan was paid off and the twenty-one debentures were returned to the company.

The company subsequently issued six of the debentures to the defendant syndicate, filling in the name and date, but without re-sealing, and the syndicate was registered as holder. The syndicate had no notice of any prior dealing.

The company proposed to issue the other fifteen debentures.

The question was now raised whether the transaction with the bank amounted to an issue so that the twenty-one debentures were spent and could not be re-issued.

Gore-Browne, K.C., and *Sargant*, for the plaintiff, the registered holder of a valid debenture.

Percy Wheeler, for the company.

The syndicate joined in the special case, but did not appear at the hearing.

SWINFEN EADY, J., in giving judgment, said that no separate point was raised as to the six debentures held by the syndicate, and the real question was whether the company have power to issue any of the twenty-one at the present time. The company claimed that these debentures never were issued to the bank, but that the first issue as to the six was to the syndicate, whilst the remaining fifteen had up to the present time never been issued at all, and could, therefore, now be issued by the company. The short point to be determined on the special case was whether the transaction with the bank amounted to an issue so that twenty-one debentures were spent and could not now be re-issued. Now it was pointed out by Chitty, J., in *Levy* v. *Abercorris Slate and Slab Co.*, 36 W. R. 411, 37 Ch. D. 260, that "'issued' is not a technical term; it is a mercantile term well understood." I will consider what the position of the bank was. There was a resolution of the directors to borrow on the security of second debenture bonds, and then the twenty-one bonds in question were signed and sealed and left blank as to date and name, and these twenty-one sealed pieces of paper were deposited in the bank. In my opinion that gave the bank an equitable charge. There was an agreement that they should have a charge, and in equity they had a charge on these bonds. If the bank had not been repaid and the company had gone into liquidation the bank would have been entitled to prove and to receive the full amount. They had a valid equitable charge on these debentures, and, in the language of Stirling, L.J., in *In re Tasker & Sons*, 54 W. R. 65, [1905] 2 Ch. 598, "If no payment had been made to" [substituting in the present case "the bank"], "and the debentures had remained in their hands, they would have been entitled to prove in the action and to receive dividends on the full nominal amount of the debentures in their hands *pari passu* with the other debenture-holders until they received in full the principal and interest due to them. This right was established by the Court of Appeal in *In re Regent's Canal Ironworks Co*, 24 W. R. 687,

(*a.*) Reported by PAUL STRICKLAND, Esq., Barrister-at-Law.

3 Ch. D. 43. It was there decided that a company may issue or deposit debentures by way of collateral security for money lent, and that the holders of other debentures of the same issue have no equity to prevent such a bargain from being carried into effect." If they might so deposit debentures validly issued, they might equally agree to deposit them, and in *In re Strand Music Hall Co.*, 14 W. R. 6, 3 De G. J. & S. 147, showed that effect might be given to such an agreement. As Buckley, J., said in *In re Geo. Routledge & Sons*, 53 W. R. 44, [1904] 2 Ch. 480: "If there is a contract that a person is to have a loan on the terms that the lender is to have a binding security, and he does not get that which he contracted to have, he has the right to be placed in the same position as if he had got it." In other words, there was a contract here giving these debentures as a security—a valid contract to issue debentures, and that, in the contemplation of equity, amounted to an issue. The debentures had now served their purpose as a security for the loan, which has run its course. Under these circumstances the transaction with the bank amounted to an issue, and as the company had no power to re-issue debentures which had once been issued, they were not in a position to re-issue any of the twenty-one debentures, and the six debentures issued to the syndicate had not been validly issued. This followed the decisions in *In re Geo. Routledge & Sons*, *In re W. Tasker & Sons*, and *In re Strand Music Hall Co.*

Solicitors, *Burn & Berridge*.

Chan. Div.
Swinfen Eady, J. } May 3.

In re CORSELLIS.
FREEBORN *v.* NAPPER. (*a*.)

Will—Illegitimate testator—Gift to "all my nephews and nieces"—Some named—Gift to "my brother A. and my sisters B., C., D., and E."—Children of unnamed sister.

An illegitimate testator left the residue of his property, subject to his wife's life estate, in trust for his brother A. and his sisters B., C., D., and E., the income of A.'s share to be paid to him for life, and on his death, in the events that happened, the principal to go "equally amongst all my nephews and nieces then living." Like provision with regard to D.'s share. There being amongst others also reputed nephews and nieces by a reputed sister of the testator who was not mentioned in the will, it was

Held, applying Hill *v.* Crook, 22 *W. R.* 137, 6 *H. L.* 265, *that, in the absence of legitimate brothers and sisters and nephews and nieces, all the reputed nephews and nieces took, although some reputed brothers and sisters and nephews and nieces only had been mentioned in the will.*

Originating summons.

This was a summons to determine certain questions arising under the will of Henry Joseph Corsellis.

By his will, dated the 9th of January, 1872, the testator, who was illegitimate, after giving certain legacies, left his residue in trust for his wife for life, and after her death in trust for his brother Charles, and his sisters Frances, Emily, Caroline and Eliza. The income of Charles' share was to paid to him for life, and at his death the principal was to be divided, subject to a power of appointment by the wife, which was not exercised, "equally amongst all my nephews and nieces then living." (This was construed as "living at the death of Charles.") Similar directions were given as to his sister Caroline's share.

The testator died on the 7th of August, 1873; Caroline died on the 24th of April, 1874, and Charles died on the 1st of January, 1876. The testator's wife died on the 22nd of April, 1905.

Besides the reputed brother Charles and the reputed sisters mentioned in the will by name (as above) the testator had another reputed brother who was referred to by name elsewhere in the will and also another reputed sister Mary. Mary had died in 1853, long before the date of the will, leaving issue, but neither she nor her children were mentioned in the will.

This summons was taken out by the present trustee to determine (*inter alia*) whether Mary's children were included in the gift to "all my nephews and nieces," and were thus entitled to participate with the children of the named sisters of the testator in the shares of Charles and Caroline Corsellis.

L. H. Elphinstone, for the trustee.

T. L. Wilkinson, for persons claiming under the children of Frances, contended that the gift was confined to the reputed nephews and nieces mentioned in the will and the children of the reputed brothers and sisters therein named.

He cited *Seale-Hayne* v. *Jodrell*, [1891] A. C. 304, 40 W. R. Dig. 284.

Peterson, for persons similarly interested, argued on the same lines, and cited *Meredith* v. *Farr*, 2 Y. & C. C. C. 525.

Manning, for persons claiming under Mary's children, contended that all the reputed nephews and nieces took, and cited *In re Deakin*, 43 W. R. 70, [1894] 3 Ch. D. 565, and *In re Wood*, 50 W. R. 695, [1902] 2 Ch. D. 542.

Vaughan Hawkins and *Cavanagh*, for other parties.

SWINFEN EADY, J.—The question I have to decide is who is to participate under the description "all my nephews and nieces" in the shares of Charles and Caroline Corsellis. Under the circumstances of this case the testator had not, and could not have, any legitimate nephews and nieces—his father and mother never having married. It is undisputed that the testator and his brothers and sisters had lived together as one family as if their parents had been married, and that all the children, including Mary, were treated by the parents as if they were lawful children, and were regarded by the testator as his lawful brothers and sisters. The testator in his will refers to some, but not all, as his brothers and sisters; he also refers to the children of some as his nephews and nieces, and to one Arthur Alexander Corsellis, as his relative, though he could have no lawful relatives. From these facts it is clear that the testator proceeded on the footing that his parents were lawfully married. It was argued that the bequest must be confined to the children of those whom in his will he had mentioned as his brothers and sisters. The language of the will does not justify that contention. It is not, as in *Seale-Hayne* v. *Jodrell* a gift "to my relatives hereinbefore named," but a gift to "all my nephews and nieces," by a testator who could have no legitimate ones. Under these circumstances I am of opinion that *Hill* v. *Crook*, 22 W. R. 137, 6 H. L. 265, applies. I hold, therefore, that the children of Mary are entitled to share in their character as nephews or nieces equally with the children of the other sisters of the testator.

Solicitors, *W. T. Coventon*, for *Brown & Elmhirst*, York; *Indermaur & Brown*, for *Cardens*, Brighton; *W. J. Homewood*.

(*a*.) Reported by R. E. V. BAX, Esq., Barrister-at-Law.

K. B. Div.
(Ridley and Darling, JJ.) May 24.

WHEATLEY v. SMITHERS AND ANOTHER. (a.)

Partnership—Bill of exchange—Auctioneer—Trading firm.

A firm of auctioneers is not a trading firm, so as to give one partner the implied power to bind the firm by accepting a bill of exchange.

This was an appeal from the City of London County Court.

The action was upon a bill of exchange for £50 accepted by one Alcock in the name of the firm, Smithers & Alcock, of which he was a partner.

The county court judge found (1) that the partnership, for the purpose of carrying on the business of auctioneers, was not a trading one; (2) that the matter for which the bill was accepted was outside the partnership business; (3) that Alcock had no express authority from Smithers to accept the bill; (4) that Alcock purposely concealed such acceptance from Smithers.

In accordance with these findings the judge gave judgment for the defendant with costs.

Cairns, for the appellant.—It is submitted that this was a trading firm, and if that was so it will not be contended that Smithers is not liable. There is no authority, but Schedule I. of the Bankruptcy Act, 1869, which is headed "Description of Trades," includes auctioneers. So far as material it is as follows. "Alum makers, apothecaries, auctioneers, . . . persons using the trade of merchandize by way of commission . . . persons who either for themselves or as agents for others seek their living by buying or selling . . . ; but a farmer, grazier, common labourer . . . shall not be deemed a trader for the purpose of this Act." An auctioneer is not allied to a profession, nor to a farmer who does not buy in order to sell, but sells the produce from the land. A limited trading company alone can borrow for its business without special powers, and in *General Auction Estates Co.* v. *Smith*, 40 W. R. 106, [1891] 3 Ch. 432, it was held that the company was a trading company: see also *Bryan* v. *Metropolitan Co.*, 3 De G. & J. 123; *Ex parte City Bank*, 16 W. R. 668, L. R. 3 Ch. 432; Palmer on Company Law (5th ed.), p. 231.

Ernest Palmer, for the respondent, was not called upon.

RIDLEY, J.—I do not think we can interfere in this case. The learned county court judge has said that in his opinion this firm is not a trading firm within the meaning of the law affecting bills of exchange, and we are not prepared to say he was wrong. It is true that the matter is bare of authority, but Mr. Cairns has not been able to point us to any authority which supports his view. We can see, on the other hand, reasons to support the judgment below. In order to get some guide, perhaps it is desirable to refer to the first schedule of the Bankruptcy Act, 1869. That Act does not apply purely to traders, but certain sections of it do. In order to define traders, the Legislature has dealt with the matter in the first schedule. [His lordship read it.] There for the purpose of the Bankruptcy Act an auctioneer was held to be a trader. But I think that it is a different thing from saying that because we ought to hold an auctioneer to be a trader for one purpose therefore we ought to regard him as a trader for all purposes. There is no definition of a trade laid down, but any definition must include the business of buying and selling. That must have something to do with it. But an auctioneer does not buy. He accepts the goods of another person for the purpose of selling them for him by auction. In the case of *Harris* v. *Amery*, L. R. 1 C. P., p. 154, Willes, J., points out that the term "business" is wider than "trade": "It is unnecessary to refer to authorities to show that 'business' has a more extensive signification than 'trade.'" An auctioneer, it is true, carries on a business; but so does a barrister, yet he does not carry on a trade. Under these circumstances I am not prepared to differ from the learned county court judge. On the whole I think his decision was the right one.

DARLING, J.—I concur.

Solicitor for the appellant, *John Smith*.

Solicitors for the respondent, *Dormer & Johnson*.

(a.) Reported by MAURICE N. DRUCQUER, Esq., Barrister-at-Law.

K. B. Div.
(Lord Alverstone, L.C.J., and Darling, J.) May 4.

LONDON COUNTY COUNCIL v. GREAT EASTERN RAILWAY CO. (a.)

Railway—Smoke—Company's default—Railway Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 20), *s.* 114—*Regulation of Railways Act*, 1868 (31 & 32 *Vict. c.* 119), *s.* 19.

Section 114 *of the Railway Clauses Consolidation Act*, 1845, *provides*: "*Every locomotive steam engine to be used on the railway shall, if it use coal or other similar fuel emitting smoke, be constructed on the principle of consuming and so as to consume its own smoke; and if any engine be not so constructed the company or party using such engine shall forfeit five pounds for every day during which such engine shall be used on the railway.*"

Section 19 *of the Regulation of Railways Act*, 1868, *provides*: "*Where proceedings are taken against a company using a locomotive steam engine on a railway on account of the same not consuming its own smoke, then, if it appears to the justices before whom the complaint is heard that the engine is constructed on the principle of consuming its own smoke, but that it failed to consume its own smoke, as far as practicable, at the time charged in the complaint through the default of the company or of any servant in the employment of the company, such company shall be deemed guilty of an offence under the Railway Clauses Consolidation Act*, 1845, *s.* 114."

Held, that it was not a default on behalf of the company merely because the company did not supply the coal which was the best that could be obtained regarded from the point of view of its smokelessness.

Case stated by a metropolitan police magistrate.

On the 26th of July, 1905, the Great Eastern Railway Co., the respondents, were summoned for that they on the 8th day of July, 1905, at Bethnal Green Junction, in the county of London, did use upon their railway at Bethnal Green Junction a locomotive steam engine, to wit, locomotive steam engine No. 363, using coal or other similar fuel emitting smoke, and not then constructed on the principle of consuming and so as to consume its own smoke, and which did not then consume its own smoke.

The material facts as set out in the case are as follows: "4. It was proved before me at the said hearing on the part of the appellants by Samuel Tinworth, a coal officer of the appellants, and

(a.) Reported by MAURICE N. DRUCQUER, Esq., Barrister-at-Law.

Herbert Court, his assistant, that on the 8th of July, 1905, he was watching from a building near to the Bethnal Green Junction Station of the respondents when a passenger train belonging to the respondents drawn by No. 363 came into his view at 6 22 a.m. from the direction of Liverpool-street Station, drew up at Bethnal Green Junction Station, and passed out of his view at 6 24 a.m., and also at 7.47 a.m. the same engine came into his view, having a similar train, which stopped at Bethnal Green Junction Station, and passed out of his view at 7.49 a.m., and that during a portion of each of the said periods of two minutes the said engine was emitting dark smoke.

"5. It was further proved before me on the hearing of the said summons that the said engine was a properly constructed engine and constructed on the principle of consuming, as far as practicable, the smoke of the coal then in use on the said engine, which was a Derbyshire or York-hire coal of a bituminous character, and that such coal was a good hard steam coal and the normal locomotive coal in use in some districts.

"6. It was further proved to my satisfaction that it was not through the default of any servant of the respondent company in the stoking or management of the said engine that any such smoke was emitted at the time aforesaid.

"7. It was also proved before me that the respondents on another line (the East London Line, over which they have running powers) are under obligation to employ and do employ on their engines on such line a Welsh smokeless steam coal different from that used in engine No. 363 on the said 8th of July. This Welsh coal produces smoke not so dark as that of the coal used by engine No. 363, and not so much in proportion to the amount of coal used as is produced by the Derbyshire and Yorkshire coal. The engine, No. 363 as constructed could have used similar Welsh coal, and if this had been done less smoke would have been emitted from the said engine. The said Welsh coal, costs about twice as much to the respondents as the coal used upon the said engine on the occasion complained of, and the greater expense of it is the principal reason why it was not used on the said engine.

"I was of opinion:

"(a) That the engine No. 363 was properly constructed within the meaning of section 114 of the Railway Clauses Consolidation Act, 1845.

"(b) That it did not fail to consume its own smoke so far as was practicable having regard to the coal which was used.

"(c) That the use of the coal which was used was not a default of the company within section 19 of 31 & 32 Vict. c. 119, and that there was no other default.

(d) That the smoke emitted by the said engine was of a darker colour and slightly more in quantity than would have been emitted if Welsh coal had been used.

"I accordingly dismissed the summons."

The question for the opinion of the court is whether I was right in law in my decision on the above facts, or whether I was bound in law to hold that the use of a coal producing a darker smoke than would have been produced by the use of a different coal was a default on the part of the company.

Bodkin, for the appellants.—The amending section 19 of the Act of 1868 is due to the decision of *Manchester, Sheffield, and Lincolnshire Railway* v. *Wood*, 29 L. J. M. C. 29, where it was held, the engine being properly constructed, there could not be a conviction because excessive smoke was produced through negligence. The effect of the two sections is that smoke must not be emitted as far as practicable, and if this could be obtained by the use of better coal, such better coal must be used, and the mere question of expense would not be considered by the court as a reason for not doing so: *Patterson* v. *Chamber Colliery Co.*, 56 J. P. 200. The Lord Chief Justice had expressed his opinion in favour of this view, it is contended, in *South-Eastern Railway* v. *London County Council*, 65 J. P. 568, and his view coincided with that of Bacon, V.C., in *Smith* v. *Midland Railway Co.*, 37 L. T. N. S. 224, at p. 226. The words, or very similar words to, "as far as practicable" had been interpreted in *Cooper* v. *Wooley*, 36 L. J. M. C. 27.

Avory, K.C. (*Grain* with him), for the respondent.—The argument of the appellants is, in the result, that we must use the best coal obtainable, and the short answer to that argument is that the statute does not say so. It contemplates smoke being emitted. [He was stopped by the court.]

Lord ALVERSTONE, L.C.J.—It has been most ingeniously argued by Mr. Bodkin that the effect of the amending section is indirectly to impose upon the railway the obligation to use coal of the highest quality from the point of view of smokelessness. It seems to me that that is going too far. I am not prepared to say that the magistrate has come to a wrong conclusion on the point of fact. Section 114 of the 1845 Act does say that the engine should be constructed so as to consume its own smoke. It was contemplated that engines might be constructed so well as to consume their own smoke. This was pointed out in the *Manchester, Sheffield, and Lincolnshire Railway case*, where it was held that in order to justify proceedings there must be proof of a wrongly-constructed engine, and it is not sufficient to show that smoke was emitted owing to the negligence of a servant. The amending section provides: [His lordship read section 19.] This section clearly contemplates that coal which will emit smoke will be used. The magistrate has here found that the smoke was of a darker colour and slightly more in quantity than the Welsh coal. The colour has nothing to do with the question except where there is evidence to show bad stoking or of smoke being emitted in an excessive quantity. But the finding is that the Welsh coal emits smoke only slightly less in quantity than the coal complained of. Is it necessary to use that coal which produces the least smoke? If so there would have been conflicting evidence as to which coal would give the best results, and that would have led to more embarrassing questions than the one we have to try. I think that section 19 points in the first instance to default in the construction of the engine or in not providing proper coal, and not in not providing the best coal. The findings in this case are: [His lordship read paragraph 5.] It is true that for some contractual reasons, they have undertaken to use Welsh steam coal when running over the East London line. It is perfectly plain that the contractual obligation cannot extend the obligation under the Act of Parliament. It is clear to my mind that it is a wrong construction of the section to say that the company has been guilty of default because it has not used a particular kind of coal. I think the magistrate has come to a right conclusion. There is no mistake in law in any case by which we can reverse his finding, for if we did we should have to say, not "as far as practicable" the company must use the engine so as not to emit smoke, but that they must use coal which does in fact cause the engine to emit the least possible amount of smoke.

DARLING, J.—I am of the same opinion. Mr. Bodkin, I think, put his argument best when he said that the company is bound to provide an engine which shall emit no smoke as far as practicable.

That is true. But further he contends that the company is bound to provide a fuel which will permit the engine as far as practicable to consume its own smoke. That is where I think he has not made out his case. The statute might have said that in the apt words used by Mr. Bodkin. It has not said so. If it had said so the case narrows itself down to this—that it is an offence to burn, even in the best constructed engine, anything but anthracite coal, probably coal from Wales, because that is coal which will give out the least smoke, and therefore the coal which makes the engine capable of using its power to consume its own smoke to the greatest possible extent. I think the fact that the Legislature has not said so in plain words is strong evidence that it did not intend it. These engines must be used in various parts of the country. This doctrine of Mr. Bodkin would also be applied to manufacturing districts, where it is also necessary to avoid by all reasonable means the production of smoke, and it would come to this: the local coal could not be used either for the local manufactures or engines, and I cannot think that the Legislature ever intended that. It intended that an engine should be so constructed that, given the use of a coal under all the circumstances of the case reasonable to be used, it will consume as far as practicable the smoke which that coal will necessarily give off. Upon Mr. Bodkin's reading of section 114 an offence would be committed unless all the smoke be consumed. I do think the Legislature relaxed the law by the enactment of 1868 and in the manner in which it has been put in my lord's judgment.

Appeal dismissed.

Counsel for the appellants, *Segar Berry.*

Counsel for the respondents, *E. Moore.*

K. B. Div.
(Lord Alverstone, L.C.J., and Ridley and Darling, JJ.) April 26, 30.

REX *v.* BRIGHTON CORPORATION.
Ex parte SHORSMITH. (*a.*)

Corporation—Highway—Alteration and making up by local authority—Orders for payment of money—Wasteful, extravagant, and unnecessary expenditure—Public road adapted for motor-car racing—Public Health Act, 1875 (38 *&* 39 *Vict. c.* 55), *s.* 149—*Municipal Corporations Act,* 1882 (45 *&* 46 *Vict. c.* 50), *s.* 141.

The court ordered a certiorari *to issue to bring up and quash a resolution of a municipal corporation for the payment by the treasurer of two several sums of* £2,500 *and* £550 *to the Public Works Committee, which sums had been expended on paving a road in the borough with tarmac, on the grounds that the expenditure was wasteful, extravagant, and unnecessary, and therefore illegal, the money not having been* bonâ fide *expended for the repair of the road, but solely for the purpose of enabling the motor-car trials of the Automobile Club to be held there.*

Rule *nisi* calling on the Corporation of Brighton to show cause why a writ of *certiorari* should not issue to remove into the High Court all and singular the orders and resolutions made by the council on or about the 6th of July, 1905, and the 4th of August, 1905, whereby it was ordered that the treasurer of the borough should pay to the Public Works Committee two several sums of £2,500 and £550, upon the grounds that the expenditure was wasteful, extravagant, and unnecessary, and therefore illegal, and that the corporation had no jurisdiction or authority to make it.

From the affidavits read in court it appeared that the corporation had spent these sums in altering and making Madeira-road, Brighton, a public highway, and completing its surface with tar macadam, in view of a contemplated motor-car competition by the Automobile Club, and then sought to cast the expense so incurred upon the ratepayers.

Sir R. B. Finlay, K.C. (*J. Eldon Bankes, K.C.,* and *E. E. Humphreys* with him), showed cause.—The cost incurred in laying a portion of the Madeira-road, Brighton, with tarmac for the purpose of an automobile competition is not *ultrà vires,* and consequently the expenditure sanctioned by the resolution for that purpose is not illegal. The question of the desirability of paving the road in this way was brought before the corporation many years ago, and they are acting strictly within their powers in adopting this form of pavement, which in their discretion they consider desirable. The immediate cause of the corporation deciding to pave the road in this way was, no doubt, because it was especially suitable for motor-cars, and they considered that the patronage of the Automobile Club would be beneficial to the town. But that is no reason whatever for disallowing the expenditure. The question is whether in acting as they did the corporation exercised perfectly *bonâ fide* the discretion given them by section 149 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), to "alter and repair roads as occasion may require" within their district. It is submitted that the evidence is conclusively in their favour, and the court has therefore no jurisdiction to interfere with their discretion.

He cited *Westminster Corporation* v. *London and North-Western Railway,* 54 W. R. 129, [1905] A. C. 426; *Attorney-General* v. *Blackburn Corporation,* 57 L. T. 385, 36 W. R. Dig. 189; *Attorney-General* v. *Cardiff Corporation,* [1894] 2 Ch. 337; *Reg.* v. *Mayor of Norwich,* 30 W. R. 752; *Attorney-General* v. *Tynemouth Corporation,* 46 W. R. 518, [1898] 1 Q. B. 604; *Reg.* v. *Exeter Corporation,* 29 W. R. 441, 6 Q. B. D. 135; and *Reg.* v. *Ramsgate Corporation,* 37 W. R. 781, 23 Q. B. D. 66.

Lush, K.C., and *Ernest Pollock, K.C.* (*W. A. Casson* with them), in support of the rule.—In deciding this case it is necessary to consider first what is the power of an urban authority with regard to spending money on roads, the rule *nisi* having been obtained on the ground that the corporation had expended this money *ultrà vires.* An ordinary urban district council under the Public Health Act, 1875, would be liable to have surcharged against them money they had spent which the auditors considered to be wasteful, extravagant, and unnecessary expenditure; but where, as here, the corporation are the urban authority, the auditor has no power to surcharge at all. In such a case as the present the court sits as a court of appeal against any wasteful expenditure, for an appeal to the court is the only remedy open to the ratepayer. It is not necessary to show that there has been an excess of jurisdiction on the part of the corporation. The discretion is not a discretion of the corporation, but of the court. It is submitted that the corporation have in fact exceeded their powers, and if not, there has been a "wasteful" expenditure, and the court had therefore power to consider if the expenditure was wasteful, and to quash the orders for payment if they find it was. The officials of the corporation are now endeavouring to justify expenditure made for one object as if it were made for

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

another, and it has been urged that there being no evidence of *mala fides*, the discretion exercised by the corporation in altering the road cannot be interfered with by the court. They said that although the cost was heavy, it was a prudent thing to make up the road with tarmac, because so many advantages were gained by it. But it was admitted that the road was in such a good state of repair that it was not necessary for ordinary traffic that any repairs should be undertaken. The repairs *quâ* highway were not necessary.

Lord ALVERSTONE, L.C.J.—This is a case of very great importance, because the court is asked to quash orders for the payment of a very considerable sum of money; and I confess that when the matter was first argued by Sir Robert Finlay I did not see my way to take the view which Mr. Lush has since convinced me we ought to take.

Speaking for myself, if there had been evidence to show that the corporation had acted *bonâ fide* under their statutory powers, I think the case of *Westminster Corporation* v. *London and North-Western Railway* would be conclusive authority that we ought not to review that discretion on this application. Of course there might be cases in which the expenditure was so unreasonable as to be *ultrâ vires*, but I wish to reserve my judgment as to what the powers of this court might be under section 141 if it was conceded that the operation of the payments made could not be brought within the points of legality.

Now, it is not disputed that the section under which the corporation have purported to act is section 149 of the Public Health Act, 1875. That section provides that the road authority shall from time to time repair such streets, and do such paving, and so forth, "as occasion may require." If there had been evidence upon the affidavits—however long they had been thinking over it, and however dilatory in coming to a decision—that the altering of the road in the way suggested was the result of a consideration by the urban authority as to the needs of the road "as the occasion required," then the question Mr. Lush had contended for on his second ground—whether this expenditure was a *bonâ fide* and proper expenditure or was so unreasonable as to be illegal—would not have arisen. If I had thought the affidavits of Sir Alexander Binnie and other distinguished engineers on behalf of the corporation had been directed to the point of view that the repairs and alteration of the road were really necessary in the interests of the road itself, I should have taken a long time before allowing myself to investigate the motives which led to such expenditure. I have come to the conclusion that the beginning and end of this expenditure was the desire of the Automobile Club to come to Brighton, and the desire of the corporation to have the automobile races there. I am satisfied from the initiation of the matter, the correspondence in the early part of 1905, the action taken by the corporation to investigate the tarmac system from the motor point of view, and also from the absence of any report or suggestion of any surveyor that the road required to be repaired with tar macadam or tarmac—prior to the suggestion made by the Automobile Club that they should go to Brighton—and the very frank statement made by the corporation in their affidavits that they were acting in the interests of the borough and not in the interests of the road—from all this I am satisfied that the beginning and end of this alteration was the automobile races and nothing else. Nor do I lose sight of the fact that these races involve excluding the public from the road, involve closing a public highway, and possibly involve operations which are not legal; but while I mention these things, I do not wish it to be thought that they were anything like half as strong grounds in support of the rule being made absolute as the fact that it was the desire of the corporation to accept the club's suggestion to hold the automobile races on this road, and that that was the only motive that moved the corporation. That view is confirmed by what happened when the resolution had once passed the council, and the club's invitation had been accepted. The contract was immediately obtained, the work was put in hand, and actually commenced before the inquiry was held into the application for a loan to meet the cost; and I see that the contract required that the work should be completed by the 17th of June. It was not suggested that the letter of the Local Government Board was a judgment as to the purpose for which the loan was required, but there is no contradiction of the statement that the avowed object of the new work was the motor speed trials. That being the uncontradicted statement of the gentleman who held the inquiry strongly confirms my own view that no question of exercising their powers, apart from creating a surface suitable for the motor speed trials, has ever been raised by the corporation. So determined, indeed, were the corporation to have the motor trials that they passed a resolution in anticipation, and directed that if the money was not allowed to be raised by loan it should be paid out of the current rates. I have no hesitation, therefore, in coming to the conclusion that it was an illegal payment, on the ground that it was not a payment that could be possibly justified in any exercise of the corporation's discretion, however wide their powers under the section. I have, perhaps, felt more difficulty than my learned brethren upon the question of time.

I still think the court would have to consider whether there were circumstances which would make it not right for them in the exercise of their discretion to impose the serious consequence of quashing the order. But while it is true that section 141 of the Act of 1882 contemplates that the money has been spent and delay in applying to the court might in some cases become material, I am not prepared to give effect to the objection that the application came too late. In this case the time within which any effective proceedings could have been taken was certainly very limited—between some day in May and the early part of June—and I can well imagine that there were some questions raised about the position of this road; and the answer of the corporation in September was ample justification for the delay between September and the time the rule was moved for. By September the mischief had been done. Looking at the correspondence, and having regard to the whole circumstances of the case, the fact that Mr. Shoesmith did not move for this rule before was not, in my opinion, sufficient to justify me in saying that the rule ought to be discharged. I think the rule ought to be made absolute.

RIDLEY and DARLING, JJ., delivered judgment to the same effect.

Rule made absolute.

Solicitors for the applicant, *E. Elvey Robb*, for *Gates & Burnand*, Brighton.

Solicitors for the corporation, *Boxall & Boxall*, for *Hugo Talbot*, Brighton.

Solicitors for the other defendant, *Cutler, Allingham, & Nesfield.*

Prob. Div. & Adm. Div. Divorce. (Gorell Barnes, P.) — Dec. 19; March 19; April 27.

DODD v. DODD. (a.)

Divorce—Desertion—Matrimonial Causes Act, 1857—*Summary Jurisdiction (Married Women) Act,* 1895.

The wife prayed for a dissolution of marriage on the ground of adultery and desertion. Prior to the commencement of the two years necessary to complete the defence of desertion within the meaning of the Matrimonial Causes Act, 1857, *the wife had obtained an order under the Summary Jurisdiction Act,* 1895, *directing that she should be no longer bound to cohabit with the respondent, on the ground that the respondent had been guilty of wilful neglect to provide reasonable maintenance.*

The Court held that, if the two years had not been completed prior to the making of the order of the court of summary jurisdiction, it would have had the effect of preventing the desertion from continuing after it. It dismissed the petition for divorce, on the ground that the wife had not proved a case of desertion but adultery alone.

Smith *v.* Smith, [1905] *P.* 249, *not followed.*

The facts of the case sufficiently appear from the judgment.

Willis, for the petitioner.

Sir J. Lawson Walton, A.G., and *Lowenthal,* for the King's Proctor.

GORELL BARNES, P., in delivering his considered judgment, said: This is a suit for divorce by the petitioner, a wife, in an undefended case, on the alleged grounds of her husband's adultery and desertion without reasonable excuse for two years and upwards. The case originally came before me on the 19th of December last, when evidence of the facts was given; the adultery was established by the evidence, but the facts with regard to the desertion have given rise to a question of importance—of importance, indeed, far beyond that which is at first apparent. Having regard to this, and to the fact that there have been two undefended cases—viz, *Levy* v. *Levy,* 21 Times L. R. 157, and *Smith* v. *Smith,* [1905] P. 249, in each of which a somewhat similar point was raised to that which causes the present difficulty, and in each of which the point was disposed of without the court having the advantage of an opposing argument, I thought it desirable to take advantage of the provisions of section 5 of the Matrimonial Causes Act, 1860, by directing that the papers in the matter should be sent to the King's Proctor, in order that he might instruct counsel to argue the case before the court. Accordingly, on the 19th of March last, the case was again considered before me, the Attorney-General arguing on behalf of the King's Proctor, and the petitioner's counsel also being heard.

The facts necessary to state in order that the point may be appreciated are as follows: On the 26th of March, 1891, the petitioner was married to the respondent, a provision merchant, of Manchester. There was one child of the marriage, born in 1892. In the year 1896 itappears that the husband had given way to drink, had lost his business, and, though living with his wife, was neglecting to provide for her and her child, and was being kept by her, and, in consequence, on the 21st of August in that year the petitioner left him and went to her mother. In the following month of September the petitioner applied to the stipendiary magistrate at Manchester under the provisions of the Summary Jurisdiction (Married Women) Act, 1895, complaining that her husband had been guilty of wilful neglect to provide reasonable maintenance for her and her infant child, and that by such neglect the respondent had caused her to leave and live separately and apart from him, and she sought to obtain an order under the provisions of that Act. On the 9th of September, 1896, the stipendiary magistrate made an order, from which it appears that the respondent appealed, and that it was ordered that the petitioner should be no longer bound to cohabit with her husband, that the legal custody of the child should be given to the petitioner, and that the respondent should pay to the petitioner a weekly sum of 10s., and 6s. 6d., the petitioner's costs. The respondent did not pay anything under the order, and the petitioner accordingly took steps to enforce it by summoning the respondent two or three times; but no payment was in fact made by him, and since that time the petitioner has been living with her mother. On the 5th of August, 1905, the petitioner having ascertained, as she alleged, that her husband had been guilty of adultery, filed her petition in the present suit to obtain a decree of divorce on the grounds aforesaid. From the date of the magistrate's order it appears that the petitioner had not had any communication with her husband. The evidence satisfied me that the adultery on the part of the respondent was established, and, therefore, the right of the petitioner to succeed in the present petition depends upon whether there has been desertion on the part of the respondent for two years and upwards. The separation between the parties having taken place in 1896, far more than two years has elapsed since that date up to the commencement of the present suit; but two questions arise—viz., whether the evidence showed any desertion on the part of the respondent, and, if it did, what was the effect of the magistrate's order of September, 1896?

With regard to the first point, I have had the opportunity since the arguments were heard of reading the shorthand notes of the evidence taken in the case; and possibly because the papers had been sent to the King's Proctor with the intention of directing his attention to the general legal question raised, and the arguments before me were confined to that question, I had not, until I had read the notes, sufficiently appreciated this point. It had been rather assumed that the court would find from the whole of the facts given in evidence that there had been desertion by the respondent in accordance wtih the principles laid down in *Sickert* v. *Sickert,* 48 W. R. 268, [1899] P. 278, where I held that desertion is not to be tested by merely ascertaining which party left the matrimonial home first, and that the one who intends bringing the cohabitation to an end commits the act of desertion. But I am satisfied upon the evidence in this case that the husband had no intention of bringing the cohabitation to an end. He was, in fact, living upon his wife, who was keeping him, and no doubt, desirous of remaining with her, but as he was drinking and doing no work, she left him. She did not summon him for desertion, but for neglect to maintain; in fact, she wanted to get rid of him, and did so. I find, therefore, that the husband was not guilty of desertion for two years and upwards, or at all, and that is really sufficient to dispose of the case. It is not, as a rule, wise to express any opinion on points which are not strictly necessary to the decision of a case; but, having regard to the fact that this case has been argued by the Attorney-General for the King's Proctor with the object of obtaining a decision upon the legal question supposed to have been raised and of reviewing the decisions in the two undefended cases above-mentioned, and to the fact that the point

(a.) Reported by GWYNNE HALL, Esq., Barrister-at-Law.

is sure to come up again when it might not be convenient to have it argued as this case has been, and to the advantage which it may be to the magistrates throughout the country to have the opinion of this court upon the matter, I have decided to express the opinion I have formed as to the effect of the magistrate's order. Desertion contemplated by the Act of 1857 must be desertion without reasonable excuse for two years and upwards, and in order to maintain desertion throughout that period there must be in fact a state of things which keeps up the desertion throughout the whole of that period. I have so held in the case of *Kay* v. *Kay*, 53 W. R. Dig. 49, [1904] P. 382 That was a case in which a supplemental petition alleging desertion for two years and upwards had been filed, but the desertion found did not occur as much as two years prior to the date of the original petition; and it was held that the filing or prosecution of a suit for dissolution of marriage precluded the petitioner from successfully pleading that the period of desertion was running during the time when the suit was being maintained, as nothing had happened to entitle the wife to refuse to return to the husband if he had desired to put an end to the desertion, and the petitioner had put it out of the power of the respondent to do anything, and could not be held entitled to treat him as continuing to desert her. Therefore the question I am now considering in this case is whether, when the two years had not been completed at the time of the magistrate's order, that order had the effect of preventing the desertion from continuing after the date of the order. But first there is a technical point to dispose of, which was not taken by the Attorney-General, no doubt because he was concerned with the broad legal question, nor pressed, so far as I recollect, by the petitioner's counsel—that having regard to the form of the order in this case it might be treated as a nullity, because it might be considered as bad on the face of it. The order does not state upon its face the finding of fact upon which the order was made; in other words, it does not state on the face of it that the respondent had been guilty of wilful neglect to provide reasonable maintenance for the petitioner and her child, and that by such neglect he had caused her to leave and live separately and apart from him. It might be said that I could therefore ignore the order, and treat it as if it had never been applied for and made, on the general principle that a magistrate's order ought to state the finding of fact essential to the exercise of the jurisdiction: see the observations in the case of *Brown* v. *Brown*, 62 J. P. 711. But it is necessary to observe first that this point is highly technical, and on an appeal to this Division the defect could have been corrected; that the petitioner acted upon the order and endeavoured to enforce it and that it undoubtedly was treated by both parties as being an effective order; and, further, that in the case of *Brown* v. *Brown* the effect of the provisions of the Summary Jurisdiction Acts and of the forms which are provided for use under those Acts was not fully considered. According to section 8 of the Act of 1895, all applications under it are to be made in accordance with the Summary Jurisdiction Acts, and without going through the details of those Acts, as they at present stand, it is sufficient to observe that the Summary Jurisdiction Rules, 1886, r. 31, provided that the forms in the schedule thereto, or forms to the like effect, might be used with such variations as circumstances might require, and the forms of orders in that schedule omit to state whether the complaint is found and adjudged to be true; so that, although in strictness the order ought to state the findings of fact essential to jurisdiction, having regard to the provisions of the Act and rules to which I have just referred, I am not prepared to hold without further argument that this order ought to be treated as bad on the face of it. I might point out, however, that it is desirable that the practice adopted, I believe, by the magistrates of London, of stating that the cause of complaint is found to be true, is desirable in order to avoid any such difficulty as arises in the present case upon this point: see the discussion of this subject, 62 J. P. 563.

Assuming, then, the order to be an operative order, I shall first consider the effect of the two cases which have already been decided—viz., *Levy* v. *Levy* and *Smith* v. *Smith*. I have been furnished by the King's Proctor with a transcript of the official shorthand writer's notes of the case of *Levy* v. *Levy*; and it is quite clear from a perusal of them that the discussion in that undefended case was of a very short character, and that no considered judgment by Lord St. Helier was given upon the point. With regard to the case of *Smith* v. *Smith*, Bargrave Deane, J., appears to have come to the conclusion in that case, without having had the benefit of any argument except that on the part of the petitioner, that he could ignore the operation of the order made by the magistrates as not affecting the jurisdiction of the court. I agree that the order does not affect the jurisdiction of this court; but desertion is a question of fact, and if something has taken place which puts an end to the desertion running on, just as, for instance, an agreement to live separate made after desertion would do, then the court cannot find the fact of the necessary desertion for two years or upwards. For the reasons which will appear I do not think I can follow that case after the very full discussion this case has had. In this court decisions in undefended cases, when the court has not had the benefit of an argument on both sides, have not been treated as so binding that the court, when it has the opportunity of a fuller consideration, is compelled to follow them. To arrive at a conclusion about this matter it is necessary to examine with some care the whole of the legislation affecting the question. According to the Matrimonial Causes Act, 1857, s. 7, no decree for a divorce *a mensa et thoro* was to be made thereunder, but in all cases in which a decree of divorce *a mensa et thoro* might be pronounced the court might pronounce a decree for judicial separation which should have the same force and the same consequence as a divorce *a mensa et thoro* then had. By section 16 a decree of judicial separation might be obtained either by the husband or wife on the ground of adultery, or cruelty, or desertion without cause for two years and upwards. By section 17 an application for judicial separation might be made by either the husband or wife by petition to the Divorce Court, and also to the judges of assize. This latter provision was the subject of much discussion at the time, and in the following year, 1858, by section 19 of the Matrimonial Causes Act of that year the provision for judicial separation by petition to a judge of assize was repealed, and so matters remained until 1878. By the fourth section of the Matrimonial Causes Act of that year it was provided that if a husband should be convicted summarily or otherwise of an aggravated assault within the meaning of the statute 24 & 25 Vict. c. 100, s. 43, upon his wife, the court or magistrate before whom he should be so convicted might, if satisfied that the future safety of the wife was in peril, order that the wife should be no longer bound to cohabit with her husband, and such order should have the same force and effect in all respects as a decree of judicial separation on the ground of cruelty, and that such order might further provide (1) for the payment

by the husband to the wife of weekly sums, which payments were to be enforced as therein provided, and the court or magistrate by whom any such order for payment of money should be made should have power from time to time to vary the same on an application by either the husband or wife, upon proof that the means of the husband or wife had been altered since the original order, or any subsequent order varying it, should have been made, and (2) for giving the custody of the children under ten years of age to the wife; and the said section further provided that any order for payment of money or for custody of the children might be discharged by the court or magistrate by whom such order was made upon proof that the wife had since the making thereof been guilty of adultery. As bearing upon the point under consideration it is important to notice that the words as to non-cohabitation are the words which are adopted in sub-section (a) of the Act of 1895, and that it seems clear that the object of inserting them in the said section 4 of the Act of 1878 was to make a complete separation between husband and wife because the safety of the wife required it. No power is contained in the section to make an order without this provision, or to vary or discharge that order otherwise than with regard to the payment of money and the custody of the children, and so it would remain in permanent operation, because it originated in the necessity for providing for the future safety of the wife. The contention in the present case on the part of the petitioner is that similar words as to non-cohabitation in the Act of 1895 are to have a totally different construction. The next Act to refer to is the Maintenance in case of Desertion Act, 1886. According to that Act a wife might summon her husband for desertion, and the justices or magistrate, if satisfied that the husband was able wholly or in part to maintain his wife or his wife and family, but wilfully refused or neglected so to do, and had deserted his wife, might order a weekly payment, which might be afterwards varied or discharged in certain circumstances as therein provided; but the Act contained no power to make a non-cohabitation order in cases of desertion, and the usual form of order made was that the payments should be made so long as the desertion continued. Then, coming to the Act of 1895, it is important to notice at the outset that that Act is an Act to amend the law relative to the summary jurisdiction of magistrates in reference to married women. It is not an Act which alters, nor do any of its provisions appear to me to affect, the Matrimonial Causes Acts applicable to this court, nor was it intended to vary, nor does it in fact vary, the causes for which a divorce may be obtained. The fourth section of the Act gives five grounds for any one of which a married woman may lay a complaint and obtain an order or orders under the Act. Those grounds are these: (1) Where the husband shall have been convicted of an aggravated assault upon her within the meaning of section 43 of the Offences against the Person Act, 1861; (2) where the husband shall have been convicted upon an indictment of an assault upon her and sentenced to pay a fine of more than £5, or to a term of imprisonment exceeding two months; (3) where the husband shall have deserted her; (4) where the husband shall have been guilty of persistent cruelty to her; and (5) where he shall have been guilty of wilful neglect to provide reasonable maintenance for her and her infant children, whom he is legally liable to maintain, and in each of such cases—viz., of persistent cruelty or neglect to maintain—shall by such cruelty or neglect have caused her to leave and live separately and apart from him. Section 5 provides that the court of summary jurisdiction to which any application under the Act is made may make an order or orders containing all or any of the provisions following, viz.—(a) a provision that the applicant be no longer bound to cohabit with her husband, which provision, while in force, shall have the force in all respects of a decree of judicial separation on the ground of cruelty; (b) a provision as to the custody of the children; (c) a provision as to weekly payments to the wife not exceeding £2 per week; and (d) a provision as to the payment of costs. Section 6 is not material to the present case. Section 7 gives power to the court on the application of the married woman or of the husband, and upon cause being shown upon fresh evidence to the satisfaction of the court, at any time to alter, vary, or discharge any order, and to increase or diminish the amount of the weekly payments so that the same do not in any case exceed the weekly sum of £2. But where an order has been made it is very difficult to get rid of it, except possibly as to the amount of payment or custody of children: see as to the meaning of the term "fresh evidence," *Johnson* v. *Johnson*, [1900] P. 19. It would seem as if the magistrates had not a simple discretion to discharge the original order, and it is very important to notice that the Act appears to contain no provisions expressly empowering the magistrates to make original orders for temporary separation or of a probationary character, with such conditions and restrictions as might be useful, though such orders might meet the needs of many cases in which time, reflection, and amendment might end the trouble. Section 8 provides that all applications under the Act shall be made in accordance with the Summary Jurisdiction Acts. Section 10 gives power to the court, if in its opinion the matters in question between the parties or any of them may be more conveniently dealt with by the High Court, to refuse to make an order under the Act. It will be seen that the Act is an amalgamation of the two Acts last referred to. In practice, I believe, since 1895, the difference between cases involving the wife's safety and cases in the nature of desertion or neglect to maintain appears to have been lost sight of, and the orders under the Act of 1895 have been made in a form commencing with the non-cohabitation provision and following with the others as to custody and payment of an allowance and costs. This ought to be noted, because it is unnecessary, as I will point out more fully later on, in desertion cases or cases such as the present of neglect to maintain, that the non-cohabitation provision should be inserted, unless indeed the applicant particularly desires to have it. It ought also to be noted that the power of magistrates appears to be discretionary. The words are "The court may make an order or orders"; the language does not appear to impose upon them an absolute obligation to do so, and however this may be it is certainly clear that the order may contain all or any of the provisions aforesaid, and therefore that only such provisions should be inserted in the order as are necessary to meet the justice of the case.

This, then, brings me to the consideration of what effect is to be given to what I may term the non-cohabitation provision when it has been inserted in an order. The language of that provision I have above stated. The argument for the petitioner was to the effect that this provision was simply for the wife's protection, and has no effect on the husband's duties, and that although the wife is no longer bound to cohabit with her husband, yet he is still under the duty to do so if required. But where do these words as to non-cohabitation come from? Clearly, I think, from the Act of 1876, where the object was to provide for the wife's safety, and to make her completely free from her husband, as I have

already pointed out; and I confess that I fail to appreciate the argument that if she be not bound to cohabit yet he still is. But still further; words are added as follows: "Which provision while in force shall have the force in all respects of a decree of judicial separation on the ground of cruelty." Now, what is the effect of these words? In my opinion their effect is to be gathered from the provisions of sections 7, 25, and 26 of the Act of 1857, the result of which is that a wife, in a case of judicial separation, is to be considered as a *feme sole* in respect of property which she may acquire, and also for the purposes of contract and wrongs and injuries, and suing and being sued in any civil proceedings. She thus obtains complete protection from her husband, and he can in no way interfere with her. It was, however, argued that if the non-cohabitation provision is to have in all respects the force of a decree of judicial separation on the ground of cruelty, then a wife, having obtained such an order, though there had been no cruelty in fact, nor desertion, for two years or upwards by the husband, could at once, upon proof of adultery, sue him for divorce. In my opinion this argument, though ingenious, is entirely unsound. To uphold it would in effect be permitting the Act of 1895 to alter the Act of 1857, though the former is only an Act to amend the law relating to the summary jurisdiction of magistrates in reference to married women, and contains no express provision varying or amending the latter Act, and would in effect be giving new grounds upon which a divorce could be obtained by a woman. The argument appears to me to be based upon a misconception. The order is not a decree of judicial separation on the ground of cruelty. It is merely to have the same effects (which are what I have already stated). In cases of cruelty and adultery, if cruelty be proved, a judicial separation may be obtained. If adultery be afterwards proved the court "if satisfied" that both cruelty and adultery have been proved may grant a decree of divorce: see sections 27 and 31 of the Act of 1857. The cruelty already found in the judicial separation suit has been proved and the parties are estopped from disputing this. But how can the court be satisfied that there has been both cruelty and adultery if, though adultery be proved, it merely has before it in addition a magistrate's order which has no cruelty for its foundation? The Attorney-General, however, went further, and suggested that the Act of 1895 was intended to do away with the two years' limit in poor cases. I confess I cannot follow this. There is no repeal of this limit, and why should it be allowed in poor cases rather than in other cases? If the Act of 1895 were to have the effect contended for there would seem to be no reason why any wife deserted by her husband could not apply to the magistrates for a non-cohabitation order, and then upon proof of adultery get a decree of divorce and maintenance from this court. The answer is that the powers of this court to grant a decree of divorce are limited to certain specific causes which the Act of 1895 does not touch. Further, it is important to notice that if a husband refuses to return to his wife, a suit for restitution can be brought, and if a decree be obtained and the respondent fails to comply with it, then by virtue of the provisions of the Matrimonial Causes Act, 1884, such non-compliance is to have the effect of desertion for two years and upwards so that a suit for judicial separation can then follow, or if there be adultery as well, a suit for divorce can then at once be maintained. This course has been adopted in a great many cases which have come before this court, and by it the two years' limit has, in such cases, been got rid of. In the present case perhaps want of means (though I have no evidence about this) might have hindered the petitioner from taking such a course, though such a suit is an inexpensive matter where not defended, but it is clear from the evidence that the petitioner would not have been likely to take such a course because it would seem probable that her husband would only have been too glad to come back to her to be kept by her. It was said that section 10 of the Act of 1895 countenances the above suggestion because the magistrates, it was said, have a discretion in making an order and may refuse to make one, but this cannot depend on the position of the people. It depends expressly on the question of convenience, as, for instance, if the court of summary jurisdiction cannot grant adequate relief or perhaps has not the means of compelling the necessary evidence. Lastly, it was urged for the petitioner that to refuse a decree will inflict great hardship upon her. That may be, but she asked for and obtained a non-cohabitation order, which put an end to the desertion, and it is desirable to consider how this jurisdiction of the magistrates should be exercised in suitable cases. I have already pointed out that the magistrate's order may contain all or any of the provisions mentioned in the fifth section of the Act of 1895, and it seems most important to consider whether it is desirable that the non-cohabitation provision should be inserted except in those cases where the wife's safety is involved, or where for some other reason it is necessary to insert it. It does not appear to have been necessary to have such a provision under the Desertion Act of 1886, and there seems to be no reason why it should be inserted in mere desertion cases now. This gives rise to the general consideration of the effect of these orders. Now, at the time when the Act of 1895 was passing through Parliament, it is remarkable that there should have been practically no discussion in either House as to the probable general result and effect of the then proposed legislation. The reports in Hansard, so far as I have been able to find, show that the Act passed almost without anything being said about it, although it went far beyond being a consolidation Act, and gave powers to grant non-cohabitation orders in large classes of cases where it did not exist before. Those who were concerned with it appear to have had their minds, if not entirely, yet mainly on the protection of women rather than on the general effects of the Act, and its probable influence on the morality of the country. The following statistics have an important bearing on the matter under consideration. The number of matrimonial causes heard in this court were—in 1886, 505; in 1896, 609; and in 1903, 743. Very few suits are now brought in this court for judicial separation. The number of orders made by courts of summary jurisdiction under the Acts prior to that of 1895 was—in 1895, 1,035; the Act of 1895 came into force on the 1st of January, 1896, and in that year the number of separation orders made by the courts of summary jurisdiction amounted to the large figure of 5,399, and the number rose in 1903 to 7,292. I have not before me the statistics for 1904 and 1905 The figure for those years will probably be greater and not less. These figures certainly give food for reflection. I can obtain no figures which could show in what number of cases the parties have come together again. I have sat on most of the appeals under the Act of 1895, and, although no doubt there are many bad cases calling for the exercise of the jurisdiction of the magistrates, I am convinced that the result of the Act has been to cause women in numerous cases to rush off to the court on slight provocation and to endeavour to make a case sufficient to obtain an order. This view was forcibly expressed in a recent communication to *The Times* by a very experienced metropolitan

magistrate. Probably the experience of other magistrates is much the same. I have frequently noticed that the magistrates have done all in their power to reconcile the parties, and have adjourned cases from time to time with this object, and I expect that this has generally been the case and that the magistrates have so far as possible endeavoured to keep these applications within bounds. At the same time it may be doubted whether these summary proceedings are suitable for the determination of matters which affect the whole future life of the parties and their children. There is, further, a broad and very serious ground upon which the operation of these orders is open to question, having regard to the very large extent to which they are being obtained—viz., at the rate of over 7,000 a year—so that at any given time there must be an extremely large number of people living separate under orders made during the previous years. That ground is that the direct tendency of these orders appears to be to encourage immorality and to produce deplorable results. Applied first in an age remote and in a state of society different from the present, the remedy of permanent separation for matrimonial grievances would always seem to have been injudicious even in days when persons could not escape from their surroundings as they now can, and when they were more amenable to the pressure and censures of the Church, and is now probably to be regarded as more unsatisfactory still, and as tending to demoralization and providing inadequate justice to the innocent. At the time of the Reformation the Royal Commission issued by Henry VIII. and renewed by Edward VI., composed of ecclesiastics, civilians, and common lawyers, inquired into this subject. The project of reforming the law came to an end with the death of the latter king, but the commissioners' report was printed in the reign of Elizabeth under the title *Reformatio Legum Ecclesiasticarum*, and the recommendations were to the effect, *inter alia*, that separation *a mensa et thoro* should be abolished as productive of great abuses and scandal in the marriage state, and that while restrictions and punishments should be imposed upon the guilty party, the innocent party should be permitted to obtain a divorce for, among other grounds, desertion: see Reeves' History (2nd ed.), vol. 4, p. 546, summarizing Ref. Leg. Eccles. 47-56. Desertion is a ground in Scotland and in certain other countries. Nothing, however, was done by the Legislature, and marriage remained indissoluble except by Act of Parliament until 1857, when, after much controversy, the Act of that year was passed, which can hardly be held to have attained to finality. By it the right of divorce was given, but confined to the cases specified therein. The remarks of Mr. Bishop in his work on marriage and divorce (section 37) on the state of things which existed in England before that Act are deserving of most careful perusal. But the figures I have given above show the limited application of this Act, especially having regard to the great increase in the population of this country, and the applications under the Summary Jurisdiction Act appear to be partly for want of means to bring the cases before this court and partly because the causes for orders effecting permanent separation are wider than the causes for granting divorce. That the tendency of these orders is to encourage immorality, bearing in mind that human nature is what it is, and the classes of persons with whom the magistrates usually have to deal, I doubt whether any one of experience sufficient to judge, will deny. That is the opinion which I have formed after a long experience in this court, where case after case shows what so often follows from these orders, and discloses a most unsatisfactory state of things. It is an opinion in accord with that expressed in very forcible language by Mr. Bishop on the subject of divorce *a mensa et thoro* (section 29 *ib.*), where he collects the opinions of certain distinguished writers on the subject. The provisions of the German Code, 1564-1576, and French Code may be usefully studied as bearing upon the subject under consideration, especially those which relate to the powers as to turning a decree of judicial separation into a decree of divorce. I will first observe that these separation orders can only be obtained by a wife, except in the one case recently provided for by the Licensing Act of 1902, when a wife is an habitual drunkard as defined by the Habitual Drunkards Act, 1879 (a case, by the way, difficult of proof, having regard to the definition there given), and it is most remarkable that in the present state of the law, while on the one hand it is more difficult for a woman to procure a divorce than for a man because she must prove adultery and one of certain other offences, whereas he has only to prove adultery, yet on the other hand she can obtain a separation order from the magistrates for the causes specified in the Act of 1895, but he can obtain no order at all, however unbearable his life may have become from his wife's drunkenness (short of her becoming an habitual drunkard within the meaning of the aforesaid Act), violence, desertion, or other cause. Moreover, these orders really impose a more serious penalty in the cases to which they apply than a decree of divorce would, for the result of a decree of judicial separation against a man is more severe to him, and in certain cases even to a woman, than a decree of divorce. The consequences of each are, in most cases, very much the same, except that the former imposes the disability of remarriage, while the latter does not, so that, for instance, a man may be more severely punished for the offence of adultery than for the same offence coupled with cruelty or desertion for two years or upwards; and, further, in the latter case the wife has the option of choosing whether to apply for separation or divorce. With regard to the orders obtained by wives against husbands, case after case in this court shows that rather than pay the allowance ordered the man goes elsewhere, either to another town, or to America, or the Colonies, and forms other ties almost as a matter of course. Again, a very frequent case in this court is where a wife by her own behaviour, such as drunkenness, violence, and neglect of home and children, causes her husband to leave her. She then takes out a summons against him for desertion; he appears, and agrees to pay so much per week rather than go back. She is found misconducting herself, as might be expected; he sues for a divorce, and asks the court to exercise its discretion in his favour notwithstanding that he had left her. These are illustrations, and are only brought to notice in this court when there is money enough for one of the parties to sue for a divorce. It is easy to guess at the state of things in the mass of cases where there are not sufficient means for this purpose, or where both parties are guilty of similar offences. I am anxious not to travel out of my province, which is *jus dicere non jus dare*; but the point as to how the Act of 1895 can be administered with regard to the non-cohabitation part of the order by the magistrates, who have, as noticed above, certain discretionary powers and can to a certain extent control the working of the Act so as to prevent as far as possible, evil results, gives rise to the foregoing general observations; and having, since I first sat on this Bench in 1892, found it necessary to make myself familiar with the history of the laws governing the relations of husband and wife and the discussions which have from time to time taken place relating thereto, more particularly at the time of the passing

of the Act of 1857 and the results of those laws, of which experience in this court gives very considerable opportunities of judging, it is desirable, in my judgment, as bearing on the subject under consideration, to express the conviction which has forced itself upon me, that permanent separation without divorce has a distinct tendency to encourage immorality, and is an unsatisfactory remedy to apply to the evils which it is supposed to prevent. That the present state of the English law of divorce and separation is not satisfactory can hardly be doubted. The law is full of inconsistencies, anomalies, and inequalities amounting almost to absurdities, and it does not produce desirable results in certain important respects. Whether any and what remedy should be applied raises extremely difficult questions, the importance of which can hardly be over-estimated, for they touch that basis on which society rests, the principle of marriage being the fundamental basis upon which this and other civilized nations have built up their social systems, and it would be most detrimental to the best interests of family life, society, and the State to permit of divorces being lightly or easily obtained or to allow any law which was wide enough to militate by its laxity against the principle of marriage. It is not necessary for me now to express a formal and final opinion upon these serious questions; but the consideration of what I have found it necessary to deal with in this judgment brings prominently forward the question whether, assuming divorce is to be allowed at all as it has been in England by judicial decree for the past fifty years, and for a long time before that by Act of Parliament, any reform would be effective and adequate which did not abolish permanent separation as distinguished from divorce, place the sexes on an equality as regards offence and relief, and permit a decree being obtained for such definite grave causes of offence as render future cohabitation impracticable and frustrate the objects of marriage, and whether such reform would not largely tend to greater propriety and enhance that respect for the sanctity of the marriage tie which is so essential in the best interests of society and the State. It is sufficient at present to say that from what I have pointed out there appears to be good reason for reform, and that probably it would be found that it should be in the direction above indicated. The petition for divorce in this case must be dismissed, for the wife has only proved adultery, and that is not sufficient to enable her to obtain a decree of divorce, and it will not be any satisfaction to her to know that if her case had arisen and her suit could have been brought in Scotland, or most other civilized countries, she would have succeeded.

Solicitors, *Crowders, Vizard, & Co.; King's Proctor.*

Court of Appeal.

From K. B. Div. (Collins, M.R., and Cozens-Hardy and Farwell, L.JJ.) — June 12.

NELSON & SONS (LIMITED) *v.* NELSON LINE (LIMITED). (*a.*)

Practice—Discovery of documents—Conduct of action taken over by plaintiffs' underwriters—Document in possession of underwriters' solicitor—Plaintiff retaining substantial interest in action—Stay of action till discovery made.

(*a.*) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

The plaintiffs, as owners of cargo, sued the defendants, as shipowners, for breach of a contract contained in a bill of lading. Underwriters, with whom the plaintiffs had effected a policy of insurance on the cargo to the extent of three-fourths of its value, paid on the policy and then took over the conduct of the action. The defendants desired to have discovery of a document which was in the possession of the underwriters' solicitors, and applied for an order to stay the action until such discovery was given.

Held, that, as the plaintiffs were not mere nominal plaintiffs, but had a real and substantial interest in the action, the order could not be made.

Willis *v.* Baddeley, 40 *W. R.* 577, [1892] 2 *Q. B.* 324, *distinguished.*

Appeal by the defendants from the refusal of Bigham, J., to order the plaintiffs to make a further and better affidavit of documents.

The action was brought by cargo-owners against shipowners to recover damages for breach of a contract to carry a cargo of frozen meat from Buenos Ayres to London. The action was founded on an alleged breach of a stipulation in the bill of lading that the temperature in the refrigerating machinery of the ship should be kept as low as possible, or, alternatively, on the alleged unseaworthiness of the vessel, whereby the plaintiffs' meat was rendered unsound. The plaintiffs had effected a policy of insurance with underwriters at Lloyd's on the cargo to the extent of three-fourths of its value. When the writ was issued the insurance money had not been paid, and the action was commenced in the name of the plaintiffs alone to recover the whole of their loss. A fortnight afterwards the underwriters paid on the policy, and took over the conduct of the action, and there was thereupon a change of solicitors.

It appeared that while the vessel was loading at Buenos Ayres the underwriters had been informed that there was something wrong with the refrigerating machinery, and thereupon a surveyor, acting on the instructions of the London Salvage Association, had examined the vessel and made a report in writing.

The defendants desired to see this report, and applied, in the first instance, to the Salvage Association, by whom they were informed that it was in the hands of the underwriters' solicitors. The defendants then wrote to the underwriters' solicitors, who, in reply, admitted that the report was in the possession of a member of their firm, but refused to allow the defendants to inspect it. The plaintiffs' usual affidavit of documents did not include the report in question.

The defendants applied for an order that the plaintiffs should make a further and better affidavit of documents.

Bigham, J., refused to make an order.

The defendants appealed.

Danckwerts, K.C., and *Bailhache*, for the defendants.—The underwriters are interested in the sum sought to be recovered in this action to the extent of three-fourths thereof, and they are *pro tanto* subrogated to the rights of the plaintiffs. The underwriters are conducting the litigation and they are employing their own solicitors. It would be contrary to justice that the defendants should not be able to obtain discovery of a document of great importance to the action, which is admittedly in the possession of the underwriters' solicitors. It is the practice of the court in such cases to stay the action until discovery is made: *Willis* v. *Baddeley*, 40 W. R. 577, [1892] 2 Q. B. 324; *Republic of Liberia* v. *Roye*, 24 W. R. 967, 1 App. Cas. 139; *West of England Bank* v. *Canton Insurance Co.*, 2 Ex. D. 472, 26 W. R. Dig. 77; *Republic of Costa Rica* v. *Erlanger*, 24 W. R. 151, 1 Ch. D. 171; *Wilson* v.

Raffalovich, 7 Q. B. D. 553. If the underwriters were suing in their own name, the defendants would be entitled to this discovery as a matter of course. They ought not to be shut out from discovery because the underwriters were suing in the name of the assured.

Rufus Isaacs, K.C., and *Mackinnon*, for the plaintiffs.—The defendants fail to show that the plaintiffs are not the real plaintiffs. The plaintiffs are the only persons who could bring this action, and they are in fact suing for their own benefit. The underwriters have no cause of action. A part of a cause of action cannot be assigned. The only cases in which a defendant has been allowed to have discovery from a person other than the plaintiff (with the exception of such special cases as actions by foreign republics) are actions on policies of marine insurance.

They cited *Harding* v. *Bussell*, [1905] 2 K. B. 83, 53 W. R. Dig. 81; *Kearsley* v. *Philips*, 31 W. R. 467, 10 Q. B. D. 465.

COLLINS, M.R.—This is an appeal from a decision of Bigham, J., refusing to make an order for discovery. The action is one brought by the owners of cargo against shipowners for injury done to the cargo in transit. The cargo owners had insured with underwriters, not to the full value of the cargo, but to a substantial portion of its value. At the time when the action was brought the underwriters had not admitted liability, but about a fortnight afterwards they came to terms with the cargo owners and agreed with them as to the amount of the damage done and paid a portion of it. The plaintiffs, having recovered indemnity from the underwriters as to three-fourths of their loss, claimed to be entitled to sue the defendants for the balance of the loss. It turns out that during the loading of the vessel something happened which put the underwriters upon inquiry, with the result that an inspection was had by a skilled person on their behalf and a report made by him to them as to the condition of the refrigerating machinery. The point we have to consider is whether, the action having been brought in the first instance by the cargo owners and being now continued by the underwriters who have settled with them, the defendants are entitled to have included in the plaintiffs' affidavit of documents this particular document, which is stated to be in the custody of the underwriters' solicitors. It is contended that, inasmuch as the underwriters are interested in the sum to be recovered to the extent of three-fourths thereof, and the plaintiffs only to the extent of one-fourth, the underwriters must be regarded as the real plaintiffs, and that we ought to treat them as such. The question is whether the rules relating to discovery and the cases do or do not entitle us to do that. It seems to me that we are not at large to do abstract justice in the matter. We are limited by the rules and by law. The whole subject-matter of the discussion is the subject of legislation. We must look to that legislation to see how far we can go. I sympathize with the defendants, but I should not be justified in departing from the foothold of existing statutory rules. The actual plaintiffs here have a real and substantial interest in the action, and are not mere nominal plaintiffs. The underwriters came in under their right of subrogation. That is not the same thing as assignment. It is impossible to effect a limited assignment of a right of action. By their right of subrogation underwriters can only put in suit the remedy which belongs to the assured. They have the right to stand in the shoes of the person whom they have indemnified, and by subrogation they take the right to put his remedy in suit; but the action still remains his and not theirs. The fact that here the actual plaintiffs are substantial plaintiffs takes this case out of the class of cases in which discovery has been ordered to be given by a person who is not a party to the action. The rules as to discovery relate to discovery as between parties. They are framed on the basis of there being a right to discovery as between parties, and *primâ facie* it is an answer to say that the person from whom discovery is asked is not a party to the action. There is no rule which provides, nor is there any authority for saying, that discovery can be ordered from a person who is merely putting in suit the remedy of another person, which other person still remains a substantial party to the action. The case of *Willis & Co.* v. *Baddeley* is distinguishable. It does not cover this case, nor does it go to the length for which the defendants contend. I therefore think the appeal should be dismissed.

COZENS-HARDY and FARWELL, L.JJ., concurred.

Appeal dismissed.

Solicitors for the plaintiffs, *Parker & Garrett.*

Solicitors for the defendants, *Hill, Dickinson, & Co.*

From K. B. Div. (Vaughan Williams, Stirling, and Moulton, L.JJ.) — May 17.

GUARDIANS OF SOUTHWARK UNION v. GUARDIANS OF CITY OF LONDON UNION. (a.)

Poor law—Removability—"Deserted" wife—Misconduct of wife—Poor Removal Act, 1861 (24 & 25 *Vict. c.* 55), *s.* 3.

A wife while living with her husband in the parish of Lambeth, in the Lambeth Union, gave way to drinking habits, and in order to obtain drink she used to pawn her husband's goods, and she neglected the children of the marriage. On several occasions she spent, for purposes other than that for which it was intended, the money given to her by her husband in order to pay the rent of the house, and she conducted herself in a manner which rendered it impossible for her husband to keep a respectable home for his children. He thereupon told her that they must part for a time, and that she must find another lodging, and he gave her sufficient furniture to furnish a room. Accordingly when she found another lodging she left his house, and he made her an allowance. Some months afterwards he discovered that she had committed adultery, and he thereupon stopped her allowance, and she went to live with a man in a parish in the Southwark Union, where she lived for such a time as would, if she were a widow, have rendered her exempt from removal. The wife having become chargeable to the City of London Union,

Held, that she had been "deserted" by her husband within the meaning of section 3 *of the Poor Removal Act*, 1861, *and that therefore she was, by her residence in a parish in the Southwark Union, exempt from removal therefrom.*

Reg. *v.* Maidstone Union, 28 *W. R.* 183, 5 *Q. B. D.* 31, *followed.*

Appeal from the judgment of a Divisional Court (Lord Alverstone, L.C.J., and Kennedy and Ridley, JJ.) upon a case stated by the quarter sessions for the City of London on the hearing of an appeal by the Guardians of the Southwark Union against an order of two magistrates of the City of London, made on the 18th of December, 1903, whereby it was adjudged that the place from which Ellen Roff, a pauper lunatic, was irremovable was in the Southwark Union.

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

Ellen Roff was the lawful wife of Frederick Roff, to whom she was married on the 28th of August, 1886. From the date of the marriage they resided and cohabited at 73, Fitzalan-street, in the parish of Lambeth, which was not within the Southwark Union, until the 12th of October, 1895. Previously to the 12th of October, 1895, Ellen Roff had given way to habits of intemperance, and had been habitually drunk; she had frequently pawned her husbands goods in order to get drink, and had neglected the children of the marriage, of whom there were four. She had on several occasions spent, for purposes other than that for which it had been intended, money given to her by her husband in order to pay the rent of the house, and had conducted herself in a manner which rendered it impossible for her husband to keep a respectable home for his children. On the 12th of October, 1895, the husband, upon his return home from work, found that a distress was being levied on his goods at 73, Fitzalan-street for non-payment of rent, and that his wife had again spent in obtaining drink the money given her for the purpose of paying the rent. He thereupon told her that he would not put up with this state of things any longer, and that he and she must part for a time, and that she would have to find some other lodging; that she might take enough furniture to furnish a room, and he would allow her 8s. a week so long as she kept straight, and that if she reformed they could live together again. The distress was withdrawn by arrangement between the husband and the landlord, and the wife remained on there for ten days, when she found another lodging. On the 22nd of October, 1895, she left, taking with her sufficient furniture to furnish a bedroom. The husband also left on the same day, taking with him his four children and the remainder of his furniture. Since that day he resided separately from her, and had never cohabited with her since the 12th of October, 1895. From the 22nd of October, 1895, he allowed his wife 8s. a week, and he continued to do so for eleven months, when he was informed that his wife appeared to be in the family way, and was constantly associating with men in public-houses, and especially with one John Humphrey, and he thereupon went to meet her at her brother-in-law's house, but she did not come. Subsequently, on the same day his wife followed him to a public-house, and he was asked by her why he had stopped her allowance. He then taxed her with infidelity, which she did not deny. She was at that time visibly pregnant with a bastard child, of which she was delivered about three months afterwards. He thereupon went away, and from that date he made her no further allowance, and neither knew nor took any steps to ascertain her whereabouts. Except that he visited her at the asylum since the commencement of these proceedings he never saw his wife nor contributed to her maintenance from the time when he met her in the public-house. He was sincerely attached to his wife, and the justices found that if she had reformed her drinking habits he would gladly have resumed cohabitation with her. Shortly after the interview in the public-house and the stoppage of the weekly payment the wife went to reside with John Humphrey at Stanhope-buildings, Redcross-street, in the St. Saviour's Union, and resided continuously with him there as his wife, and afterwards at Mowbray-buildings, Redcross-street, in the Southwark Union, from about September, 1896, to the 19th of July, 1903. On this latter date she left Mowbray-buildings, and was found on that day wandering in the City of London in a state of lunacy. On the 29th of July, 1903, she was removed, by order of one of the magistrates for the City of London, as a lunatic to the City of London Lunatic Asylum. On the 18th of December, 1903, an order was made by two of the magistrates for the City of London adjudging that the pauper lunatic was, on the 29th of July, 1903, irremovable from her place of residence in the Southwark Union.

Upon appeal by the Guardians of the Southwark Union to the Quarter Sessions for the City of London, it was contended on their behalf that the pauper had never been deserted by her husband, and that she had not, therefore, become irremovable under section 3 of the Poor Removal Act, 1861, from the Southwark Union by reason of her residence in that union. The quarter sessions found as facts that the pauper had been deserted by her husband, and that after she had been deserted she had resided for twelve months and upwards in the Southwark Union in such a manner as to render her irremovable therefrom, and they dismissed the appeal.

The question for the court was whether there was evidence upon which the quarter sessions could so find.

In the Divisional Court Lord Alverstone, L.C.J., and Kennedy, J., held, upon the authority of *Reg.* v. *Maidstone Union*, 5 Q. B. D. 31, that the pauper was "deserted" by her husband within the meaning of the Act, and affirmed the decision of quarter sessions; Ridley, J., held that she had not been "deserted" by her husband

The Guardians of the Southwark Union appealed.

By section 3 of the Poor Removal Act, 1861: "Where a married woman shall have been, or shall be, deserted by her husband, and shall after his desertion reside for three years in such manner as would, if she were a widow, render her exempt from removal, she shall not be liable to be removed from the parish wherein she shall be resident, unless her husband return to cohabit with her." 29 & 30 Vict. c. 113, s. 17, substituted one year for three years in the above section.

J. B. Matthews, for the appellants.—The pauper was not "deserted" by her husband within the meaning of section 3 of the Poor Removal Act, 1861. Desertion implies a voluntary act bringing the cohabitation of husband and wife to an end. The wife's conduct in the present case brought about the cessation of cohabitation, and therefore the husband was not guilty of desertion in the matrimonial sense of that word: *Frowd* v. *Frowd*, [1904] P. 177, 52 W. R. Dig. 66. The wife by her wilful conduct made it impossible for the husband to keep up the matrimonial home, and he was justified in turning her away with a sufficient allowance to enable her to keep herself. It was only when he discovered that she was committing adultery that he stopped the allowance, as he was entitled to do. In *Reg.* v. *St. Mary, Islington*, 18 W. R. 923, L. R. 5 Q. B. 445, the husband left his wife without any means of support. The present case is like *Reg.* v. *Cookham Union*, 9 Q. B. D. 522, 31 W. R. Dig. 142. The case of *Reg.* v. *Maidstone Union*, 28 W. R. 183, 5 Q. B. D. 31, was a different case from this on the facts, but if it cannot be distinguished it ought to be overruled.

R. Cunningham Glen, for the respondents, was not called upon.

VAUGHAN WILLIAMS, L.J.—Personally I have a great deal of sympathy with the old-fashioned notion that one ought to consider it almost impossible to excuse a husband sending his wife away from his home. I do not say this as meaning that I should have arrived at the same conclusion as the court did in *Reg.* v. *Maidstone Union*. No one would say that what occurred in the present case was desertion in the ordinary sense of the word. That word, when one is speaking of husband and wife, as a rule, means

that the desertion is doing something wrongful. I should have been inclined to think that, if that be so, that would be the meaning of the word in section 3 of the Poor Removal Act, 1861 (24 & 25 Vict. c. 55)—a section which conferred a privilege upon a married woman—because one would think that a statute would hardly give a privilege to a married woman if she did not behave herself properly. I do not think, however, that Field and Cave, JJ., took that view in *Reg.* v. *Cookham Union*, though Field, J., seemed to think—as appears from the passage in his judgment where he says that "the object of the Act is this, that where a husband has by his desertion of her reduced the wife to the condition of a *feme sole*, she shall not be deprived of the advantage of gaining a settlement as a *feme sole*"—that the Act intended to confer a privilege on the wife. Still there is the decision in *Reg.* v. *Maidstone Union*, pronounced ever twenty-six years ago, a decision which has been recognized again and again, and I do not think that we ought lightly to depart from the law so laid down and recognized as it has been from time to time. I agree that it is not like a decision upon a conveyancing question, upon which conveyancers have acted and on which therefore titles depend. Nor do I think that it can be said that the decision was given sufficiently long ago to let in the doctrine of *contemporanea expositio*. But I do not think that the mere fact that I myself would not have arrived at the same conclusion is sufficient to justify me in departing from that decision. I do not feel the same difficulty with regard to the judgment of Manisty, J., as I do with regard to that of Cockburn, L.C.J. The former said, with reference to section 3 of 24 & 25 Vict. c. 55, "it must be taken to mean that, where a woman is, whether rightfully or wrongfully, sent away by her husband so as to be left as a free woman, she can so reside as to gain a settlement apart from him, unless he returns to cohabit with her." It was obviously present to that learned judge's mind, as it was to the mind of Field, J., in *Reg.* v. *Cookham Union*, that the Legislature was by section 3 conferring a privilege on a wife, but at the same time he came to the conclusion that if her husband sent her away, whether rightfully or wrongfully, he must, within the meaning of section 3 of the Act, be said to have deserted her. It is impossible to depart from the decision in *Reg.* v. *Maidstone Union*, and I feel bound by it just as the Divisional Court did. The appeal therefore fails.

STIRLING, L.J.—I am of the same opinion.

MOULTON, L.J.—I am of the same opinion. The judgment of Manisty, J., in *Reg.* v. *Maidstone Union* expresses my view of section 3 of the Poor Removal Act, 1861. I think that the question whether the desertion of the wife was rightful or wrongful has nothing to do with the operation of section 3. If we were to hold otherwise we should be making the settlement of the wife depend upon the rights or wrongs of matrimonial squabbles of years before. In my opinion the judgment of Manisty, J., in the above case is correct and applies to the present case.

Appeal dismissed.

Solicitor for the appellants, *Howard C. Jones.*

Solicitors for the respondents, *Rexworthy & Barnard.*

From K. B. Div. (Vaughan Williams, Stirling, and Moulton, L.JJ.) — April 24; May 14.

In re BLAIR & GIRLING. (*a.*)

Solicitor—Costs—Taxation—Disbursement—Stamp duty on share capital of company—Stamp Act, 1891 (54 & 55 *Vict. c.* 39), *s.* 112—*Finance Act,* 1899 (62 & 63 *Vict. c.* 9), *s.* 7—*Solicitors Act,* 1843 (6 & 7 *Vict. c.* 73), *s.* 37.

A payment made by a solicitor on behalf of the promoter of a company in respect of the ad valorem *stamp duty payable on the nominal share capital of the company under section* 112 *of the Stamp Act,* 1891, *as extended by section* 7 *of the Finance Act,* 1899, *is not a "disbursement" within the meaning of section* 37 *of the Solicitors Act,* 1843, *and ought not to be included in his bill of costs.*

Appeal by Messrs. Blair & Girling, a firm of solicitors, from the refusal of Channell, J., to order a review of taxation of costs.

The solicitors were employed by Mr. Herbert Ernest Moore on behalf of the promoters of a company to be called the Barkly West Syndicate (Limited) to act for them in the formation and registration of the company under the Companies Acts. They proceeded to do the necessary work, and in the course of it paid the stamp duties payable on registration. One of these payments was a sum of £150, being the *ad valorem* stamp duty payable on the statement of the amount of the nominal share capital of the company, under section 112 of the Stamp Act, 1891, as extended by section 7 of the Finance Act, 1899. In their bill of costs the solicitors included this sum of £150 as a disbursement. The total amount of the bill of costs as delivered was £525 13s. 7d.

On taxation the taxing-master disallowed the item of £150, on the ground that it ought not to have been included as a disbursement in the bill of costs and transferred it to the solicitors' cash account, but he allowed the items of £18 15s. and 10s. paid as stamp duty upon the registration of the memorandum of association and the articles of association respectively. From the bill of costs, without taking the sum of £150 into account, he taxed off the sum of £83 5s. 7d. The consequence of disallowing the £150 as a disbursement in the bill of costs was that the total amount of the bill was reduced to £375 13s. 7d., whereof more than one-sixth—viz., £83 5s. 7d. was taxed off, and therefore, by virtue of section 37 of the Solicitors Act, 1843, the solicitors had to pay the costs of the taxation. If, on the other hand, the £150 was properly included as a disbursement in the bill of costs, then less than one-sixth of the bill had been taxed off, and in that case the client would have to pay the costs of the taxation.

The solicitors carried in an objection to the disallowance by the taxing-master of the sum of £150, on the ground that the payment was made by them in pursuance of their professional duty undertaken by them, which they were bound to perform, and also that in accordance with an opinion published by the Incorporated Law Society the payment in question was sanctioned as a professional payment by the general and established custom and practice of the profession. This opinion was to the effect that payments by solicitors of stamps and fees payable on the registration of a company were professional payments and were properly included as disbursements in a bill of costs.

The answer of the taxing-master to the objection

(*a.*) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

was as follows: "In my opinion this point is governed by *In re Kingdon & Wilson*, 50 W. R. 533, [1902] 2 Ch. 242. The *ad valorem* duty in this case is a stamp duty originally imposed by the Stamp Act and since twice increased by the Finance Acts of 1896 and 1899, and the solicitor is acting as agent for his client in paying this sum and not as solicitor. The amount is very large, and, as might not unreasonably be expected, the inclusion or exclusion of this large sum governs the incidence of the costs of this taxation, and such a result, as was pointed out in *In re Kingdon & Wilson* is undesirable. The opinion of the Law Society to which I have been referred was given before the case of *In re Kingdon & Wilson* was decided, and I cannot think either that by the words 'stamps and fees' therein referred to the committee of the society intended to include an *ad valorem* duty of this description, and I cannot come to the conclusion either that a payment of this sort comes within the certificate given by the taxing-masters in *In re Remnant*, 11 Beav. 603, 613, referred to in *In re Kingdon & Wilson*. This case is also somewhat out of date as regards modern practice, and, even if the item comes within the language of the certificate I have referred to, which I do not think it does, it certainly does not come within its spirit. I therefore overrule the objection, and, in my opinion, the solicitors should pay not only the costs of the reference, but the costs of the application for taxation."

The solicitors applied to Channell, J., for an order to review the taxation, but the learned judge dismissed the application.

The solicitors appealed.

Gore-Browne, K.C. (*Norman Craig* with him), for the appellants.—The rule was laid down in *In re Remnant* that payments made by solicitors in pursuance of their professional duty are properly included as disbursements in the bill of costs. Where solicitors are employed to act in the formation and registration of a company, payment of the stamp duty on the registration of the company is an ordinary and necessary incident of their professional employment, and it is the custom and practice of solicitors to include sums paid by them on account of such stamp duty in their bills of costs. The opinion of the taxing-master was based on *In re Kingdom & Wilson*, but that was a decision on estate duty, and does not govern this case.

They referred to *In re Lamb*, 37 W. R. 506, 23 Q. B. D. 5, and *In re Grant, Bulcraig, & Co.*, *ante*, p. 165, [1906] 1 Ch. 124.

Montague Lush, K.C., and *H. M. Giveen*, for the respondent.

During the argument the court determined to refer the question of the practice to the taxing-masters, and they received from the taxing-masters the following report or certificate: "In compliance with your lordships' directions, the taxing-masters beg respectfully to state that the practice as to the payments by a solicitor proper to be included in his bill of costs remains the same as it was certified to be in *In re Remnant*. For a time the practice in the taxing office was unsettled by the decision in *In re Lamb*, but the Court of Appeal in *In re Kingdon & Wilson* restored the practice, and in *In re Buckwell & Berkeley*, 50 W. R. 629, [1902] 2 Ch. 596, confirmed it on what the taxing-masters venture to think are the proper lines and in accordance with the ordinary busines relations between a solicitor and his client. The taxing-masters are of opinion that the duty payable on registration of a joint stock company in respect of its capital is not an ordinary professional disbursement such as a solicitor can be required by his client to make. He is not bound to find the money, but if he does, the disbursement is properly and usually included in his cash account and not in his bill of costs. The taxing-masters certify that this is and has been the practice and custom in cases coming before the taxing-masters, and the cases where a solicitor has sought to introduce the amount into his bill of costs are extremely rare. The inclusion of the amount in the bill of costs would in most cases throw the costs of taxation in any event on the client, and in such cases would impose on the client a tax of £2 10s. per cent. on the duty, that being the taxing fee on a bill of costs; while, if the amount is in the cash account as a receipt, the taxing fee is 1s. per cent."

VAUGHAN WILLIAMS, L.J. — At the instance of counsel for the appellants the court have obtained a certificate of the taxing-masters, and it is sufficient to say that the taxing-masters do not recognize the custom for which he contends. A question has arisen in this case, as in many others, as to what is a disbursement within the meaning of section 37 of the Solicitors Act, 1843. It is not disputed that the disbursements spoken of in that section mean disbursements made by a solicitor as such. That being so, the question arises whether a particular disbursement in cash made by a solicitor was made by him in his professional character as a solicitor or was made by him as an agent independently of that character, as a payment might be made by a banker or any other kind of agent. I agree that it makes no difference whether, in fact, the money was supplied by the client or not. What we have to consider in each case is whether it was a professional disbursement. I cannot feel any doubt in this particular case of the payment of capital duty on the registration of a company, that such a payment is *primâ facie* not a professional disbursement. One reason for my coming to that conclusion is the consideration of *quantum*. But apart from that, I think that this is not a disbursement which, *primâ facie*, is a professional disbursement made by a solicitor. It is suggested that, though that is so, yet a custom has been established to the contrary, a custom which shows that this payment must be treated as a professional disbursement. I do not think that that is established. When I look at the affidavits which have been filed as to the practice of solicitors, they do not seem to me to establish the alleged custom. They say that solicitors often do include such charges in their bill of costs as distinguished from their cash account. But in cases where there is no submission to taxation it makes little or no difference to the client whether the charge appears in the bill of costs or the cash account, as, in any event, he will have to pay it. In my opinion we ought not to draw the inference that the custom has been established because many solicitors enter this charge as a disbursement in their bill of costs. And I do not find sufficient evidence of the habitual treating of this charge as a disbursement to establish the custom. I come to the conclusion that the certificate of the taxing-masters is substantially right. *Primâ facie*, this particular disbursement is not a professional disbursement, and the appellants fail to prove any custom which establishes that as between solicitor and client this disbursement is properly included in a bill of costs.

STIRLING and MOULTON, L.JJ., concurred.

Appeal dismissed.

Solicitors for the appellants, *Blair & Girling.*

Solicitors for the respondent, *Statham, Rose, & Co.*

High Court of Justice.

Chan. Div.
Kekewich, J. } April 30; May 1.

LAW GUARANTEE AND TRUST SOCIETY v. MITCHAM AND CHEAM BREWERY CO. (LIMITED). (a.)

Mortgage—Security for debentures—Licensed premises—Compensation money for loss of licence—Licensing Act, 1904 (4 *Ed.* 7, *c.* 23), *s.* 2.

A brewery company specifically mortgaged its freehold and leasehold property, including a leasehold beerhouse, the Running Horse, to trustees as security for certain debentures, which were not redeemable until 1920. *The company also gave a floating charge on all its property not specifically mortgaged. The licensing authorities refused to renew the licence of the Running Horse, and compensation was awarded in respect thereof under the Licensing Act,* 1904. *The trustees thereupon claimed the money as coming within their mortgage, while the company claimed the money as being property over which they had granted the floating charge.*

Held, that the trustees were entitled to receive the money as being part of their mortgage security, but that they could not apply the money in reduction of the mortgage debt until the security became enforceable, and that until then the brewery company were entitled to the income derived from the investment of the money.

Adjourned summons.

This summons was taken out for the purpose of determining who was entitled to a sum of money awarded as compensation under the provisions of the Licensing Act, 1904, for the refusal to renew the licence of a certain public-house; the money being claimed both by the defendant company and the persons to whom they had mortgaged the house.

By a deed dated the 3rd of March, 1899, executed by the defendant company as security for the issue of debenture stock, the plaintiffs, the Law Guarantee and Trust Society, were appointed trustees. The deed contained provisions for securing debentures to the extent of £75,000 and interest which were redeemable at the option of the defendant company after the 31st of December, 1920, or earlier in case of reconstruction or liquidation at a premium.

By clause 4 the defendant company conveyed unto the trustees the freehold lands and hereditaments described in the first schedule thereto, and also the goodwill of the business carried on in connection with the same premises or upon or in connection with the hereditaments referred to in the second schedule thereto as to the goodwill absolutely.

By clause 5 the defendant company demised unto the trustees the leasehold premises described in the second schedule, which included the house in question, to hold upon the terms of the leases to which the same were subject, except the last day thereof.

By clause 7 the defendant company declared that they held the reversions of the original terms in trust for the trustees.

By clause 8 the defendant company charged all their other property, rights, and assets for the time being, both present and future, including their uncalled and unissued capital for the time being and their undertaking, with the payment of all principal moneys and interest thereinbefore covenanted to be paid by the company, such charge as regards all freehold, copyhold, and leasehold hereditaments and any interest therein (other than interest created by way of security only) to be a fixed charge, but as regards all other premises affected thereby to be and rank as a floating charge, and such charge should in no way hinder or prevent the company from selling, alienating, mortgaging, charging, or otherwise disposing or dealing with their property (other than freehold, copyhold, or leasehold hereditaments) for the time being for any purpose whatsoever for the time being authorized by the memorandum of association, as the company might from time to time deem expedient, and as if they were absolute owners thereof, but subject to the powers so reserved to the company the floating charge thereby effected should attach as a first charge upon all the property for the time being of the company affected thereby or the interest of the company for the time being therein.

By clause 9 the defendant company undertook to vest any other property thereafter acquired in the trustees for the purpose of giving them a further security corresponding, so far as incumbrances would admit, with the security constituted by the present deed upon the premises specifically mortgaged.

Clause 13 provided that the trustees should permit the company to hold and enjoy all the premises thereby specifically mortgaged and to receive the rents and profits thereof and to carry on thereon and therewith the business authorized by the association until the security thereby constituted should become enforceable, and in that event the trustees might in their discretion enter upon and take possession of the mortgaged premises or any parts thereof or receive the rents and profits thereof, and might at the like discretion sell the same or any part thereof.

Clause 14 provided the events upon which the security should become enforceable: (i.) Non-payment of principal or interest for six weeks; (ii.) non-performance by the company of its obligation; (iii.) resolution to wind up the company.

Clause 17 provided that the trustees should hold the proceeds of any sale under the primary trust for sale upon trust and apply the proceeds, after the payment of costs, in payment to the stockholders *pari passu* in proportion to the stock held by them.

Clause 22 provided that at any time the trustees might, before they had made entry, upon the application of the company, sell or concur in selling any of the mortgaged premises in the same manner as they could do if the primary trust for sale had arisen.

Clause 23 provided that the proceeds of any sale under the powers of clause 22 should be invested by the trustees at their discretion in one or other of the following modes: (*a*) In the erection of buildings for the purposes of the company. (*b*) In the purchase of freehold or leasehold hereditaments for the purposes of the company. (*c*) In the purchase of any interest in any hereditaments comprised in the mortgaged premises. (*d*) In payment of part of the purchase-money of any hereditaments, the residue to be provided by the company. (*e*) In payment of any premiums on leases. (*f*) In payment of any premiums on any renewed, extended, or reversionary lease. (*g*) In discharge of any mortgage upon any hereditaments comprised in the mortgaged premises and having priority over the security thereby constituted. (*h*) In payment of the enfranchisement of any copyhold hereditaments comprised in the mortgage. (*i*) In any investment authorized for the investment of trust funds or in making advances to any tenant of any part of the mortgaged premises upon a mortgage of his tenancy, or in making deposits in the names of the trustees in such bank as they should think fit.

Clause 38 provided that the defendant company would during the continuance of the security carry on and conduct the business in a proper manner . . .

(a.) Reported by R. FRANKLIN STUBBING, Esq., Barrister-at-Law.

and that the company would keep the licences for carrying on the sale of intoxicating liquors upon the mortgaged premises insured to the satisfaction of the trustees against loss or refusal, and would pay over to the trustees all moneys to be received by virtue of any insurance of a licence, to the intent that the same might be applied in the same manner as moneys arising from a sale of the mortgaged premises under the powers therein contained.

One of the leasehold properties comprised in the second schedule to the deed was a beerhouse, known as the Running Horse beerhouse, in Austin-road, Battersea, about which the dispute in this present action arose. This house was held upon a lease for twenty-one years from the 25th of December, 1904, and a further lease of it was granted to the defendant company by a deed dated the 24th of April, 1903, for a term of twenty-one years from the 25th of December, 1905.

By a deed dated the 21st of April, 1904, the Running Horse was sub-demised to the plaintiffs for the residue then to come and unexpired of the term created by the indenture of the 24th of April, 1903, except the last day thereof.

At the brewster sessions, 1905, the licensing authority referred the renewal of this licence to the quarter sessions with a report against its renewal, and the quarter sessions refused to renew the licence and referred the matter of compensation to a later meeting.

The company made a claim for compensation to the extent of £1,556 15s., made up of the following items: Beer trade lost, £575; improved value of premises as licensed premises by reason of the 1869 licence, £143 15s.; capitalized loss of rent, £787 10s.; loss on sale of fixtures, £50.

The compensation authority awarded a sum of £1,510 as compensation in respect of the house, which they apportioned—£272 to the owners of the freehold; £105 to the licensee; and £1,133 to the defendant company.

The trustees did not appear before the compensation authority as their interest was co-extensive with that of the company.

This summons was taken out by the trustees to determine whether they were entitled to the whole of £1,133 awarded as compensation to the company; if not, to any and what part of it.

The Licensing Act, 1904, s. 2 (1), provides: "Where quarter sessions refuse the renewal of an existing on-licence under this Act, a sum equal to the difference between the value of the licensed premises (calculated as if the licence were subject to the same conditions of renewal as were applicable immediately before the passing of this Act, and including in that value the amount of any depreciation of trade fixtures arising by reason of the refusal to renew the licence) and the value which those premises would bear if they were not licensed premises, shall be paid as compensation to the persons interested in the licensed premises; (2) the amount to be so paid shall, if an amount is agreed upon by the persons appearing to quarter sessions to be interested in the licensed premises and is approved by quarter sessions, be that amount, and in default of such agreement and approval shall be determined by the Commissioners of Inland Revenue in the same manner and subject to the like appeal to the High Court as on the valuation of an estate for the purpose of estate duty, and in any event the amount shall be divided amongst the persons interested in the licensed premises (including the holder of the licence) in such shares as may be determined by quarter sessions: Provided that in the case of the licence-holder regard shall be had, not only to his legal interest in the premises or trade fixtures, but also to his conduct and to the length of time during which he has been the holder of the licence, and the holder of a licence, if a tenant, shall (notwithstanding any agreement to the contrary) in no case receive a less amount than he would be entitled to as tenant from year to year of the licensed premises."

Section 6: "A secretary of state may make rules for carrying into effect this Act."

Rule 2 of the Licensing Rules 1904: "'The registered owner' in respect of any licensed premises includes any person whose name appears on the register of licences as the owner of those premises."

Rule 22: "The persons interested in the licensed premises within the meaning of sub-section 2 of section 2 of the Act (in these rules referred to as the persons entitled to compensation) (1) shall be deemed to be the licensee and the registered owner of the premises, if no claim to be treated as a person interested in the licensed premises is sent in to the compensation authority under these rules; (2) and if a claim is so sent in, shall be deemed to be the persons entitled to compensation in accordance with these rules."

Licensing Act, 1874, s. 29: "Any person possessing an estate or interest in premises licensed for the sale of intoxicating liquors, whether as owner, lessee, or mortgagee, prior or parmount to that of the immediate occupier, shall on payment of a fee of one shilling to the clerk of the licensing justices be entitled to be registered as owner or one of the owners of such premises: provided that when such estate or interest is vested in two or more persons jointly, one only of such persons shall be registered as representing such estate or interest."

P. O. Lawrence, K.C., and *E. Beaumont*, for the plaintiffs.—The trustees being mortgagees are entitled to the compensation awarded in respect of this property. The sum was arrived at as being the difference in value of the premises with a licence and without a licence, and to do that the trade must be taken into account. Under clause 13 the company were to hold and enjoy the premises specifically demised until the security became enforceable, but the company could not alienate the mortgaged premises. If part of the premises had been compulsorily acquired before the mortgage became enforceable the proceeds of sale would belong to the mortgagee and not to the mortgagor. There is no express provision, but this would follow by analogy from clause 23, where it was provided that the proceeds of sales should be retained as capital where the sale was by consent of the mortgagee and mortgagor. The mortgagees could have been parties to the proceedings before the compensation authority. Section 29 of the Licensing Act, 1874, read in connection with the rules made under section 6 of the Licensing Act, 1904, makes the rules apply to any person who may be on the register as regards licensed premises. [KEKEWICH, J., referred to *Martin* v. *London, Chatham, and Dover Railway Co.*, 14 W. R. 880, L. R. 1 Ch. 501, where it was held that mortgagees, who were entirely outside the award, were not bound by it unless they approbated.] In this case there was an actual assignment of property and also of the goodwill; this property is part of the specifically mortgaged property which the company could not deal with without the consent of the trustees. The whole question is whether money received as compensation in respect of specifically mortgaged property is subject to the floating charge or not. This money takes the place of property and by strict analogy it ought to be invested in the names of the trustees so to allow the company to receive the income until the security becomes enforceable. Under clause 38 the trustees

were to receive the insurance money arising from the loss of a licence. The deed does not deal with this compensation money because it was executed before the Licensing Act of 1904 was passed. In *Pile* v. *Pile, Ex parte Lambton*, 24 W. R. 750, 3 Ch. D. 36, it was held that mortgagees were entitled to compensation paid for the goodwill of a business, as that passed with the premises. The mortgagor cannot sell without the consent of the mortgagee, and the mortgagee cannot sell unless the security becomes enforceable; if a sale takes place by consent the proceeds of the sale have to be treated as capital under clause 23. As there is no express provision in the deed in respect of this money, it ought to be treated as capital in analogy to the proceeds of a sale by consent and insurance money paid for the loss of a licence. In *King* v. *Midland Railway Co.*, 17 W. R. 113, it was held that the goodwill attached to the premises and that the mortgagee was entitled to the amount of compensation paid in respect of the goodwill.

Stewart Smith, K.C., and *P. B. Abraham*, for the defendant company.—The plaintiffs have no right under the Licensing Act, 1904. As they did not register themselves as owners of the charge and were not parties to the proceedings when the compensation was awarded, their rights must accordingly depend on their position as mortgagee. The compensation is given for the loss of the licence to sell intoxicating liquor, the licence is granted to a person and not to a house; this is recognized in the Licensing Act, 1904. In assessing compensation other elements have to be considered besides the value of the licensed premises and the licensee's interest in them it depends partly on the licensee's conduct and the length of time he has held the house. The compensation is not attached to the premises, the sum represents the difference in value between the value of the premises with a licence and without a licence. It is the only way in which compensation can be measured. The cases of *Pile* v. *Pile* and *King* v. *Midland Railway Co.* can be distinguished, because they were both decided under the Lands Clauses Act; in both cases the mortgagees had gone into possession, and where a mortgagee has gone into possession and the property is sold the mortgagee receives the compensation for the goodwill, because the goodwill is part of the property mortgaged to him; but that does not apply here, when the business is still being carried on by the mortgagors, and the mortgagees have not gone into possession. It was held in *In re Bennett, Clarke* v. *White*, 47 W. R. 406, [1899] 1 Ch. 316, that the taking possession of the premises amounted to the acquisition of the goodwill *de facto*, and that unless possession was taken the mortgagee did not acquire possession of the goodwill. There are no provisions in the trust deed which relate to this compensation, therefore the plaintiffs have to rely on analogies. But this money will not pass under the specific mortgage in the deed unless express reference is made to it. The goodwill that passed to the trustees under clause 4 was the goodwill attached to the brewery company by reason of the house being tied to it, the goodwill of the house itself belongs to the licensee. The analogy relied upon by the plaintiffs of the two cases where it was expressly provided by the deed that the moneys payable thereunder should come into the hands of the trustees, really help the defendants as those were the only cases in which the parties contemplated that the money should come into the hands of the trustees. The deed must be construed strictly and not by analogy. This compensation money comes within the other property to which the floating charge attaches, and under clause 8 that charge does not prevent the company from disposing of their property other than property specifically charged. This money is not part of the leasehold hereditaments. The company has received money as compensation for one of their leases and they are entitled to carry on their business therewith in accordance with clause 13. The Legislature has given the company the right to receive something which was never contemplated under the deed, and the court cannot enlarge the provisions of the deed, so as to prevent this being done.

KEKEWICH, J.—The difficulty in this case is occasioned by the fact that the contractual relations of the parties are determined by a deed of 1899, whereas the contest arises respecting a sum of money produced by the intervention of the Legislature quite irrespective of those contractual relations in 1904, and the deed which defines those contractual relations is extremely difficult to apply to the facts with which we have to deal. By that deed, which is one in the ordinary form for the creation of a charge through the medium of trustees for the benefit of debenture-holders, there is assigned, or strictly sub-demised, certain leasehold property to trustees upon trust for the benefit of debenture-holders. The sub-demise is also in ordinary form, and excepts one day, but the lessor, in this case the company creating the charge, declares itself a trustee of that remaining day, so that for all practical purposes, though not strictly in law, the trustees, who are the owners, are in the same position really as the assignees of the lease which was formerly held by the company. That lease has not been taken by anyone. It is still vested in the trustees by virtue of that which I have called an assignment, though it is not strictly an assignment. It is vested in them as mortgagees, and the equity of redemption is still vested in the company, but the property is not what it was because something has been taken out of it. In truth a restriction has been placed upon the use of it. The leasehold property was assigned as a property on which the business of a licensed victualler could be carried on, and the licence has been taken away and it is now a leasehold property which can be used for any purposes other than that of a licensed victualler. A restriction has been put upon it, and money has been paid for the purchase of the right to place that restriction on. That is the practical result. That is all done under the Act of 1904, and it has been necessary for the consideration of this case to go into some sections of the Act, and also it was right and proper to refer to some rules made under the Act. But really I am not concerned with any construction of the Act. I have not to consider what the policy or the scope of the Act is, or how it is carried into effect, further than this, that it has provided for a certain authority being able to refuse a licence up to that time granted in respect of particular premises and to assess the compensation to those who are interested in those licensed premises, and it also provides for the payment of the compensation so assessed. Again, I am not concerned with any distribution of the compensation. In this particular instance there were three persons or three classes interested. It was, as I have said, a leasehold property and, therefore, the freeholder was entitled to some part of the compensation. We have nothing to do with that. There was also the publican, although not the actual holder of the licence at the time, who was always entitled to some compensation. The people claiming under the lease were the company or those claiming through them who were entitled to the lease, and it is in respect of that that this money has been paid. It is important to see for what the

money was paid because some of the cases which have been referred to speak of goodwill, and goodwill has been referred to in the agreement. I think that the affidavit of the valuer of the company shows exactly for what the money has been paid. He says that he was instructed by the company to investigate and report to them upon the value of the Running Horse licensed property for the purpose of submitting their claim for compensation to the compensation authority. He valued the Running Horse as it was and he valued the house as it would be, and he assessed the compensation on the footing of the difference, and, though he speaks of loss of profits, depreciation in value of fixtures, and loss of rent, because the premises would not be rentable at so high a figure in the future, what he has contemplated plainly according to his own statement is the difference in value of this property as a licensed house and the value of it as an unlicensed house, or worse than that, a house to which in future no licence ought to attach. That runs through the rest of the affidavit, and all that he did was on instructions to agree the amount of compensation which in this case was rather less than was paid —the sum was eventually fixed at £1,133 as being the amount to be paid to those who represent the company, either the company themselves or those claiming through them. If that is a correct view, what does this money represent? In my opinion, it represents not the whole of the property, because the property remains, but the value of the property with this restriction placed upon it, just the same as if there had been a restriction against building or any other restriction of a like nature. It is now a property which, until another licence is granted—which may be regarded as an unlikely event—cannot now be used for the purposes of a licensed victualler, and must, therefore, be used for other purposes, and the whole of the compensation money represents the difference between the value of the house as it stands and the value of the house as it stood before the intervention of the licensing authority. If that is so, it is impossible, it seems to me, to see how it could go otherwise than to those to whom the property belongs. The property belongs to the mortgagor and the mortgagees between them—that is to say, the mortgagor, the company, own the property subject to rights of the mortgagees. It is never safe to push an analogy very far, but the analogy of a purchase under compulsory powers is very close to the facts which have occurred here. It might have been a purchase under the Lands Clauses Act, or under some such Act as Michael Angelo Taylor's Act. I am not sure that there is any other Act that enables a compulsory purchase to be made, but all those Acts are embodied in the Lands Clauses Act as convenient machinery. Although neither the Lands Clauses Act, nor Michael Angelo Taylor's Act, nor any other special Act applies to this case, the proper authority is entitled, under the Licensing Act, 1904, to say: "You shall lose certain advantages in your house, and for that you are to be paid." There is, in fact, a compulsory purchase of part, not a physical part, of the premises but of some of the value attached to the premises, in that there is now a restriction placed on the use of them. This money is really part of the house. I do not think that it can be called goodwill in any sense. If it is goodwill, it is goodwill attached to the house. The money is for every purpose a part of the house. I am not now saying that the mortgagees are entitled to it. I am now only considering whether the mortgagors are entitled to money which represents a house which they have assigned away. It seems to me impossible to say that the mortgagor is entitled to it, because it is not his property. He did not, of course, intend that the mortgagee should receive his money, nor did he contemplate it. The mortgagor is not entitled to say "This is my money." It is attached to the house, and the house belongs to the mortgagees. The only possible way, it seems to me, of putting it, and the only way in which it has been put, is this, that the deed contemplates a floating charge. That is so, and I need not go into the character of the floating charge. For the present purpose it is well known what it means. The floating charge is contained in clause 8, and the first observation which I make upon that clause is that this particular property is excepted from the floating charge. The charge in favour of the trustees represents, not the leasehold property which has been specifically assigned, but all their other property, and everthing in that clause which refers to a floating charge deals with property other than that specifically assigned or demised to the trustees. There is no floating charge upon that. Then they say, if we get it then the floating charge will attach. I agree, but the fact that there is a floating charge upon their property does not entitle the mortgagors to have it, though if they did receive it it would be subject to the floating charge. The company cannot use the argument of a floating charge in order to enable them to get what would be subject to the floating charge if they got it. The right of the trustees supervenes and prevents their getting it. But then, that being so, the practical difficulty is, what is to be done with the money? The trustees are mortgagees in this way, that they hold this property, including the proceeds of sale, as a security for money which is not yet due. They are therefore not entitled to receive it and reduce the amount of their mortgage; their rights have not accrued for that purpose. On the other hand, it seems to me that they are not entitled to use it in any way. If the deed had contemplated what happened, no doubt some provision might have been made for that, but I find that they are in that position that the mortgagors cannot receive it, that the mortgagees are the only legal hands to receive it, and the mortgagees cannot use it when they have got it. Now, the only thing that I can do is to decide this question on principle. None of the provisions in the deed assist me at all, because, though there are elaborate provisions for dealing with the property arising from sales under clause 23, this case does not arise in that way, but is entirely independent of the deed altogether, and therefore it seems to me the deed applies in principle only. The mortgagees are entitled to receive it, but I think that the mortgagors still being, not so much under the deed, but as a matter of fact in accordance with law, in possession for the moment are entitled to the usufruct of it—that is to say, any money which is yielded by interest from the money placed upon deposit or otherwise invested ought to be paid to the company, the mortgors. There is not much difficulty in expressing that, but what occurs to me as being more difficult is to say how long that is to continue, because at any moment the trustees' right to enter may accrue, at any moment the trustees' powers may come into force. They may be entitled to sell and they may be entitled to exercise the rights of mortgagees in possession, and then, immediately that occurs, and whenever that occurs, although from what I have heard it is not at all likely to occur; at any moment, then, the mortgagees will be entitled to the principal and certainly to the income. The only words that occur to me, giving them such consideration as I could apply, listening to the arguments, are the words "until otherwise determined." It would not do to say "until further order," because the court would not be in a position to make any

further order. There will be a declaration that the company is not entitled to this money, that it ought to be paid to the trustees as they are so described in the deed, but that they shall not apply it in reduction of their mortgage debt or otherwise until the security becomes enforceable, and that the company is entitled until that event to any dividends or investments or moneys arising from the investment thereof—investments is a wide term and will include profits.

Solicitors, *Gribble, Oddie, Sinclair, & Johnson; Wm. Brewer.*

Chan. Div.
Joyce, J. } May 29, 30, 31.

In re EHRMANN BROTHERS (LIMITED).
ALBERT *v.* EHRMANN BROTHERS (LIMITED). (*a.*)

Company—Debentures—Registration—Extending time—Winding up—Protection of creditors—Companies Act, 1900 (63 & 64 *Vict. c.* 48), *ss.* 14, 15.

A company in 1901 *issued debentures which were not registered within twenty-one days as required by section* 14 *of the Companies Act,* 1900. *On the* 24*th of July,* 1903, *an order was made under section* 15 *of the Act extending the time for registration until the* 14*th of August. This order contained the proviso that "this order is to be without prejudice to the rights of parties acquired prior to the time when such debentures shall be actually registered." The debentures were registered before the* 14*th of August,* 1903.

Held, that the creditors of the company whose debts had been incurred prior to the date of registration take pari passu *with the debenture-holders the share of the assets which the debenture-holders would have taken if their debentures had been duly registered in accordance with section* 14 *of the Act.*

In re Anglo-Oriental Carpet Manufacturing Co., 51 *W. R.* 634, [1903] 1 *Ch.* 914, *followed.*

Further consideration.

This was the hearing on further consideration of a debenture-holder's action.

The company was incorporated in 1900. In July, 1900, it was resolved to raise a sum of £26,250 by the issue of debentures to rank *pari passu.* In pursuance of this resolution certain debentures were issued prior to the 1st of January, 1901, the date upon which the Companies Act, 1900, came into operation. Other debentures of the same series were issued in 1901. Through inadvertence the debentures issued in 1901 were not registered within twenty-one days of the date of issue as required by section 14 of the Act.

In 1903 an application was made to the court under section 15 of the Act that the time for registration might be extended, and on the 24th of July, 1903, an order was made extending the time for registration until the 14th of August, 1903. This order contained the proviso that "this order is to be without prejudice to the rights of parties acquired prior to the time when such debentures shall be actually registered." These debentures were accordingly registered prior to the 14th of August.

In November, 1903, the company went into voluntary liquidation.

On the 18th of February, 1904, an order in the action was made directing inquiries as to the dates when these debentures were actually registered, and as to which of the unsecured creditors of the company at such dates of registration remained unsatisfied. It was also ordered that Gonzalez, Byass, & Co. (Limited), unsecured creditors, should have liberty to attend on these inquiries.

The question now before the court was to what extent, if any, the rights of unsecured creditors were affected by the order of the 24th of July, 1903, having regard to the proviso contained therein.

Hughes, K.C., Gore-Browne, K.C., and *E. Ford,* for the debenture-holders.—The proviso to the order of the 24th of July, 1903, only gave rights in the nature of specific charges and did not give priority to unsecured creditors over these debenture-holders: *In re Joplin Brewery Co.* (*Limited*), 50 W. R. 75, [1902] 1 Ch. 79; *In re Johnson & Co.* (*Limited*), 50 W. R. 482, [1902] 2 Ch. 101; *In re Spiral Globe* (*Limited*), 50 W. R. 187, [1902] 1 Ch. 396; and *In re S. Abrahams & Sons,* 50 W. R. 284, [1902] 1 Ch. 695.

Badcock, K.C., and *Ashton Cross,* for the unsecured creditors.—These debentures have no priority over the debts of unsecured creditors existing at the dates of registration of these debentures. The amount which these debenture-holders would have received if the debentures had been registered in accordance with section 14 of the Act, should be divided rateably between the holders of such debentures and the unsecured creditors whose debts existed prior to the dates of registration: *In re N. Defries & Co.* (*Limited*), *Bowen* v. *N. Defries & Co.* (*Limited*), 52 W. R. 253, [1904] 1 Ch. 37, and *In re Anglo-Oriental Carpet Manufacturing Co.,* 51 W. R. 634, [1903] 1 Ch. 914.

Younger, K.C., and *Austen,* for the directors and the holders of the earlier debentures.

JOYCE, J., in giving a considered judgment, said: This case raises a question as to the meaning and effect of the conditions imposed in the order for enlarging the time for the registration of debentures not registered within twenty-one days as required by section 14 of the Companies Act, 1900 The form of the proviso or condition is taken from what is now the common form which was settled by the Court of Appeal in the case of *In re Johnson & Co.* (*Limited*). There are indications in the report of that case that the form of the proviso previously used was altered possibly with a view to this very question, and it is intended to prevent the registration of debentures under section 15 from affecting the position of creditors whose debts accrue prior to the date when such registration is actually effected. It is clear that such a proviso debars these debenture-holders from taking priority over persons who were unsecured creditors prior to the date of registration, and it is impossible to differ from the judgment of Buckley, J., in *In re Anglo-Oriental Carpet Manufacturing Co.* The fact that in that case a winding up had occurred before the date of registration makes no difference.

Therefore the creditors whose debts had been incurred before the actual date of registration take *pari passu* with the debenture-holders registering under the order, the share of the assets which such debenture-holders would have taken if their debentures had been duly registered in accordance with section 14 of the Companies Act, 1900. The costs to come out of the fund so divisible between these creditors and debenture-holders

Solicitors for the plaintiffs, *Harris, Chetham, & Cohen.*

Solicitors for the unsecured creditors, *Tamplin, Tayler, & Joseph.*

Solicitors for the directors and other debenture-holders, *Nordon, De Frece, & Drury.*

(*a.*) Reported by P. JOHN BOLAND, Esq., Barrister-at-Law.

Chan. Div.
Swinfen Eady, J. } May 11.

In re DAWSON.
ARATHOON *v.* DAWSON. (*a.*)

Will—Tenant for life and remainderman—Residuary personalty—Covenant to pay life annuities—Capital and income—Apportionment.

A testator directed that his residuary estate should be held on trust for a life tenant and a remainderman. He had covenanted to pay certain annuities.

Held, that each instalment of the annuity should be apportioned between capital and income, according to the value of the life estate and the reversion as ascertained at the time of the testator's death.

Yates *v.* Yates, 28 *Beav.* 637, *followed.*

Originating summons.

Robert Dawson, by his will dated the 5th of August, 1897, devised and bequeathed all the residue of his real and personal estate upon trust to sell the same and to stand possessed of the residuary trust moneys and the investments, in trust to pay the income to his wife, L. Dawson, one of the defendants. And he declared that after her death the capital of the trust funds should be held in trust for his children. And if there should be only one child the whole to be in trust for that one child.

The testator died on the 11th of February, 1903, and left the defendant Mrs. Dawson, and one child only, the defendant R. Dawson, an infant.

The testator had covenanted to pay J. H. Arathoon an annuity by two equal half-yearly payments, and, further, that if J. D. Arathoon should survive his father, J. H. Arathoon, that the testator should pay J. D. Arathoon an annuity from the death of his father. Both the annuitants were living.

The estate, after clearing debts and legacies other than the annuity debt, was £3,900

This summons was issued to determine the following questions:

Whether or not the annuities covenanted to be paid by the testator ought to be provided for entirely out of the capital of the testator's estate by means of half-yearly sales of a sufficient portion of the investments thereof?

If the said annuities ought not to be provided for entirely out of capital, then ought the same to be provided for partly out of income and partly out of capital, and in the proportion which the value of the life estate of the defendant L. Dawson in the testator's estate bears to the value of the reversion of the defendant R. Dawson in the said estate at the time of payment, or in some other and what proportion?

Walters Horne, for the trustees.

Dighton Pollock, for the tenant for life.—The sum payable each year ought to be paid out of capital, the tenant for life thus bearing only the interest.

He referred to *In re Bacon*, 41 W. R. 478, 62 L. J. Ch. 445.

Bryan Farrer, for the remainderman.

The following cases were referred to: *Allhusen* v. *Whittell*, L. R. 4 Eq. 295, 15 W. R. Ch. Dig. 122; *In re Harrison*, 38 W. R. 265, 43 Ch. D. 55; *In re Muffett*, 37 W. R. 9, 39 Ch. D. 534; *Yates* v. *Yates*, 28 Beav. 637.

SWINFEN EADY, J., stated the facts and said: How ought the payment to the annuitant to be borne as between the tenant for life and the remainderman? The tenant for life is tenant for life of the clear residue. The covenants are obligations, though indefinite, and in the case of the second annuity the covenant is contingent. [He referred to *Fletcher* v. *Stevenson*, 3 Hare 360; *Allhusen* v. *Whittell*, and *Yates* v. *Yates*.] A separate calculation for each instalment would be beyond the capacity of ordinary trustees, and would necessitate constant professional assistance and would be highly inconvenient. On the other hand, if the proportion were fixed once and for all according to the value of the life estate and the reversion at the testator's death, the expense would be less and the result practically the same. I will follow *Yates* v. *Yates* and direct the successive payments to be apportioned in that fixed proportion, and to be paid partly out of capital and partly out of income in the proportions which the value of the life interest and the value of the reversion bear to each other on the day of the testator's death.

Solicitors, *Pollock & Co.*

(*a.*) Reported by PAUL STRICKLAND, Esq., Barrister-at-Law

Chan. Div.
Warrington, J. } May 14, 15, 16, 31.

SHEPHEARD *v.* BRAY. (*a.*)

Company—Directors—Fraudulent prospectus—Action by shareholder—Liability for contribution—Death of director—Actio personalis—*Directors' Liability Act*, 1890 (53 & 54 *Vict. c.* 64), *s.* 3.

A director of a company, who has become liable to make payments under the provisions of the Directors' Liability Act, 1890, *is entitled to recover contribution from the estates of directors who have died since the issue of a prospectus containing untrue statements.*

Action.

This was an action brought by certain directors of the London and Northern Bank (Limited) against their co-directors for a declaration that the defendants were liable to contribute to any sums which the plaintiffs or some of them had paid or were liable to pay arising out of the action of *Broome* v. *Speak*, 51 W. R. 258, [1903] 1 Ch. 586, and numerous other actions brought against the present plaintiffs or some of them under the provisions of the Directors' Liability Act, 1890.

The directors had issued a prospectus containing untrue statements, and in December, 1901, the action of *Broome* v. *Speak* was commenced by a shareholder for compensation for loss sustained. The decision of Buckley, J., that the shareholder was entitled to succeed, was affirmed on appeal both by the Court of Appeal and by the House of Lords: *Shepheard* v. *Broome*, 53 W. R. 111, [1904] A. C. 342. The present action was to recover contribution from the defendants.

The defendant Bray had died since action brought, and it had been ordered that it should be continued against his executors. The defendants Simpson, Butler, and Wade were sued as the executors of Gaunt, and Oswald as the executrix of W. W. Oswald.

Astbury, K.C., and *Felix Cassel*, for the plaintiffs.

Gore-Browne, K.C., and *F. Russell*, for Gaunt's executors.—This is an *actio personalis*. The defendant had died, and is therefore not liable: *Hughes-Hallett* v. *Indian Mammoth Gold Mines Co*, 31 W. R. 285, 22 Ch. D. 561, and see the judgment of Bowen, L.J., in *Finlay* v. *Chirney*, 36 W. R. 534, 20 Q. B. D. 502. The only payment the plaintiffs have become liable to make under the Act is damages; the defendants are therefore not liable to contribute to costs of the various actions.

(*a.*) Reported by LEONARD T. FORD, Esq., Barrister-at-Law.

Danckwerts, K.C., and *Kirby*, for Bray's executors.

Gatey, for the defendant Gillies.

The other defendants did not appear.

WARRINGTON, J., in delivering a considered judgment, said that the plaintiffs' claim is based on the fifth section of the Directors' Liability Act, 1890, which provides: "Every person who by reason of his being a director, or named as a director or as having agreed to become a director, or of his having authorized the issue of the prospectus or notice, has become liable to make any payment under the provisions of this Act, shall be entitled to recover contribution, as in cases of contract, from any other person who, if sued separately, would have been liable to make the same payment." The liability referred to in that section is that created by section 3, the short effect of which is, "Where, after the passing of this Act a prospectus or notice invites persons to subscribe for shares in a company, every person who is a director of the company at the time of the issue of the prospectus or notice, and every person who having authorized such naming of him is named in the prospectus or notice as a director of the company or as having agreed to become a director of the company shall be liable to pay compensation to all persons who shall subscribe for any shares, debentures, or debenture stock on the faith of such prospectus or notice for the loss or damage they may have sustained by reason of any untrue statement in the prospectus or notice, or in any report or memorandum appearing on the face thereof, or by reference incorporated therein so issued therewith unless" certain things are proved. What those are, it was not necessary to read. [His lordship then stated the facts at considerable length, and said that the plaintiffs had become liable to make payments under the provisions of the Act, and that Bray and Gaunt would, if living, be liable to make the same payments, and the plaintiffs would be entitled to contribution.]

There is a serious question of law raised by the executors of Bray and Gaunt respectively, as to whether the cause of action against Bray and Gaunt ceased with their deaths. The section provides that a person who has become liable shall be entitled to recover contribution "as in cases of contract" from any other person who if sued separately would have been liable. In cases of contract the right to recover contribution arises (except in cases of express stipulation) not from any notion of implied contract, but as an equitable right springing from the relations of parties as persons liable for the same debt. The right existed from the commencement of those relations, though there might be no means of asserting it by action until one of the parties had met the common obligation, or more than his due proportion thereof, or is, at all events, in imminent danger of being compelled to meet it: see *Wolmershausen* v. *Gullick*, [1893] 2 Ch. 514, 41 W. R. Dig. 16, 193, and the cases there cited; also *Gerson* v. *Simpson*, 51 W. R. 610, [1903] 2 K. B. 197. The right of contribution existed from the commencement of the relations giving rise to the common obligation—namely, at the time when the shareholder incurred loss by reason of the untrue statement in the prospectus. The argument on the part of the defendants, the executors, founded on the maxim *actio personalis moritur cum persona* therefore failed.

Judgment for the plaintiffs.

Solicitors for the plaintiffs, *Waterhouse & Co.*

Solicitors for the defendants, *Helder, Roberts, & Co.* for *Simpson & Co.*, Leeds.

House of Lords.

From C. A. (England). } May 21.

BOSTON FRUIT CO. v. BRITISH AND FOREIGN MARINE INSURANCE CO. (*a.*)

Insurance—Marine—Charterers—Right of charterers to sue on policy—Intention—Construction of charter-party.

Although the words of a policy are wide enough to include third persons, only those will be included on whose behalf the policy is in fact effected. And where the evidence of such inclusion is to be inferred from the terms used in the charter-party "that the owners shall pay for the insurance of the vessel," this will not be sufficient to enable the charterers to avail themselves of the wide terms of the insurance policy.

Decision of the Court of Appeal (53 *W. R.* 420, [1905] 1 *K. B.* 637) *affirmed.*

Appeal from an order of the Court of Appeal (Vaughan Williams, Romer, and Stirling, L.JJ.) (53 W. R. 420, [1905] 1 K. B. 637), affirming judgment of Bigham, J.

The action was brought by charterers against insurers, and the question was whether the charterers, the appellants, were entitled to sue the respondents on a policy of insurance effected by the owners on the steamship *Barnstable*.

The policy was a time policy from the 21st of March, 1895, to the 20th of March, 1896. There was a running-down clause attached to the policy.

On the 13th of January, 1896, *The Barnstable* came into collision with a ship *The Fortuna*, and *The Fortuna* was sunk. The collision was caused by the negligence of the master and crew of *The Barnstable*.

On the 15th of January, 1896, the owners of *The Fortuna* instituted proceedings against *The Barnstable* in a district court of the United States of America, claiming damages in respect of the collision.

On the petition of the owners of *The Barnstable* the appellants as charterers were made parties to the suit. At the hearing the liability of *The Barnstable* was admitted, and damages agreed at 14,575 dols., with interest at 6 per cent. The suit thenceforward proceeded as an independent cause between the appellants and the owners of *The Barnstable*, to determine which as between them was the party liable to pay the said damages. This question was ultimately decided in the owners' favour by the Supreme Court of the United States. The amount for which the appellants became liable was paid, and the appellants now sought to recover a due proportion of this sum under the policy. The necessary clauses of the charter-party and policy are given in the judgments.

The Court of Appeal upheld Bigham, J., who dismissed the action.

Carver, K.C., and *Llewellyn Davies*, for the appellants.

Scrutton, K.C., *J. A. Hamilton, K.C.*, and *Maurice Hill*, for the respondents.

Lord LOREBURN, L.C.—In this case the charterers of the steamship *Barnstable*, who navigated her under a charter-party amounting to a demise of the ship, were held liable in the United States to pay damages to the owners of another ship with which *The Barnstable* had come into collision. The question now is whether the charterers can recover against the

(*a.*) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

defendant underwriters on a policy not effected by themselves, but effected by brokers instructed by the owners, which includes risk of having to pay damages arising from collision, and contains a description of the assured wide enough to cover the plaintiffs or any others concerned in interest. I have come to the same conclusion as did the Court of Appeal, that this question must be answered in the negative. The substantial contentions of the plaintiffs are as follows: They say that being within the description they are entitled to the benefit of the policy, because the owners were bound to insure, and so must be taken to have insured, charterers' risks by virtue of clause 22 of the charter-party. That clause provides "that the owners shall pay for the insurance on the vessel." In my opinion these words do not so bind the owners, and if an action were brought on such a clause for breach of a contract to insure it must fail. If what is suggested had been meant, nothing would have been easier than to say it. Next, the plaintiffs urge that they are entitled to the benefit of the policy because it must be taken to mean what it says—viz., that all "to whom the subject-matter of this policy does, may, or shall appertain in part or in all" are insured. Now, I agree that a policy may be made for the benefit of all such persons. But where it has been established that in fact the person claiming the benefit was not such a person as those who effected the policy had in contemplation, courts have disallowed his claim though he might be within the description. In the present case the plaintiffs and the assignees of the owners agreed in the course of the American litigation that the former had no insurance on *The Barnstable*, and the litigation was for a long time conducted by the plaintiffs on the footing that the owners intended to insure their own interest and no other. In reality, this is the only evidence we have in regard to intention. It appears conclusive to show that this appeal must fail.

Lord MACNAGHTEN.—In this case an American corporation, who were the charterers of the British steamship *Barnstable* under a time charter, claim the benefit of a policy effected by the owners in England on the hull and machinery of the vessel. The policy was in a common form, and purported to be made on the proposal of certain insurance brokers "as well in their own names as for and in the name and names of all and every other person or persons" to whom the subject-matter of the policy did, might, or should appertain in part or in all. There was a running-down clause attached to the policy. *The Barnstable*, owing to the fault of the persons in charge of the navigation, who were the servants of the charterers, ran down and sank another vessel. This disaster gave rise to protracted litigation in America. *The Barnstable* was condemned in damages, and ultimately it was decided that as between the charterers and the owners the loss must fall on the charterers. Having discharged their liability in respect of the collision, the charterers sue the insurance company in this country. Their contention is that the charter imposed upon the owners an obligation to insure on behalf of the charterers as well as on their own behalf, or, in the alternative, that the owners were authorized to insure and did in fact insure on behalf of the charterers, or at least in terms wide enough to cover them, and that they had duly ratified and adopted the contract. There is not the slightest evidence of intention on the part of the owners to protect the charterers by insurance, unless such intention can be inferred from the mere fact of the existence of the policy in question taken in connection with the language of the charter. The main part of the argument was addressed to the construction of the charter. There are only three clauses which can have any bearing upon the question. They are clause 3, clause 17, and clause 22. Clause 3 declares that the charterers shall provide and pay for certain specified charges "and all other charges whatsoever" except for painting and repairs to hull and machinery, and anything appertaining to keeping the ship in proper working order. Clause 17, after declaring among other things, that should the vessel be driven into port or to anchorage by stress of weather the detention or loss of time should fall on the charterer, ends with this statement: "It is understood in event of steamer from above causes putting into any port or ports other than those to which she is bound that the charterers are covered as to expenses as the owners are by their insurance." Up to this point there is no reference to insurance to be found in the charter. The next and only other mention of insurance is in clause 22, in the following words: "That the owners shall pay for the insurance on the vessel." Clause 3, if unexplained or unqualified, might possibly have given occasion for an argument to the effect that the expense of insurance was to be borne by the charterers. But clause 22 leaves no room for such a contention. And indeed, as was suggested in the course of the argument, the clause may have been inserted in order to put that matter beyond question. It will be observed that clause 22 does not indicate the amount to be insured or specify the risks to be covered. It merely says that the owners shall pay for the insurance on the vessel. It imposes no obligation on the owners which the charterers could enforce. The meaning, therefore, I think, must be simply this—that if the owners choose to insure they must pay the premiums without recourse to the charterers. The owners are not to trouble themselves about the charterers at all. The insurance contemplated, if effected, is no concern of the charterers. Now, if the matter rested there, it seems to me that the conclusion must be that when the owners proposed to insure, acting as they did without any communication with the charterers, the charterers cannot be regarded as persons within the contemplation of the proposal. They were not persons intended to be covered by the policy or persons for whose benefit the insurance was proposed. They were strangers to the contract altogether. Clause 17 is obscure. Vaughan Williams, L.J., seems to think that under certain circumstances it might give the charterers the benefit of an insurance made by the owners. I cannot think that that can be the meaning. I prefer the suggestion of Mr. Hamilton, that what was meant was only this: That if the charterers should desire protection against the risks contemplated they were to look out for themselves and themselves alone, just as the owners were to do by their insurance on the vessel. If this be the true meaning it would strengthen the view I have already indicated, as the result of clause 22, that the insurance on the vessel was intended to be for the benefit of the insuring owners, and not in any event or under any circumstances for the benefit of the charterers. I am therefore of opinion, notwithstanding the very able argument of Mr. Carver and Mr. Llewellyn Davies, that the order appealed from is right, and that the appeal should be dismissed with costs.

Lord ROBERTSON concurred.

Lord ATKINSON.—I concur in the conclusion that the judgment of the Court of Appeal should be upheld, and this appeal dismissed with costs. I think that clauses 17 and 22 of the charter-party, taken singly or together, do not on their true construction amount to a contract between the owners and

charterers that the former should insure the ship, nor do they, in my opinion, impose any duty or obligation on the owners so to do, or constitute or appoint them the agents of the charterers for that purpose. I am further of opinion that whether Messrs. Craggs & Son intended to insure on behalf of the appellants or not, or whether or not Messrs. I. Holman & Son professed or intended to insure on their (the appellants') behalf and as their agents, the appellants, with full knowledge of the facts, repudiated, in the American proceedings, the authority of the persons they now contend acted as their agents, and disclaimed the contract those alleged agents entered into. At p. 37 of the record of the American proceedings a stipulation of facts agreed upon between the appellants and the owners is set forth. Paragraph 8 of this stipulation contains the following statement: "The appellants had no insurance on the said steamship." The excuse now given for this statement is that at the time it was made the appellants were contesting their liability for the damages caused to another vessel by the negligent navigation of *The Barnstable*; but if their present contention be well founded they were interested in other risks different from, and in addition to, the risk of having to pay damages for injury caused to other vessels by the negligent navigation of the vessel they had chartered. And the contention that unless they were held liable in damages for this collision they had no interest in the policy of assurance, and that while that liability was undetermined this statement in paragraph 8 could not be treated as a repudiation of the authority of their agents, or a reprobation of the contract of assurance which prevents them now from approbating it, cannot, in my opinion, be sustained. At the time this statement of facts was agreed upon the appellants knew all the fa.ts. They insisted, no doubt, upon a construction of the charter-party which would have protected them from liability for the damages then sued for; but the fact that the question of construction was still *sub judice*, and that they did not know that their contention would fail, or that they would be held liable to pay these damages, may show a want of appreciation of the soundness of a legal argument, or the correctness of a legal opinion, but does not, in my opinion, amount to such ignorance of fact as will entitle a party to escape from the consequences of an election between two remedies made by him while that ignorance continued. I think that the statement in this paragraph 8 must be treated as an unequivocal expression on the part of the appellants of their determination not to adopt or ratify, or be bound by the contract of insurance which has been entered into, and that, though made in a suit between the appellant and a third party, it is upon the authority of *Clough* v. *The London and North-Western Railway Co.*, L. R. 7 Eq., pp. 26, 34-36, binding in the present case upon those who made it. Upon the true construction of the general clause in the policy of marine insurance so much discussed, I express no opinion. Under the old authorities the governing factor in determining the person or class of persons who came within such a clause, or was or were entitled to ratify the contract contained in it and take advantage of that contract, was apparently the intention, disclosed or undisclosed, existing in the mind of the person who effected the policy with the underwriters at the time he effected it. The underwriter, it would seem, was held to have insured those whom the person who dealt with him intended should be insured, though that intention was never communicated to the underwriter. I doubt very much whether that doctrine can long survive the decision of your lordships' house in *Keighly, Maxted, & Co.* v. *Durant*, [1901] A. C. 240, 49 W. R. Dig. 41, or whether the rule of construction they adopted in the case of marine policies from earlier times is not inconsistent with the root principle which lies at the foundation of all the law of contract—namely, that there must always be the consent *ad idem* of the two contracting minds to make a valid contract. Having come to the conclusion I have mentioned on other points of the case, it is unnecessary for the purposes of this appeal that I should express any opinion upon this point, and I wish to hold myself entirely free, should the necessity arise, to reconsider it upon a future occasion.

Appeal dismissed.

Solicitors, *Thorne & Welsford; Walton, Johnson, Bubb, & Whatton.*

Court of Appeal.

From Chan. Div.
(Vaughan Williams, Romer, and Moulton, L.JJ.) June 19.

In re BOURNE.
BOURNE *v.* BOURNE. (*a.*)

Partnership—Lien of executors of deceased partner on the assets of the partnership—Realization of assets—Deposit of deeds by surviving partner—Priorities—Partnership Act, 1890 (53 & 54 *Vict. c.* 39), *s.* 39.

On the dissolution of a partnership by death, the surviving partner has both a right and a duty to realize the partnership assets for the purpose of winding up the partnership, and this right and duty extend alike to real and personal property of the partnership, the lien of the representatives of the deceased partner extending only to the surplus assets of the partnership, and not attaching to the specific assets so as to prevent the surviving partner giving a good title to a bonâ fide *purchaser from him.*

Decison of Farwell, J., ante *p.* 154, [1906] 1 *Ch.* 113, *affirmed.*

This was an appeal from a decision of Farwell, J. (reported *ante*, p. 154, [1906] 1 Ch. 113).

On the 1st of July, 1873, articles of partnership were entered into between W. T. Bourne and G. Grove.

G. Grove died on the 9th of May, 1901.

A deposit of deeds was made on the 7th of February, 1902, in favour of Messrs. Berwick & Co., bankers, accompanied by a memorandum of deposit signed by W. T. Bourne in the name of "Bourne & Grove." The memorandum related to certain hereditaments which formed part of the assets of the partnership of "Bourne & Grove."

W. T. Bourne died on the 3rd of September, 1902. His estate was insolvent. The overdraft at the bank was then about £4,500.

An action was commenced against Bourne's executors to administer his estate.

By an order dated December, 1903, in the claim of the executors of G. Grove to rank as creditors against the capital which G. Grove had in the business of Bourne & Grove, it was ordered that the executors of G. Grove should be at liberty to prove for £3,000 against the estate of W. T. Bourne and have a lien for the amount of such debt and costs on the assets of the said partnership.

After the death of W. T. Bourne the business was carried on as a going concern and was sold under an

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

order of the 6th of April, 1903, for a lump sum, and the proceeds of sale were paid into court and invested in Consols.

The partnership real estate the subject of the deposit of the 7th of February, 1902, realized about £5,300, and was therefore insufficient to pay both the bankers and G. Grove's executors in full.

On the action coming on for further consideration, Farwell, J., decided that the bankers were entitled to priority in respect of the £4,500.

Eve, K.C., and *Wheeler*, for the appellants, cited *In re Thomas Ryan*, L. R. Ir. 3 Eq. 222; *In re Langmead's Trusts*, 3 W. R. 602, 20 Beav. 20; *Clayton's case*, 1 Mer. 572; *In re Clough*, 34 W. R. 96, 31 Ch. D. 324.

Butcher, K.C., and *Martelli*, for the respondents, were not called on to argue.

Stamp, for the parties having the conduct of the action.

VAUGHAN WILLIAMS, L J.—This case turns, I am almost disposed to say, upon a single point. It is admitted by both the learned counsel for the appellant that they cannot deny that when there is a partnership between two partners, and one of those partners dies, unless there is something in the partnership articles to the contrary, *primâ facie* the surviving partner has not only the right but the duty to realize the partnership property, and for the purpose of that realization to carry on the business if it is necessary so to do for a reasonable realization of the partnership assets. That is not disputed, but it is said that although that is perfectly true with regard to so much of the partnership assets as constitute personal property, it is not true in respect of real property. Now in the first place no case has been produced to us which decides anything of the sort, no case has been produced which excludes the surviving partner from the right to realize and deal with partnership realty for the purpose of paying partnership liabilities. In the next place, so far as the principle is concerned, it is obviously wide enough to cover both personalty and realty. The real truth of the matter is that, leaving out all questions of legal estate and *jus accrescendi* and anything else of that sort, there is as between a surviving partner and the representatives of a deceased partner an overriding duty to wind up the partnership, and to do all such acts as are necessary for the purpose, and, if it is necessary for the purpose of the winding up either to continue the business, or to borrow money, or to sell assets whether those assets are real or personal; and the right and the duty of such surviving partner are co-extensive. It further appears from the case of *In re Clough*, to which Mr. Wheeler called our attention, that it cannot be denied in the face of the authorities that, given a debt which was in existence before the dissolution by death, there is the right to sell or pledge the realty. It is not suggested here that the rule does not apply to realty, but it is said that the rule is limited, and that although the surviving partner has the right to raise money on the mortgage of the realty, he can only do it for the purpose of paying particular debts I say again that I cannot find any authority for that proposition. With regard to the proposition stated in p. 166 of Lindley on Partners, which it was argued only applied as between living partners in an existing partnership, it is plain from p. 248 that the same proposition applies to the case where there has been a dissolution of partnership. In those circumstances I think that this part of the argument fails. Then it is said that by the application of the principles, which are the basis of the rule in *Clayton's case*, this debt must be taken to have been paid, and therefore the bankers cannot rely upon this mortgage, because they ought to have known that, this debt having been paid, the surviving partner had no right to pledge or mortgage the real estate. All that I can say with reference to that is, that as far as the bankers are concerned this was apparently an ordinary winding up, there were payments in and payments out, and both the payments in and the payments out must be taken to have been on account of the realization and winding up. In these circumstances it seems to me that that point also fails. I think, therefore, that the appeal fails, and must be dismissed with costs.

ROMER, L.J.—I am of the same opinion. When a partner dies and the partnership comes to an end, the surviving partner has a right as well as a duty cast upon him to realize the assets for the purpose of winding up the partnership affairs, including the payment of the partnership debts. It is true that in a general sense the executors or administrators of the deceased partner may be said to have a lien upon the partnership assets in respect of any balance that may come to the deceased partner's estate in respect of his interest in the partnership on taking the partnership account, but that lien is not one which affects each particular piece of property belonging to the partnership so as to affect that property in the hands of any person dealing with the surviving partner in good faith. It is really what you may call a general lien upon the surplus assets, and does not affect each particular piece of property so as to interfere with the right of the surviving partner to deal with the property belonging to the partnership for the purpose of realization, so as to give a good title to persons dealing in good faith with him in respect of such property. The power of the surviving partner, of course, extends to a sale, and it also extends to giving a mortgage on any particular part of the property belonging to the partnership to secure in good faith a partnership debt. That being the general rule, it has been argued in this appeal that for that purpose there is a distinction to be drawn between real estate and chattels. I do not know whether it is intended to draw a distinction between real estate and chattels real, or between real estate and chattels personal and *choses in action*, but I gather that it is intended to say that so far as concerns real estate, and possibly chattels real, a distinction is to be drawn between them and chattels personal or *choses in action*. To my mind, when you consider the reasons for the rule that the lien of the deceased partner's executors or representatives does not impede the powers of the surviving partner, those reasons apply equally well to real estate as to leaseholds and *choses in action* or chattels personal. In fact, they apply to any property which forms part of the partnership assets—as, for example, to a patent or a share in a patent, and no good reason can be suggested, or has been suggested, to my mind, why any distinction should be drawn between real estate and personal. It is to be borne in mind that the interest of the partnership in real estate is of a personal character, because wherever the legal estate may be, whether it is in the partners jointly, or in one partner, or in a stranger, it does not matter, but the beneficial interest in the real estate belongs to the partnership, with an implied trust for sale for the purposes of the partnership, for realization, and for the purpose of giving to the two partners their interests when there has to be a winding up of the partnership and an account taken. So that no real distinction can be drawn between real estate held for partnership purposes and personal estate. There is no more

difficulty in dealing with the one than there is in dealing with the other, or any reason why you should give a power to the surviving partner to deal with personal estate and not with real estate. The real estate has nothing to do with it. In the eyes of equity the real estate is mere personalty just as much as a chattel real. That being so, it appears to me that the chief argument of the appellants here, that a distinction ought to be drawn in their favour because the property charged was real estate, entirely fails.

Then the only question remaining is this: Was the debt to the bank which the surviving partner gave the charge to secure, one that really to the knowledge of the bank was not a partnership debt? To my mind the bank was entitled to consider and treat it as a partnership debt. The account with them was a partnership account. It was continued under the partnership name and apparently for the purposes of the partnership, and it appears to me impossible to say that it is not or may not be reasonably necessary for the surviving partner to continue the partnership account for the purpose of winding up the estate. To my mind the case is very much as if the only change in the account had been to put the account of the partnership "in administration," or some wording like that. When you find an account of that kind continued, and it is only continued for something like nine months before the charge is given, the bankers, it appears to me, are entitled, in the absence of evidence showing the contrary, to assume and to be credited with the belief that the surviving partner is continuing for the purpose of realization, and that when sums are paid into that account and drawn out of that account all is done for the purposes of the partnership. That being so, in this case, when the account is finally taken and there is a balance due which the bankers are entitled to believe and to assert was, so far as they were concerned, a partnership debt in respect of which they were entitled to have security given, which this surviving partner gave, it appears to me that in these circumstances from any point of view, the charge given was one which it was within the power of the surviving partner to give, and that accordingly the bankers have a right in respect of that charge which is superior to any claim by the executors of the deceased partner in respect of their lien.

MOULTON, L.J. — I am of the same opinion. It appears to me that the powers and duties of a surviving partner with regard to the realization of the partnership estate spring from the very nature of the partnership and its relationship to the world outside, and are quite independent of the nature of any particular property which may be owned by the partnership. I cannot help thinking that a good deal of confusion in this case has arisen from the phrase that the deceased partner has a "lien on the surplus assets of the firm." I doubt whether "lien" is the word which best describes his right. It is not a lien on any specific property existing at the date of the death such as would fetter its realization or conversion into money, but the right is really a claim against the surplus assets after realization, whether those surplus assets consist entirely of the proceeds of realization, or whether they include some specific property which existed at the date of the death. As soon as you get your surplus the lien attaches. Until you get your surplus there is no claim or lien which in any way affects the power and duty of the surviving partner to realize the property of the partnership and to discharge its liabilities.

Solicitors, *Badham & Comins*, for *Brooks & Badham*, Pershore; *Maples, Teesdale, & Co.*, for *Lord & Parker*, Worcester; *P. W. Chandler*.

High Court of Justice.

Chan. Div.
Kekewich, J. } April 5, 10.

In re PARDOE, DECEASED.
MCLAUGHLIN *v.* ATTORNEY-GENERAL. (*a*.)

Will— Construction— Charity — Gift for ringing of church bells—Gift for headstones in churchyard—Gift to "public charities and institutions."

A testatrix by her will made (inter alia) *the following bequests: The sum of £1 to be paid to the bellringers of a parish church to ring a peal annually "in commemoration of the happy restoration of the monarchy to England"; the income of the sum of £700 to be applied in the erection and maintenance of headstones on the graves of certain poor persons buried in the churchyard; and a gift of residue "to and amongst such public charities and institutions" as her trustees should think fit.*

Held, that each of these gifts constituted a good and effectual charitable bequest.

Adjourned summons.

This was a summons taken out by the executors and trustees of the will of Mrs. E. M. Pardoe to determine the validity of certain charitable bequests given by the will.

The testatrix by her will dated the 11th of May, 1901, bequeathed (*inter alia*): (*a*) The sum of £200 to the vicar and churchwardens of the parish of Cirencester, to be invested by them in the names of the official trustees of charitable funds, and the income thereof to be distributed annually at Christmas as to the sum of £1 to the ringers for the time being of the parish church who should ring a peal of bells from six to seven o'clock in the forenoon on each 29th day of May in commemoration of the happy restoration of the monarchy to England and as to the residue among the poor as therein mentioned. (*b*) The sum of £700 to the vicar and churchwardens of Cleeton St. Mary to be similarly invested and the income to be applied (*inter alia*) in the erection and maintenance of headstones to the graves of any persons who at the date of their death were resident as pensioners at the almshouses at Cleeton erected by the testatrix's late husband, and who should be buried in the churchyard of the said church. (*c*) The net proceeds of her residuary estate to her trustees upon trust to distribute the same to and amongst such public charities and institutions or for such charitable purposes for the public advantage or benefit as her trustees for the time being should in their absolute discretion consider worthy and fitting objects to receive the same.

The testatrix died on the 15th of July, 1903, and her said will was duly proved by the executors therein named.

With regard to the gift of £200 to the vicar and churchwardens of the parish of Cirencester:

P. O. Lawrence, K.C., and *Methold*, for the next-of-kin.—This gift is not for a charitable purpose.

R. J. Parker, for the Attorney-General.—If this gift is in aid of the church service it is good, but if it is for the ringing of a peal of bells in commemoration of a political event it cannot be a gift for a charitable purpose.

Jennings, for the vicar and churchwardens of Cirencester.—This is a good charitable gift. It falls within the classification made by Lord Macnaghten in *The Commissioners of Income Tax* v. *Pemsel*, [1891]

(*a*.) Reported by H. WOLCOTT WARNER, Esq., Barrister-at-Law.

A. C. 531. It is a gift for religious purposes, and therefore good: *In re Scowcroft*, [1898] 2 Ch. 638, and *Attorney-General* v. *Whorwood*, 1 Ves. sen. 534.

KEKEWICH, J., in giving judgment, said: The bells are to be rung on each 29th day of May, the anniversary of the restoration of the monarchy to England, in commemoration of that event. As I understand it, the object of the gift is that the restoration of the monarchy may be brought to the mind by the ringing of the bells. The restoration was a happy event, and the idea of the testatrix was to bring back happy thoughts, and these happy thoughts necessarily connote gratitude to the Giver of all good gifts, and therefore the ringing of the bells should move the hearers to gratitude to heaven. If that is so it is a good charitable gift. It is also a good gift inasmuch as the ringing of the bells connotes the idea of worship. Therefore I hold that this gift is a good and valid bequest.

With regard to the gift of £700 to the vicar and churchwardens of Cleeton St. Mary:

Fischer-Williams, for the vicar and churchwardens of Cleeton St. Mary.—This is a good gift. It is for the purpose of providing poor persons with the usual funeral necessities, and therefore is charitable. The test is whether the person is benefited in his capacity as a poor person: *In re Vaughan, Vaughan* v. *Thomas*, 35 W. R. 104, 33 Ch. D. 187, and *In re Manser, Attorney-General* v. *Lucas*, 53 W. R. 261, [1905] 1 Ch. 68.

R. J. Parker, for the Attorney-General.—There is no reason why this gift should not be good charitable gift.

P. O. Lawrence, K.C., and *Methold*, for the next-of-kin.—If this gift is held to be a good charitable gift the principle will be extended further than it has ever been carried before. Such a gift is not for the benefit of the persons over whose graves the headstones are erected. There is no obligation upon anyone to erect or to maintain headstones upon the graves of deceased persons. This gift is really for the benefit of the relations of those who die in the almshouses. It has been held that a gift to plant flowers on a grave is not a good charitable gift. It cannot be for the benefit of the public to erect headstones, which, in fact, are not necessary for a grave.

KEKEWICH, J., in giving judgment, said: I have before me a passage in the judgment of Warrington, J., in *In re Manser, Attorney-General* v. *Lucas*, where he says: "Now, in my opinion, a gift of money for the purpose of providing, or, as in this case, for the purpose of keeping in good order a burial-ground, though that burial-ground may not be a parish churchyard, and though it may be connected with the meeting-house of or for the benefit of members of a particular religious community, may be supported as a gift for the advancement of religion, and therefore a good charitable gift"; and later he says, referring to a decision of North, J.: "To put it shortly, I do not see any difference between a gift to keep in repair what is called 'God's House' and a gift to keep in repair the churchyard round it, which is often called 'God's acre' That is the ground upon which I think this, as I have already said, can be decided in favour of the legacy" The only answer to that is this, that a gift to erect headstones is not a gift for the repair of a churchyard, partly because headstones are not necessary, and partly because they have fallen into disuse. In one sense everything is unnecessary. It is only necessary to cover a grave over decently. But the object of a headstone is to show whose the grave is, and also to make it neat. As regards its use, if headstones really are abandoned because the authorities will not allow them to be erected, this charity will have to be administered *cy-près*, but in the meantime I venture to think that headstones have not fallen into such disuse as to render a gift to mark a grave with the name and age of the deceased not a charitable gift.

With regard to the residuary gift to the plaintiffs:

Lawrence, K.C., and *Methold*, for the next-of-kin.—This trust is too vague. The testatrix has in effect delegated the making of the will to the executors: *Grimond* v. *Grimond*, [1905] A. C. 124, 53 W. R. Dig. 184; *In re Allen, Hargreaves* v. *Taylor*, 54 W. R. 91, [1905] 2 Ch. 400. The words "public charities and institution," imply that "institutions" may include objects not charitable in their nature.

Parker, for the Attorney-General.—If a gift is partly to objects not charitable it fails as being too vague, but here there is clearly a charitable intention, and if there is a public institution which is not charitable it would receive nothing. There is, therefore, a good charitable bequest: *Blair* v. *Duncan*, 50 W. R. 369, [1902] A. C. 37; *Hunter* v. *Attorney-General*, 47 W. R. 673, [1899] A. C. 309.

Methold replied.

Stewart Smith, K.C., and *Cann* appeared for the executors.

KEKEWICH, J., in giving judgment, said: It is not my intention to determine the question whether a public institution is necessarily a charity, nor is it incumbent upon me to do so in the case before me. As is usual in cases of this kind, the first thing to do before applying the law, is to see what the meaning of the will is. [After reading the terms of the bequest, his lordship continued:] Now, what is the class marked out by this bequest as the area of selection by the trustees, or is there such a class at all? It seems to me that the will is not framed accurately, yet there is a distinct expression of the testator's intention that the selection shall be made from a particular class, and that the class is described with sufficient accuracy. In the first place, I think the gift is to "public charities" and "public institutions," for I have no doubt that the word "public" attaches to "institutions" as well as to "charities." The testatrix said "public charities and institutions," not "public charities or institutions." She did not divorce charities from institutions, but treated them as being connected together and as being both public. Then the gift goes on "or for such charitable purposes for the public advantage or benefit," &c. In my opinion it is impossible to construe that language as comprising anything that is not charitable, and if the trustees could select a public institution which is not charitable they would, in doing so, be doing what the will did not allow. I think that charity must really govern their selection.

If this is the true view of the case, it is not necessary to distinguish this case from *Grimond* v. *Grimond*, because the House of Lords could not have intended to depart from their own decision in *Blair* v. *Duncan*, where Lord Davey said: "If, therefore, the words in the present case were merely 'charitable purposes' or were 'charitable and public purposes,' I think effect might be given to them, the words in the latter case being construed to mean charitable purposes of a public character." That is entirely consistent with the rule that a testator may bequeath his property to charity, leaving his executors to ascertain to what precise charity the property should be applied. It would be a most mischievous thing to cast any doubt on gifts of this character because it is a very

common form of charitable gift. In *Grimond* v. *Grimond*, which comes from Scotland, the residue was to be divided "among such charitable or religious institutions or societies" as the trustees might select, and in Scotland a gift for religious purposes is not necessarily a gift for charitable purposes. The Lord Chancellor did not pause to consider how far the gift was charitable, but said that the testator had not sufficiently described for himself amongst what objects the property was to be distributed; in fact, that he had not given a class at all. The Lord Chancellor thought it impossible to give effect to a gift in that case, because no court could see what the testator meant. That decision has no application to the present case, and in my opinion the gift of residue in this case is a good and effectual charitable gift.

Solicitors, *Charles Sawbridge & Sons; Peacock & Goddard*, for *Mullings, Ellett, & Co.*, Cirencester; *Lee & Pembertons; The Treasury Solicitor.*

Chan. Div.
Swinfen Eady, J. } May 26; June 1.

In re LEES BROOK SPINNING CO. (*a*.)

Company—Capital—Reduction of capital—Paying off capital in excess of company's wants—Procedure—Form of minute—Companies Act, 1867 (30 & 31 *Vict. c.* 131), *ss.* 9, 15—*Companies Act*, 1877 (40 & 41 *Vict. c.* 26), *ss.* 3, 4.

On a petition presented by the Lees Brook Spinning Co. for confirmation by the court of a special resolution for reduction of its capital by repaying to its members £1 10s. per share, the shares to be reduced to £2 each and £1 per share to be deemed to be paid up, a question arose as to the proper form of minute, having regard to the decision of Buckley, J., *in* In re Calgary and Edmonton Land Co., [1906] 1 *Ch.* 141.

Held, that an order confirming the reduction could be made, although the £1 10s. per share had not been returned, and that the proper minute to approve for registration was one which, after stating the reduced capital, contained the words "at the time of the registration of this minute the sum of £1 and no more is proposed to be deemed to have been paid up on each share."

In re Calgary and Edmonton Land Co. *not followed.*

Petition for reduction of capital.

The capital of this company consisted of £80,000 in 16 000 shares of £5 each, of which £2 10s. per share was paid up.

The company had passed a special resolution for the reduction of its capital to £32,000 in 16,000 shares of £2 each—£1 per share to be deemed to be paid up—by returning to the shareholders the sum of £1 10s. per share, and now presented a petition to the court in the usual way for confirmation of the reduction.

The form of minute proposed to be registered, pursuant to section 15 of the Companies Act, 1867, was in the ordinary form, and stated that "at the time of the registration of this minute the sum of £1 has been and is to be deemed to be paid up on each of the said shares." No part of the £1 10s. per share had in fact been returned when the petition was presented.

R. J. Parker, for the company—The difficulty as to the form of the minute has been caused by the decision of Buckley, J., in *In re Calgary and Edmonton Land Co.*, [1906] 1 Ch. 141. The learned judge held there that the court ought not to make the order approving the minute stating the reduced capital until the capital had actually been reduced by the repayment, and he accordingly adopted the following procedure: he first made an order confirming the reduction, then allowed the further hearing of the petition to stand over in order that an affidavit might be supplied showing that the repayment had been made, then post-dated the order, referring therein to the affidavit and approving a minute stating the capital as reduced by the order. There is no necessity for that procedure; moreover, by section 9 of the Companies Act, 1867, no resolution for reduction of capital can be acted upon until the order of the court has been registered, and by section 15 of the same Act registration cannot be made until the minute has been approved and a copy produced to the registrar. Section 16 provides that after registration the minute shall be deemed to be substituted for the corresponding part of the memorandum of association of the company. The point is referred to in the 9th edition of Palmer's Company Precedents, Part I., at pp. 1144 and 1145. The form of minute is in the same volume of the same work, at p. 1122, and the material part runs thus: "At the time of the registration of this minute the sum of £ has been and is to deemed to be paid up on each of the said shares." The object of Buckley J., was presumably to bring the facts into exact correspondence with that wording. [SWINFEN EADY, J.—If that means that that sum only has been paid up it is open to the criticism that it is inaccurate. To omit "has been" and say "proposed to be deemed" would seem to meet the objection of Buckley, J.]

His lordship said he would allow the reduction, but that, having regard to the decision of Buckley, J., in the case referred to, he would consider the question and deliver judgment in a few days.

Cur. adv. vult.

June 1.—SWINFEN EADY, J., read the following judgment: This is a petition for confirmation of the reduction of capital, involving a return to the shareholders of £1 10s per share, upon the footing that £1 may be called up again, the shares being reduced from £5 to £2 with £1 paid. Upon the evidence I have no difficulty in making an order confirming the reduction. A question, however, has been raised as to the form of the order and the minute. It has recently been decided by Buckley, J., in *In re Calgary and Edmonton Land Co.*, [1906] 1 Ch. 141, that the court cannot make the order approving the minute stating the reduced capital until the capital has in fact been reduced by the repayment, and that the proper procedure is to make the order confirming the reduction and then allow the further hearing of the petition to stand over until evidence has been produced that the capital to be paid off has actually been returned to the shareholders, and when this has been done to post-date the order confirming the reduction and approving a minute showing, with respect to the capital as altered by the order, the particulars required by section 15 of the Companies Act, 1867, and section 4 of the Companies Act. 1877. That procedure has been objected to in the present case, and it was urged that the company had no right to make any repayment of capital to shareholders until the sanction of the court had been obtained. the order drawn up, passed, and entered, and the minute registered. By the Companies Act, 1867, s. 9, no resolution for reducing the capital of any company is to come into operation until an order of the court is

(*a*) Reported by R. E. V. BAX, Esq., Barrister-at-Law.

registered by the registrar of joint stock companies, as thereinafter mentioned. Section 15 provides that the registrar, upon the production to him of an order of the court confirming the reduction, and the delivery to him of a copy of the order, and of a minute approved by the court, showing with respect to the capital of the company, as altered by the order, the amount of such capital, shall register the order and minute, and on the registration, the special resolution, confirmed by the order so registered shall take effect. The certificate of the registrar is to be conclusive evidence that the capital of the company is such as is stated in the minute. By section 4 of the Act of 1877 the minute required to be registered is to show, in addition to the other particulars required by law, the amount (if any) at the date of the registration of the minute proposed to be deemed to have been paid up on each share. In my judgment the Acts clearly contemplate that the order of the court and the registration of the minute are to precede any repayment of capital. The resolution for reduction does not come into operation until after order made and minute registered, and the company is not entitled to make any repayment of capital to shareholders except under and in pursuance of an effective resolution for reduction of capital. By section 3 of the Act of 1877 the power to reduce capital includes a power to pay off any capital in excess of the wants of the company. Again, the minute is to show the capital as altered by the order, and the amount "proposed to be deemed to have been paid up on each share." This means the amount which is proposed to be deemed to have been paid up after the alteration of the capital. The Companies Acts do not contemplate two orders being made on a petition for reduction—one a preliminary order sanctioning the reduction, and the other an order approving the minute after the reduction has been carried into effect. Again, great difficulties in practice would arise if there were to be one order drawn up and post-dated after the reduction had been carried out. Some shareholders might be abroad or unable to be found, so that repayment of capital could not be made to them; others, perhaps, dead, without legal personal representatives; possibly disputes existing as to the ownership of other shares; and the Acts do not contain any provisions for dealing with the amount payable to such persons so as to make any particular disposition by the company of the amount of their capital equivalent to repayment to them. Moreover, the company would be paying off capital, not only before the resolution had become effective, but before it was known whether there would be an appeal from the order confirming the reduction. I prefer to adhere to the practice which prevailed before the recent decision of Buckley, J., and which is fully stated in Palmer's Company Precedents (9th ed.), Part I., pp. 1144, 1145, where numerous precedents of orders are referred to. I make the order confirming the reduction in the usual form. The minute will be as follows: "Minute approved by the court. The capital of the Lees Brook Spinning Co. (Limited) is henceforth £32,000 divided into 16,000 shares of £2 each, instead of the original capital of £80,000 divided into 16,000 shares of £5 each. At the time of the registration of this minute the sum of £1 and no more is proposed to be deemed to have been paid up on each share."

Solicitors, *Wrigley, Claydon, & Trustram*, Oldham.

Prob. Div. & Adm. Div.
Divorce.
(Gorell Barnes, P.)

March 2.

BEER v. BEER. (a.)

Divorce—Restitution of conjugal rights—Judicial separation—Withdrawal from cohabitation—Just cause—Habitual drinking habit—Habitual Drunkards Act, 1879 (42 & 43 *Vict. c.* 19), *s.* 3—*Licensing Act*, 1902 (2 *Ed.* 7, *c.* 28), *s.* 5.

The wife instituted a suit for restitution of conjugal rights, and in answer the husband pleaded that he had just cause for his withdrawal from cohabitation, alleging that the wife was addicted to habits of intemperance to such an extent that she was a drunkard within the meaning of the Habitual Drunkards Act, 1879, *and the Licensing Act*, 1902. *The husband also prayed for a decree of judicial separation on the ground of cruelty.*

The Court *dismissed the wife's petition and refused the husband's cross-prayer.*

The facts of the case sufficiently appear from the judgment of the court.

Barnard, K.C., and *Stevenson* for the petitioner.

Willock, for the respondent.

GORELL BARNES, P., in delivering judgment, said that the case was one of a somewhat unfortunate character—unfortunate because undoubtedly the root of the matter was the root of most cases in this court—drink. The point raised was somewhat new, although the principles to be applied to it were neither difficult nor novel. The petition was one by a wife for restitution of conjugal rights, the husband's answer and defence being that he had just cause for withdrawing from cohabitation, and he further asked to be judicially separated from his wife on the ground of her cruelty. A similar defence had been considered in *Russell* v. *Russell*, [1895] P. 315, where the wife's suit for restitution had failed on the ground that her conduct disentitled her to such relief, but the husband's application had also failed, because it was held that the wife's conduct, although sufficient to disentitle her to restitution of conjugal rights, was not sufficient to establish legal cruelty. In *Oldroyd* v. *Oldroyd*, [1906] P. 175, also, a suit for restitution of conjugal rights, the justification for the husband's withdrawal from cohabitation, however, failed, and in his judgment in that case he (the learned President) had said: "The Court of Appeal, however, does not hold that the court is to exercise a general discretion in granting or refusing a decree of restitution. To go so far would involve a large alteration of the old law, and would confer a discretionary power on the court of far-reaching effect and most difficult to exercise. Indeed, it was not contended that the decision in *Russell* v. *Russell* went to this extent. The effect of that case appears to be that in cases where the conduct of the petitioner has led to desertion by the respondent, and has amounted to sufficient cause to disentitle the petitioner to maintain a suit for judicial separation on the ground of desertion, the court is now empowered to refuse to pronounce a decree compelling the respondent to return to cohabitation with the petitioner. The truth is that in such cases it has become practically impossible for the spouses to live properly together. I may add that there may be some little inconsistency in holding that a decree for restitution may not be pronounced, and yet that the other party cannot obtain a decree for judicial separation; but that seems to be the result of the case of *Russell* v.

(a.) Reported by GWYNNE HALL, Esq., Barrister-at-Law.

Russell." These were the principles which had to be applied to the present case; and the question I have to decide is, what were the real facts. It was admitted that on the 4th of January, 1905, the husband had left his wife, and the position taken up by the parties was indicated in the two following letters. On the 30th of January the wife wrote to her husband: "Dear Bob,—It is now nearly four weeks since you left me, and a week since you had the furniture from our home removed, and turned me out into the street, and I really cannot continue to live apart any longer. I think that any little differences we have had in the past ought to be overlooked on both sides and that we should live together again. Will you, therefore, please make immediate arrangements for returning to live with me and making a home for me somewhere? I am quite ready to come at any time.—Your affectionate wife, MAUDE." To this the husband replied on the 1st of February: "My dear Maude,—I know it is four full weeks since I left you and took away with me the children of our marriage, and since which, and even now, you have not made the least inquiry after. It is also as you say a week since I had the furniture removed. I did so happily just in time to save you the trouble and expense of doing so yourself. There are many valuable articles, particularly of silver, I left, now missing. I really will not live with you again. Our differences, unfortunately, have not been, as you are pleased to term them, 'little,' they have been very large and painful and caused solely and only by your own long-continued wilful misconduct, gross cruelty to myself, and neglect (owing to the drunken and dissipated condition you allowed yourself to get in) of all your domestic duties, improperly pledging my credit, spending money to procure drink which I had given you for domestic purposes; indeed, you had brought yourself to such a condition that I was again, after endless suffering, compelled to seek legal advice. The law is such, so I am advised, that for my own protection I was entitled to take the step I did. My solicitor's letter to you of the 5th of January last truly states your condition and my intention. You have had warning after warning, notice after notice, have been forgiven over and over again, begged, prayed, and implored to amend your ways, all to no avail, and now it is too late. Your own brother on the 3rd of January wrote me with reference to yourself: 'About my staying with you, I think it would lead to a "bust up," for as sure as fate I should lose control and let into her. In fact on Saturday evening before you came in I picked her up off the floor and felt inclined to bang her down again. To say I am sorry for you, Bob, is not the word, and you have all our sympathy. God knows you deserve an easier life, for you do your share.' The above is the view of your family as to yourself and myself, and I know all others of our friends agree. You have many times threatened to take your life with poison and razors, and also the children's. My punishment is greater than yours, and you know it. It is more than twelve months back that I then at your earnest request, and relying on your solemn promise after I had left you, again forgave you and returned to live with you. Now, as to the future (I see by your address you are at your mother's), I will allow you £1 per week for your maintenance; I really cannot possibly do more. I have three children to bring up, and to do so properly and as I should wish I could spend upon them all my income; in addition I have to keep myself. My mother and step-father made me a liberal allowance whilst we were together, but things have now changed. I will cause the money at above rate (which is more than I ought to pay), on hearing from you, to be sent you. I have written you fully, and beg you will please accept this as my ultimatum.—Your unhappy husband, BOB." These two letters define pretty clearly the attitude the parties had adopted towards each other; and the negotiations as to a deed of separation having fallen through on the 6th of February, 1905, the wife filed her petition for restitution of conjugal rights, raising the issues, as to the husband's withdrawal from cohabitation on the 4th of January and his continuing refusal to render her conjugal rights. The husband in March filed his answer admitting withdrawal and refusal, and setting out as a "just cause" for so doing a plea obviously framed from the wording of the Habitual Drunkards Act, 1879 (42 & 43 Vict. c. 19), s. 3, which defined a habitual drunkard as "a person who, not being amenable to any jurisdiction in lunacy, is notwithstanding by reason of habitual intemperate drinking of intoxicating liquor, at times dangerous to himself or herself or to others, or incapable of managing himself or herself, and his or her affairs." The Licensing Act, 1902 (2 Ed. 7, c. 28), s. 5, sub-section 2, provided that "where the wife of a married man is an habitual drunkard as defined by section 3 of the Habitual Drunkards Act, 1879, the married man shall be entitled to apply to a court of summary jurisdiction for an order under this sub-section, and on any such application the court may make . . . orders containing . . . the following particulars: (*a*) A provision that the applicant be no longer bound to cohabit with his wife (which provision while in force shall have the effect in all respects of a decree of judicial separation on the ground of cruelty); (*b*) a provision for the legal custody of any children of the marriage." In one of the earlier letters the husband had suggested that he should take proceedings under the Licensing Act, 1902, but that idea had been abandoned when negotiations were going on for a deed of separation. Those negotiations, however, fell through, and after the suit for restitution of conjugal rights had been commenced it was useless to take proceeding in the police-court. The question which I have to consider is whether the wife's suit could be maintained. I do not think it necessary to determine what the effect would be if a different state of things existed at the present time to that which existed in January, 1905. If such a change of circumstances arose it would be time enough to consider what the effect would be in any suit which might hereafter be brought. This case depended entirely upon the evidence, and the husband having set up a plea of justification, the burden of proof was upon him of establishing it. The wife, while admitting that at times she had indulged to excess, denied that she had done so to the extent suggested by her husband, who she alleged had put forward greatly exaggerated evidence. There were certain broad facts in the case, the first of which was that in January, 1904, a year before the final separation, the husband had been compelled to leave his wife. Why had he in fact done so? His evidence was that it was for the reasons subsequently set out in the letter of the 1st of February, 1905, and because his wife was getting worse and worse, in spite of his efforts to check her habit. There was, however, one very striking piece of evidence, that of Mr. C. J. Smith, the respondent's solicitor. This gentleman's evidence had been submitted to the test of a keen cross-examination by Mr. Barnard, but the result had been that I have placed very great reliance upon Mr. Smith's evidence, as opposed to that of the petitioner's solicitor. His account of the interview which he and his client had had with the petitioner on the 14th of January, 1904, was dramatic. The wife

screaming hysterically, drunk, with her eyes glaring, shouting that she would do for herself and her children, that twopence would always enable her to put herself and them out of the world, that she intended to die, that the children would be found on the parents' doorstep, and that she then had poison in her possession. After a time Mr. Smith succeeded in pacifying the lady and in inducing the husband to return to her. If correct, this was a very remarkable incident; and to my mind it was quite in accord with the weight of evidence in the case, which was in favour of the husband's case. The wife had called her mother and brother to support her case, but neither of them had seen her during her married life between 1899 and December, 1904. The brother, now that he was backing up his sister's case, had changed the view he had expressed as to her conduct in his letter of the 3rd of January, 1905, quoted by the respondent in his letter of the 1st of February, 1905. I prefer to accept the view he had formed at the time when the facts were fresh in his mind. Then there was the wife's letter of the 7th of January, 1905, in which she wrote: "I also wish to inform you that on further consideration I am perfectly willing to enter an inebriates' home for treatment, for which you state my husband is willing to pay." She, however, now explained that she had only written that offer in deference to her husband's wishes. One could not, however, conceive such a letter being written unless the writer felt that she was a proper case for such a home. The medical evidence, moreover, was exceedingly strong, showing that in August and September, 1904, this lady was in a condition bordering on *delirium tremens*; that on Christmas Day she was "dazed through alcohol"; that she was not a fit person to have the care of young children; and that although not certifiable as a lunatic, she was a fit and proper case for an inebriates' home. The result of this evidence showed, although I have not got to so find, that this lady was a person very nearly within the provisions of the Licensing Act, 1902, at the time when this suit was instituted. The evidence was sufficient to show that this lady had for a considerable period been addicted to drink; that the disease was progressive; and that she was at times dangerous to herself, and possibly to her children. Whether or not the husband could have absolutely checked her habit it was impossible to say, for it was very difficult for a man, a stevedore, whose business kept him away from home day and night at the docks, to take stronger steps than this husband had done in personally warning the tradesmen not to supply her with drink. It was almost impossible to stop cases of secret drinking, for if the money supply was cut off women only pawned things to make up the deficiency. The husband complained that married life had become impossible; to this the wife replied that her lapses were due to his conduct in inciting her, who had been brought up a strict teetotaler, to take spirits after her marriage. In my view there was no foundation for such a charge, and her brother's evidence did not add much to the value of being brought up as a strict teetotaler, for admittedly he had on the evening of the 31st of December, 1904, himself lapsed from his strict principles. The wife had further suggested that she had taken to drink to solace her loneliness; but she knew full well that her husband had his duties to attend to at the shipping, and there was no excuse for her conduct. She was a woman with a happy home and three little children, and there was no justification for turning herself into an habitual drunkard. Although it was submitted that the husband's letters did not complain of the wife's intemperate habits, it was obvious that those which had been produced were mostly of ancient date. The result was, in my view of the case, that the husband (the respondent) had succeeded in establishing that he had "just cause" for withdrawing from cohabitation and refusing to return to his wife. With regard to the respondent's cross-claim for judicial separation, it did not stand on the same basis as his defence to the suit for restitution. I am not satisfied that a case of legal cruelty within the cases of *Oldroyd* v. *Oldroyd* and *Russell* v. *Russell* had been made out, although it might possibly be that the wife might have uttered certain threats. The petition for restitution of conjugal rights must therefore be dismissed, and the husband's cross-prayer for a judicial separation refused.

Solicitor for the petitioner, *L. E. Townroe.*

Solicitors for the respondent, *Smith & Hudson.*

Court of Appeal.

From Chan. Div. (Vaughan Williams, Stirling, and Cozens-Hardy, L.JJ.) — Dec. 7, 8; April 7.

ATTORNEY-GENERAL v. ODELL. (a.)

Land transfer — Mortgage or charge — Registration — Registered proprietor — Fraud — Forged transfer — Rectification of register — Indemnity — Insurance fund — Request to register — Implied warranty of title — Loss by rectification — Land Transfer Act, 1875 (38 & 39 *Vict. c.* 87) — *Land Transfer Act,* 1897 (60 & 61 *Vict. c.* 65), *s.* 7.

A transferee of a charge on registered land in Middlesex took his transfer to the Land Registry for registration, and was accordingly registered as proprietor of the charge. It was afterwards discovered that the transfer was forged by the solicitor of the original proprietor. The original proprietor obtained an order for rectification of the register. The transferee applied to the registrar for indemnity under section 7 *of the Land Transfer Act,* 1897, *and the registrar made an award in his favour, which was confirmed by* Kekewich, J.

Held, on appeal, that as the transferee had no transfer from some person previously on the register, and had not, therefore, in that sense relied on the register, he had suffered no loss by rectification, and was not entitled to any indemnity under section 7.

Per Stirling, L.J.—*The registrar under the Land Transfer Acts has a statutory duty of a ministerial character to register transfers of registered charges on registered land, and on the demand of the transferee to issue to him a certificate of proprietorship. It is a breach of duty and a wrong to the existing registered proprietor to remove his name and register the charge in the name of the supposed transferee if the latter has, in fact, no title to require the registrar to do so. And an act of the registrar when called upon to exercise his duty on the request, direction, and demand of another, which is apparently legal, but is, in fact, illegal and a breach of duty, is contemplated by the Act of* 1897 *as giving rise to rights of indemnity against the Crown. On the principles laid down in* Sheffield Corporation *v.* Barclay, 54 *W. R.* 49, *there ought to be implied a contract by any person applying for registration to keep the Crown indemnified against any liability which may result from the exercise by the registrar of the supposed duty to*

(a.) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

register the instrument presented to him. Also a person who brings a transfer to a registering authority and requests him to register it, not only affirms it to be genuine but warrants it to be so.

Decision of Kekewich, J. (53 *W. R.* 541), *reversed.*

This was an appeal against the decision of Kekewich, J. (reported 53 W. R. 541). The case raised an important question upon the construction of the Land Transfer Act, 1897, s. 7, which gives a right of indemnity in certain cases of fraud or mistake in the registration of titles.

On the 7th of December, 1901, Mrs. Connell was registered as proprietor of a charge on some property at Notting Hill, which was on the register for £350, but was subsequently reduced to £300.

In February, 1903, Mrs. Connell's solicitor, Alexander Thompson, entered into negotiations with Mr. Odell for the transfer to him of this charge. Mr. Odell, after investigating the title, agreed to take a transfer.

On the 23rd of February Odell paid £300 to Thompson in pursuance of a written authority purporting to be signed by Mrs. Connell, and received in exchange an instrument of transfer, also purporting to be signed by Mrs. Connell, and the transfer was registered in due course. The authority and the transfer were not, in fact, signed by Mrs. Connell, but her name was forged by Thompson, who was subsequently convicted of the forgery. As soon as Mrs. Connell discovered the fraud she applied to the court for rectification of the register, and by an order made by Kekewich, J., on the 25th of June, 1904, the register was ordered to be rectified by removing Mr. Odell's name therefrom, and restoring that of Mrs. Connell as proprietor of the charge, and the register was rectified accordingly. In these circumstances, Mr. Odell applied to the registrar, under sub-section 5 of section 7 of the Land Transfer Act, 1897, to determine whether he was entitled to an indemnity under that section. The registrar, being of opinion that Mr. Odell had suffered loss by the rectification, and that he was not aware of the fraud, and had, in fact, exercised reasonable care in the transaction, held that he was entitled to indemnity and awarded him the sum of £369 17s. 4d., to be paid out of the insurance fund established in that behalf by section 21 of the Land Transfer Act, 1897.

The Treasury and the trustees of the insurance fund appealed from this decision.

On behalf of the respondent, Mr. Odell, it was objected that the appellants had no *locus standi*, and that upon the true construction of sub-section 5 of section 7 the sole right of appeal was in the applicant for indemnity, but the court overruled this objection, and the case was then heard upon its merits.

The question depended primarily upon the construction of the first four sub-sections of section 7 of the Act of 1897, and especially upon the construction of sub-section 4, which provides that where the register is rectified under the principal Act by reason of fraud or mistake which has occurred in a registered disposition for valuable consideration, and which the grantee was not aware of and could not by the exercise of reasonable care have discovered, the person suffering loss by the rectification shall likewise be entitled to indemnity under this section.

Kekewich, J., held that the case fell within the statute.

The Treasury appealed.

The Land Transfer Act, 1875 (38 & 39 Vict. c. 87), s. 7: "The first registration of any person as proprietor of freehold land (in this Act referred to as first registered proprietor) with an absolute title shall vest in the person so registered an estate in fee simple in such land, together with all rights, privileges, and appurtenances belonging or appurtenant thereto, subject as follows: (1) To the incumbrances, if any, entered on the register; and (2) unless, under the provisions of this Act, the contrary is expressed on the register, to such liabilities, rights, and interests, if any, as are by this Act declared not to be incumbrances; and (3) where such first proprietor is not entitled for his own benefit to the land registered as between himself and any persons claiming under him, to any unregistered estates, rights, interests, or equities to which such persons may be entitled, but free from all other estates and interests whatsoever, including estates and interests of her Majesty, her heirs and successors."

Section 8: "The registration of any person as first registered proprietor of freehold land with a possessory title only shall not affect or prejudice the enforcement of any estate, right, or interest adverse to or in derogation of the title of such first registered proprietor, and subsisting or capable of arising at the time of registration of such proprietor; but, save as aforesaid, shall have the same effect as registration of a person with an absolute title."

Section 22: "Every registered proprietor of any freehold or leasehold land may in the prescribed manner charge such land with the payment at an appointed time of any principal sum of money either with or without interest, and with or without a power of sale to be exercised at or after a time appointed. The charge shall be completed by the registrar entering on the register the person in whose favour the charge is made as the proprietor of such charge, and the particulars of the charge and of the power of sale, if any; the registrar shall also, if required, deliver to the proprietor of the charge a certificate of charge in the prescribed form."

Section 29: "Every registered proprietor of freehold land may, in the prescribed manner, transfer such land or any part thereof. The transfer shall be completed by the registrar entering on the register the transferee as proprietor of the land transferred, but until such entry is made the transferor shall be deemed to remain proprietor of the land. Upon completion of the registration of the transferee the registrar shall, if required, deliver to him a land certificate in the prescribed form; he shall also, in cases where part only of the land is transferred, if required, deliver to the transferor a land certificate containing a description of the land retained by him."

Section 30: "A transfer for valuable consideration of freehold land registered with an absolute title shall, when registered, confer on the transferee an estate in fee simple in the land transferred, together with all rights, privileges, and appurtenances belonging or appurtenant thereto, subject as follows: (1) To the incumbrances, if any, entered on the register; and (2) unless the contrary is expressed on the register, to such liabilities, rights, and interests, if any, as are by this Act declared not to be incumbrances, but free from all other estates and interests whatsoever, including estates and interests of her Majesty, her heirs and successors."

Section 40: "The registered proprietor of any charge may, in the prescribed manner, transfer such charge to another person as proprietor. The transfer shall be completed by the registrar entering on the register the transferee as proprietor of the charge transferred; the registrar shall also, if required, deliver to the transferee a fresh certificate of charge, but the transferor shall be deemed to remain proprietor of such charge until the name of the transferee is entered on the register in respect thereof."

[The Land Transfer Act, 1897 (60 & 61 Vict. c. 65), contains, in Schedule I., the following "minor amend-

ment" to the above section 40: "A registered transferee for value of a charge, and his successors in title, shall not be affected by any irregularity or invalidity in the original charge itself, of which the transferee was not aware when it was transferred to him."]

Section 49: "The registered proprietor alone shall be entitled to transfer or charge registered land by a registered disposition; but, subject to the maintenance of the estate and right of such proprietor, any person, whether the registered proprietor or not of any registered land, having a sufficient estate or interest in such land, may create estates, rights, interests, and equities in the same manner as he might do if the land were not registered; and any person entitled to or interested in any unregistered estates, rights, interests, or equities in registered land may protect the same from being impaired by any act of the registered proprietor by entering on the register such notices, cautions, inhibitions, or other restrictions as are in this Act in that behalf mentioned. The registered proprietor alone shall be entitled to transfer a registered charge by a registered disposition; but, subject to the maintenance of the right of such proprietor, unregistered interests in a registered charge may be created in the same manner and with the same incidents, so far as the difference of the subject-matter admits, in and with which unregistered estates and interests may be created in registered land."

[The Land Transfer Act, 1897, contains in Schedule I. the following "minor amendment" to the above section 49: "This section includes power to sever the mines and minerals from the surface."]

Section 95: "Subject to any estates or rights acquired by registration in pursuance of this Act, where any court of competent jurisdiction has decided that any person is entitled to any estate, right, or interest in or to any registered land or charge, and as a consequence of such decision such court is of opinion that a rectification of the register is required, such court may make an order directing the register to be rectified in such manner as it thinks just."

Section 96: "Subject to any estates or rights acquired by registration in pursuance of this Act, if any person is aggrieved by any entry made or by the omission of any entry from the register under this Act, or if default is made, or unnecessary delay takes place in making any entry in the register, any person aggrieved by such entry, omission, default, or delay may apply to the court in the prescribed manner for an order that the register may be rectified, and the court may either refuse such application with or without costs, to be paid by the applicant, or it may, if satisfied of the justice of the case, make an order for the rectification of the register."

Section 97: "The registrar shall obey the order of any competent court in relation to any registered land on being served with such order or an official copy thereof."

Section 98: "Subject to the provisions in this Act contained with respect to registered dispositions for valuable consideration, any disposition of land or of a charge on land which if unregistered would be fraudulent and void, shall, notwithstanding registration, be fraudulent and void in like manner."

The Land Transfer Act, 1897, s. 7: "(1) Where any error or omission is made in the register, or where any entry in the register is made or procured by or in pursuance of fraud or mistake, and the error, omission, or entry is not capable of rectification under the principal Act, any person suffering loss thereby shall be entitled to be indemnified in the manner in this Act provided. (2) Provided that where a registered disposition would if unregistered be absolutely void, or where the effect of such error, omission, or entry would be to deprive a person of land of which he is in possession, or in receipt of the rents and profits, the register shall be rectified and the person suffering loss by the rectification shall be entitled to the indemnity. (3) A person shall not be entitled to indemnity for any loss where he has caused or substantially contributed to the loss by his act, neglect, or default, and the omission to register a sufficient caution, notice, inhibition, or other restriction to protect a mortgage by deposit or other equitable interest, or any estate or interest created under section 49 of the principal Act, shall be deemed neglect within the meaning of this sub-section. (4) Where the register is rectified under the principal Act by reason of fraud or mistake which has occurred in a registered disposition for valuable consideration, and which the grantee was not aware of and could not by the exercise of reasonable care have discovered, the person suffering loss by the rectification shall likewise be entitled to indemnity under this section. (5) The registrar may, if the applicant desires it, and subject to an appeal to the court, determine whether a right to indemnity has arisen under this section, and, if so, award indemnity. In the event of an appeal to the court, the applicant shall not be required to pay any costs except his own, even if unsuccessful, unless the court shall consider that the appeal is unreasonable. (6) Where indemnity is paid for a loss, the registrar, on behalf of the Crown, shall be entitled to recover the amount paid from any person who has caused or substantially contributed to the loss by his act, neglect, or default."

Section 21: "(1) For the purpose of providing indemnity payable under this Act, there shall be established an insurance fund to be raised by setting apart at the end of each financial year such portion of the receipts from fees taken in the land registry as the Lord Chancellor and the Treasury shall by order determine. (2) The insurance fund shall be invested in such names and manner as the Treasury from time to time direct. (3) If the insurance fund is at any time insufficient to pay indemnity for any loss chargeable thereon, the deficiency shall be charged on and paid out of the Consolidated Fund of the United Kingdom, or the growing produce thereof; but any sum so paid out of the Consolidated Fund, or the growing produce thereof, shall be repaid out of the money subsequently standing to the credit of the insurance fund."

Sir R. B. Finlay, A.G., and *R. J. Parker*, for the appellants, in addition to the arguments used by them in the court below, contended that the decision of the House of Lords in *Sheffield Corporation* v. *Barclay*, *ante*, at p. 49, [1905] A. C. 392, was applicable to the present case.

P. O. Lawrence, K.C., and *Baden Fuller*, for the respondent.

R. J. Parker replied.

Cur. adv. vult.

VAUGHAN WILLIAMS, L.J.—It has been urged in this case that the decision of the House of Lords in the case of *Sheffield Corporation* v. *Barclay*, and in particular the opinion of Lord Davey in that case, are applicable in the present case. In other words, it is argued that in the case of an application to register a transfer under the Land Transfer Acts, 1875, 1897, by the registered proprietor of a charge to another person as proprietor there is implied by law a contract, by the person making the application to register, to keep indemnified the person having the duty to register against any liability which may result from

the exercise of the duty to register, and that the person requesting, directing, or demanding registration will be liable to the obligations of such implied contract notwithstanding the fact that he was not aware of any invalidity in his title to make such request, and could not with reasonable diligence have discovered it. I do not think that it was argued that this implied covenant would arise in every case of a person applying for registration under the Land Transfer Acts; for instance, I do not think that it was argued that such an implied contract to indemnify would arise in the case of an application for registration of any person as proprietor of freehold land with an absolute title, which registration, by the terms of section 7 of the Act of 1875, vests in the person so registered an estate in fee simple in such land, and is the act of the registrar acting to some extent in a judicial capacity, hearing objections and determining them, subject to an appeal to the court. It seems to me, therefore, that before the court can come to the conclusion that the principle declared by the decision in the House of Lords in *Sheffield Corporation* v. *Barclay* applies to a person applying to register and registering a transfer by the registered proprietor of a charge on land, the court must examine carefully what are the provisions of the Land Transfer Acts, 1875, 1897, generally, and in particular in regard to the transfer of such charges. In my opinion, however, it is not necessary to decide this question in the present case, and for this reason—that either the plaintiff is or he is not entitled to the statutory indemnity under the Land Transfer Act, 1897. If he is so entitled, this is wholly inconsistent with the application of the principle of *Sheffield Corporation* v. *Barclay*. If he is not so entitled, this appeal must succeed, whether or not the principle of *Sheffield Corporation* v. *Barclay* applies to applications to register under the Land Transfer Acts. No question is raised on this appeal as to any obligation on the applicant to indemnify the registrar.

I will proceed, therefore, to examine those Acts. It is to be remembered that the object of the Land Transfer Acts, as the preamble states, is to make provision for the simplification of the title to land, and for facilitating the transfer of land in England by means of registration. I will now examine what are the provisions of the Act of 1875. Part I. deals with the entry of land on register of title. Section 5 deals with the application for registration with an absolute title, or with a possessory title only; section 6 with the evidence of title required on application. Section 7 provides that the first registration of any person as proprietor of freehold land with an absolute title shall vest in the person so registered an estate in fee simple in such land. Section 8 provides that the registration of any person as first registered proprietor of freehold land with a possessory title only shall not affect or prejudice the enforcement of any estate, right, or interest adverse to or in derogation of the title of such first registered proprietor and subsisting or capable of arising at the time of the registration of such proprietor, but save as aforesaid shall have the same effect as registration of a person with an absolute title. It would appear, therefore, that, subject to the provisions for rectification, registration as proprietor of freehold land with an absolute title is not liable to be affected by the enforcement of any estate, right, or interest adverse to or in degrogation of such title. Section 10 provides for the delivery to the registered proprietor of a certificate called a land certificate, which certificate, I think, is rightly stated in the note on p. 151 of Brickdale and Sheldon's Land Transfer Act (2nd ed.) for almost all purposes to take the place of title-deeds. Then follow the sections dealing with registration of leasehold land, and in this case also the registration as first registered proprietor, with a declaration that the lessor had an absolute title to grant the lease under which the land is held, is to be deemed to vest in such person the possession of the land for all the leasehold estate therein described. Section 17 deals with the regulations as to the examination of title by the registrar in the case of freehold and leasehold land, and sub-section 1 provides for prescribed notices giving persons an opportunity to come in and object, and sub-section 2 provides that the registrar shall have jurisdiction to hear and determine any such objections, subject to an appeal to the court. The registrar in this case would seem to be exercising a judicial function. Part II. deals with registered dealings with registered land, and provides for the creation of charges by every registered proprietor of freehold or leasehold land, and the delivery of a certificate of charge. And the remainder of the sections under this head deal with the covenants to be implied upon the registration of such mortgage or charge and other matters as to the entry on the land by the registered proprietor of a registered charge, his power of sale, priority, and discharge of registered charges. Section 29 deals with the transfer of freehold land by registered proprietors of such land and for delivery to the transferee of a land certificate. Section 30 provides that a transfer for valuable consideration of freehold land registered with an absolute title shall, when registered, confer upon the transferee an estate in fee simple in the land transferred free from all other estates or interests whatsoever, including estates and interests of her Majesty. Under the heading "Transfer of leasehold land" one finds, *mutatis mutandis*, similar provisions with regard to transfers of leasehold land in the case of transfer for valuable consideration of leasehold land with a declaration of absolute title of lessor. It seems to me difficult, in the case of the application by a person for registration resulting in his registration as first registered proprietor of freehold land or of leasehold land with a declaration of the absolute title of the lessor, to raise the implied covenant to indemnify the registrar such as that referred to in the decision of the House of Lords in *Sheffield Corporation* v. *Barclay*, in case the registered proprietor shall turn out not to have a good title. So far as the title of the first registered proprietor is concerned, the words as to the conferring on the transferee in the one case an estate in fee simple, and in the other case the words as to vesting in the transferee the possession, do not seem to be reconcileable with the raising of such implied covenant of indemnity. I will now deal with section 40, which deals with the transfer of charges. It provides that the registered proprietor of any charge may in the prescribed manner transfer such charge to another person as proprietor. The transfer shall be completed by the registrar entering on the register the transferee as proprietor of the charge transferred. The registrar shall also, if required, deliver to the transferee a fresh certificate of charge, but the transferor shall be deemed to remain proprietor of such charge until the name of the transferee is entered on the register in respect thereof. In Schedule I., s. 40, it is provided that a registered transferee for value shall not be affected by any irregularity or invalidity in the original charge itself of which the transferee was not aware when it was transferred to him. This schedule is the schedule of minor amendments which derives its legislative force from section 18 of the Act of 1897. I will now deal with the Act of 1897, and in particular with the indemnity section 7 and its relation to the facts of the present case. In construing section 7 it is to be

remembered that the Act of 1875, ss. 95 and 96, which provided for rectification, made no provision for indemnity, whereas section 7 of the Act of 1897 not only makes provision for indemnity, but seems by sub-section 2 to extend the area of rectification. Section 7 of the Act of 1897 begins thus with sub-section 1: [His lordship read the sub-section, and continued:] This sub-section has no application to the present case, because the entry of the name of Mr. Odell is capable of rectification. Sub-section 2 of section 7 provides: [His lordship read the sub-section, and continued:] This sub-section seems to extend the area of rectification, for it provides for rectification in cases where the effect would be to destroy estates or rights acquired by registration under this Act. The sub-section appears only to apply to land, but this is not very clear. Sub-section 3 of section 7 excludes from indemnity a person who has contributed to any loss by his act, neglect, or default. In this case the facts found prevent this part of the sub-section from applying to Mr. Odell. The latter part of this sub-section deals with omissions to register. It runs thus: [His lordship read the sub-section, and continued:] It is under this sub-section, if at all, that Mr. Odell can claim indemnity for loss suffered by him from the rectification of the register by the erasure of his name as registered proprietor of this charge. These words are undoubtedly capable of a construction wide enough to support Mr. Odell's claim to indemnity on the ground that he has suffered loss by the rectification of the register necessitated by reason of the fraud and forgery of the name of the registered proprietor of the charge, but on its true construction I do not think that this sub-section entitles Mr. Odell to indemnity. It is true that the register has been rectified by reason of fraud which has occurred in a registered disposition for valuable consideration, but in my judgment the whole scheme of the Acts is to afford facilities and give security in the transfer of land and in the creation and transfer of incumbrances thereon to those who have acquired estates or rights by registration, or to those who have for valuable consideration become transferees from registered proprietors of land or charges. I cannot, having regard to the decision of this court and the observations of Cozens-Hardy, L.J., speak in relation to this Act of legal estates as passing by reason of registration, but merely of overriding rights; but, using the words "estates and rights" (which are the words used in the 95th section of the Act of 1875) in the sense of overriding rights, I think that Mr. Odell has no claim to indemnity under this clause. His name as registered proprietor of the charge has not been put on the register after any judicial investigation, such as that which takes place before the registration of a person as first registered proprietor of freehold land with absolute title or a qualified title (see sections 7, 8, 9 of the Act of 1875), or the registration of the first registered proprietor of leasehold land with a declaration of title of lessor to grant the lease: see section 13 of the Act of 1875, and rule 46 of the rules of 1898. The act of the registrar in putting the name of a transferee of a charge on the register is a mere ministerial act in the performance of a ministerial duty. It confers on the transferee no estate or right which he had not before registration. The utmost which it confers on him is the capacity to transfer to a purchaser for valuable consideration unaware of any irregularity in the transaction. But it may be said that Mr. Odell by the rectification of the register has lost this capacity to transfer, because until the rectification by the erasure of his name from the register he could have given a good title to a transferee of the charge for valuable consideration, and that by the erasure he has lost this, but I do not think that it is by the erasure that he has lost this capacity; he could not, in my judgment, have exercised this power given to him by the ministerial, not the judicial, act of the registrar after notice of the fact of the forgery, and I think that he could be restrained by injunction from so doing. There is one more suggestion with which I have to deal—that is, that the words of amendment 40 in the first schedule to the Land Transfer Act of 1897, which is an amendment of section 40 of the principal Act, properly construed, affect the title of registered transferees of a charge with any irregularity or invalidity in respect of title, unless such irregularity or invalidity is to be found in the original charge itself. But I do not agree in this construction. It is to be observed that in the case of charges the object of the Act is to protect those who take a charge in reliance on the Act and following the steps prescribed by the Act. Now it is plain that the original charge, if it is invalid by reason of forgery or otherwise, has not been made good by being placed on the register; there is no judicial act such as there is on the first registration of title to freehold or leasehold land, and the result is that the original charge on which the whole succession of transfers is based is itself invalid, and I am inclined to think that this accounts for and is the reason of the amendment in question in the first schedule of the Act of 1897. I think that Mr. Odell is not entitled to indemnity, and that this appeal must be allowed.

STIRLING, L.J., stated the facts, and continued: In support of this appeal two main grounds were urged—(1) that the application of Odell was precluded by the decision of the House of Lords on the 3rd of July, 1905 (a date subsequent to that of the decision of Kekewich, J.), in *Sheffield Corporation* v. *Barclay*; and (2) that in the circumstances, and upon the true construction of the Acts, Odell was not entitled to the indemnity which he claimed. It was admitted that Odell was entirely innocent, and acted in perfect good faith in the transaction, and it was not alleged that he could by the exercise of reasonable care have discovered the invalidity of the transfer. The case cited, however, shows that if the transaction had related to stock or shares governed by the provisions of the Companies Clauses Act, 1845, or similar provisions in a private Act of Parliament, Odell would, in the circumstances stated above, have been liable to indemnify the company or corporation, whose stock or shares were the subject-matter of the transaction, against liability arising from the company or corporation having acted on his request to register the forged instrument. If the principles on which that decision is based apply to the Land Registry, then Odell's claim must fail. The Land Registry is a branch of the public service, established and conducted under and in accordance with the provisions of the Land Transfer Acts of 1875 and 1897. The registrar is a servant of the Crown, appointed by the Lord Chancellor, receiving a salary paid by the Treasury out of money provided by Parliament (Act of 1875, s. 106). By section 108 of the same Act it is enacted that "subject to the provision of this Act, the registrar shall conduct the whole business of registering land under this Act." For the services rendered by the registry fees are charged, which by virtue of section 113 of that Act came under the control of the Treasury, and ultimately (subject to the deduction of certain expenses) find their way into the Consolidated Fund. This section has been repealed, and the fees are now dealt with under the Public Offices Fees Act, 1879 (42 & 43 Vict. c. 58), but they still constitute part of the public funds.

When land is for the time placed on the register, the registrar has important duties of a judicial or

quasi-judicial nature to perform as regards the examination of the title; but, as regards transfers of registered charges on registered land, his duties are of a ministerial character. Neither the Acts, nor the rules made under them, impose on the registrar the duty of ascertaining that the instrument of transfer has been duly executed, except to the extent of sending to to the registered proprietor, at his registered address, notice of the fact that the instrument has been delivered at the registry for registration, and abstaining from completing the registration for three clear days from the posting of the notice. This precaution was taken in the present case, but, unfortunately, was ineffectual by reason of the registered proprietor's absence from home.

Section 40 of the Act of 1875 prescribes that a transfer by the registered proprietor shall be completed by the registrar entering on the register the transferee as proprietor of the charge; and also that the registrar shall, if required, deliver to the transferee a fresh certificate of charge. It is to be remarked that the Act contains no provision conferring on the transferee of a charge any estate or right or interest such as is found in section 30 with respect to transfers of land. The Act of 1875 provided for rectification of the register in certain cases (see sections 95-97), but did not in any way provide for indemnity to any person to whom loss was caused either by errors or omissions in the register or by rectification. This was altered by the Act of 1897, s. 7 of which confers a right to indemnity in the following cases: Sub-section 1, where any error or omission is made in the register, or where any entry in the register is made or procured by fraud or mistake, and the error, omission, or entry is not capable of rectification under the Act of 1875; sub-section 2, where a registered disposition would, if unregistered, be absolutely void, or where the effect of such error or omission or entry would be to deprive a person of land of which he is in possession, or in receipt of the rents and profits; and sub-section 4, where the register is rectified under the Act of 1875 by reason of fraud or mistake which has occurred on a registered disposition for valuable consideration and which the grantee was not aware of and could not by the exercise of reasonable care have discovered. The order for rectification in the present case may have been made under sections 95 and 96 of the Act of 1875, or under section 7, sub-section 2, of the Act of 1897; in either case the enactment is that the person suffering loss by the rectification should be entitled to indemnity. A limitation to this right is imposed by sub-section 3 of section 7, which provides that a person shall not be entitled to indemnity for any loss where he has caused or substantially contributed to the loss by his act, neglect, or default. Sub-section 6 provides that where indemnity is paid for a loss the registrar on behalf of the Crown shall be entitled to recover the amount paid from any person who has caused or substantially contributed to the loss by his act, neglect, or default. Section 21 of the Act of 1897 enacts that for the purpose of providing indemnity under the Act there shall be established an insurance fund to be raised by setting apart a certain portion of the receipts from fees taken in the Land Registry; that this insurance fund shall be invested in such names and manner as the Treasury from time to time direct, and that if the insurance fund is at any time insufficient to pay indemnity for any loss chargeable thereon the deficiency shall be charged on and paid out of the Consolidated Fund.

Now, the principle of the decision in *Sheffield Corporation* v. *Barclay* is thus stated by Lord Davey: "I think that the appellants have a statutory duty to register all valid transfers and on the demand of the transferee to issue to him a fresh certificate of title to the stock comprised therein. But of course it is a breach of their duty and a wrong to the existing holders of stock for the appellant to remove their names and register the stock in the name of the supposed transferee if the latter has in fact no title to require the appellants to do so. I am further of opinion that where a person invested with a statutory or common law duty of a ministerial character is called upon to exercise that duty upon the request, direction, or demand of another (it does not seem to me to matter which word you use) and without any default on his own part acts in a manner which is apparently legal, but is in fact illegal and a breach of the duty, and thereby incurs liability to these parties, there is implied by law a contract by the person making the request to keep indemnified the person having the duty against any liability which may result from the exercise of the supposed duty. And it makes no difference that the person making the request is not aware of the invalidity in his title to make the request or could not with reasonable diligence have discovered it." Much of this is directly applicable to the present case. The registrar has a statutory duty which (as I have already pointed out) is of a ministerial character, to register transfers of registered charges on registered land, and on the demand of the transferee to issue to him a certificate of proprietorship. It is a breach of duty and a wrong to the existing registered proprietor to remove his name and register the charge in the name of the supposed transferee if the latter has in fact no title to require the registrar to do so. It is said, however, that the registrar incurs no personal liability when he is called upon to exercise his duty on the request, direction, or demand of another, and without default on his own part acts in a manner which is apparently legal, but is in fact illegal and a breach of duty. I do not think it is necessary to decide that this proposition is well founded, but it seems to me very likely that it may prove to be so, for the reason that, the rights of registered proprietors being purely statutory, and remedies being in certain specific cases (of which the present is one) given by the same statute for the violation of those rights, it may well be that registered owners are not entitled to other remedies than those given, and are in particular excluded from any action against the registrar. I should, therefore, assume that the registrar is under no personal liability in the present case. Still, the legal position appears to be this: The registrar is a servant of the Crown "conducting"—in the language of section 108 of the Act of 1875—"the whole business of registering land under the Land Transfer Acts, 1875 and 1897. The fees taken in the Land Registry form part of the public revenue, and are in the eye of the law Crown property. The acts of the registrar are contemplated by the Act of 1897 as being capable of giving rise to rights to indemnity which are to be satisfied out of a portion of the fees, and, if necessary, out of the Consolidated Fund—that is, out of Crown property. The acts of the registrar may therefore under the statute give rise to liability on the part of the Crown. It seems to me that in this state of things there may, and ought to be, implied a contract by a person applying to the registrar to register a transfer, to keep the Crown indemnified against any liability which might result from the exercise by the registrar, as the servant of the Crown, of the supposed duty to register the instrument presented to him. It may be a question whether such contract ought to be implied with the Crown directly, or with the registrar, the head of this department of Crown business, who is by the Act of 1897 expressly authorized to sue on behalf of the Crown where indemnity has been paid for a

loss. It would seem that a good deal may be said for the latter view, but for the purpose of the present decision it is unnecessary to decide which is the more correct.

Even if no such contract can be implied, I still think that this claim to compensation ought not to succeed. It is laid down by Lord Davey in the same case of *Sheffield Corporation* v. *Barclay* that a person who brings a transfer to a registering authority, and requests him to register it, thereby makes a representation that it is a genuine document, and he further said that he was disposed to think (though it was not necessary so to decide) that such person not only affirmed it to be genuine, but warranted that it was so, and he expressly said that he considered this to be the result of the decision in *Oliver* v. *Bank of England*, 50 W. R. 340, [1902] 1 Ch. 610, affirmed in the House of Lords under the name of *Starkey* v. *Bank of England*, 51 W. R. 513, [1903] A. C. 114. Consequently, Odell, who brought the transfer to the registrar and requested him to register it, thereby affirmed and warranted that the transfer was genuine, which it was not. This act on his part (although innocent) directly brought about the registration of the charge in his name, and, in my opinion, caused or substantially contributed to the loss of which he now complains. Further, if he had, before the discovery of the forgery, transferred the charge to a purchaser for value without notice whose name was afterwards removed from the register and who received indemnity, I think that the registrar would have been entitled to recover the amount paid from him under section 7, sub-section 6, of the Act of 1897.

I think, therefore, that the principles laid down in *Sheffield Corporation* v. *Barclay* apply, and on this ground, which was not before Kekewich, J., I think that his decision ought to be reversed and the claim of Odell disallowed. It is therefore unnecessary to say anything on the second of the two grounds which I have mentioned, but as this portion of the case has been fully discussed by my brethren I wish to add that I do not differ from their conclusion, though I have entertained a doubt, which is not wholly removed, whether Mr. Odell did not by the removal of his name from the register lose the benefits which are conferred on the registered proprietor for the time being of a charge by sections 23 to 27 of the Act of 1875, and thus become entitled to some compensation.

COZENS-HARDY, L.J., after stating the facts and reading sub-section 4 of section 7 of the Land Transfer Act, 1897, continued: Now, under the Land Transfer Act, 1875, a person who can prove (1) that he has a transfer from a registered proprietor, and (2) that he has been entered on the register as proprietor in respect of such transfer, has certain definite rights conferred upon him. If the transaction relates to land the case is governed by section 29 and following sections. If the transaction relates to a charge the case is governed by section 40, but no person other than the person first registered can claim any beneficial right or interest from the mere fact of being on the register unless he can also prove that he has a transfer from some person previously on the register, and in that sense has relied upon the register. Odell has no such transfer, and has not suffered any "loss by the rectification," and he is therefore not entitled to any indemnity under section 7. On this ground I think the appeal must succeed. If Odell had transferred his charge to X., who without notice of the forgery had been entered on the register, X. might have had a claim for indemnity, because X. would have fulfilled both the registered conditions. He would have relied, as he was entitled to rely, upon the fact that Odell was registered as proprietor. His position would be substantially different from that of Odell. I may observe that Odell took what purported to be an indorsed transfer of Mrs. Connell's original mortgage as well as a transfer of the land charge. In the result he takes no benefit under or by virtue of either of these forged documents.

In the course of the argument many points of great importance and of considerable difficulty were raised. In my view it is neither necessary nor desirable to express any opinion except upon the one point which is sufficient to dispose of this appeal.

Their lordships accordingly made an order allowing the appeal and discharging the order of the registrar. Counsel for the Attorney-General not objecting, the respondent's costs of the appeal, and also those directed to be paid by the order of Kekewich, J., and by the registrar's award, were ordered to be paid out of the insurance fund.

Solicitors, *Solicitor to the Treasury; J. T. Rossiter.*

From K. B. Div. (Vaughan Williams, Stirling, and Moulton, L.JJ.) — May 15.

MAYOR, &c., OF NORWICH v. NORWICH ELECTRIC TRAMWAYS CO. (a.)

Tramway — Difference — Arbitration — Dispute under special Act—Paving of street—Jurisdiction of court—Tramways Act, 1870 (33 & 34 *Vict. c.* 78), *s.* 33—*Norwich Electric Tramways Act*, 1897 (60 & 61 *Vict. c. cclv.*), *s.* 57, *sub-section* 5.

By section 57 *of the Norwich Electric Tramways Act*, 1897, *if the tramway company fail to maintain and keep in good condition, to the satisfaction of the corporation (sub-section* 5), *the junction of the paving laid and maintained by the company with the surface laid and maintained by the corporation, the corporation might, if they thought fit, themselves at any time, after seven days' notice to the company, do the work necessary for the repair and maintenance of the road, and the expense reasonably incurred by the corporation in so doing shall be repaid to them by the company.*

The corporation repaired the road at the junction of the paving laid by the tramway company, and claimed to recover the expense thereof from the company under the above section. The company denied their liability to pay it, and the corporation brought an action to recover the amount.

Held, that the difference between the corporation and the company must be referred to arbitration under section 33 *of the Tramways Act*, 1870, *and that the court had no jurisdiction to entertain the action; and that, as the jurisdiction of the court was ousted, the objection to the jurisdiction might be taken for the first time in the Court of Appeal.*

Appeal by the defendants from the judgment of Phillimore, J., at the trial of the action without a jury.

The action was brought to recover £53 13s. 10d. for the expense of repairs to roadways, and for a declaration as to the rights of the respective parties under the Norwich Electric Tramways Act, 1897, s. 57, sub-section 5.

The defendants were the owners of tramways in the city of Norwich. The tramways were in some cases laid in granite setts, or in wood-paving edged

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

with a line of granite setts, the roadway on either side being of macadam. The life of a granite sett is about twenty years under ordinary town traffic, but macadam will in the same circumstances not last more than four years. According to the evidence given at the trial the effect of this was to produce, as the macadam wore away a sort of descent or step from the granite setts on to the macadam. The line of granite setts thus tended to form a guiding ridge along which wheels of vehicles ran, gradually forming a trough which accumulated water, softening the macadam road. The plaintiffs, the corporation of Norwich, contended that under section 57, sub-section 5, of the Norwich Electric Tramways Act, 1897, the defendants were liable to keep the road in a proper state of repair. The defendants contended that the word "junction" in the section meant the place where the two surfaces met, and that the plaintiffs could only require the tramway company to keep the two surfaces even at the same height at the junction if the plaintiffs maintained the surface of the macadam at the level at which it was originally laid.

By section 57 of the Norwich Electric Tramways Act, 1897: "If the company fail to maintain and keep in good condition to the satisfaction of the corporation . . . (5) the junction of the paving laid and maintained by the company with the surface laid and maintained by the corporation, the corporation may, if they think fit, themselves at any time, after seven days' notice to the company, do the work necessary for the repair and maintenance of the road, and the expenses reasonably incurred by the corporation in so doing shall be repaid to them by the company with the addition of 5 per centum on such expense."

Phillimore, J., gave judgment for the plaintiffs for the amount claimed, and he made the following declaration: "That the obligation of the company under section 57 (5) of the Norwich Electric Tramways Act, 1897, to maintain and keep in good condition the junction therein mentioned extends to cases where by reason of the presence of tramways in a road the traffic in such road has caused the surface laid and maintained by the corporation to become worn down below the level of the paving laid and maintained by the company, and involves the maintenance by the company of a uniform and unbroken contour of such surface and paving, whether that is to be effected by the raising of the surface immediately adjoining such paving or the lowering of the paving itself."

The defendants appealed.

Upon the appeal the point was taken for the first time that the question in dispute must be referred to arbitration as required by section 33 of the Tramways Act, 1870, and that the jurisdiction of the court was ousted.

By section 22 of the Tramways Act, 1870, "Part II. and Part III. of this Act shall apply to every tramway, which is hereafter authorized by any provisional order or Act of Parliament, and shall be incorporated with such provisional order or Act, and all the said provisions of this Act, save so far as they shall be expressly varied or excepted by any such provisional order or Act, shall apply to the undertaking authorized thereby, so far as the same shall be applicable to such undertaking, and shall, with the provisions of every other Act or part of any Act which shall be incorporated therewith, form part of the said provisional order or Act, and be construed therewith as forming one provisional order or Act, as the case may be."

By section 28, "The promoters shall, at their own expense, at all times maintain and keep in good condition and repair, with such materials and in such manner as the road authority shall direct, and to their satisfaction, so much of any road whereon any tramway belonging to them is laid as lies between the rails of the tramway and (where two tramways are laid by the same promoters in any road at a distance of not more than four feet from each other) the portion of the road between the tramways, and in every case so much of the road as extends eighteen inches beyond the rails of and on each side of any such tramway."

By section 33, "If any difference arises between the promoters or lessees on the one hand and any local authority or road authority, or any gas or water company, or any company, body, or person, to whom any sewer, drain, tube, wires, or apparatus for telegraphic or other purposes may belong, or any other company, on the other hand, with respect to any interference or control exercised, or claimed to be exercised, by them or him, or on their or his behalf, or by the promoters or lessees by virtue of this Act, in relation to any tramway or work, or in relation to any work or proceeding of the local authority, road authority, body, company, or person, or with respect to the propriety of or the mode of execution of any work relating to any tramway, or with respect to the amount of any compensation to be made by or to the promoters or lessees, or on the question whether any work is such as ought reasonably to satisfy the local authority, road authority, body, company, or person concerned, or with respect to any other subject or thing regulated by or comprised in this Act, the matter in difference shall (unless otherwise specially provided by this Act) be settled by an engineer or other fit person nominated as referee by the Board of Trade on the application of either party, and the expenses of the reference shall be borne and paid as the referee directs."

Danckwerts, K.C., and *Henlé*, for the defendants.—Parts II. and III. of the Tramways Act, 1870, are by section 22 of the Tramways Act, 1870, and by section 2 of the Norwich Electric Tramways Act, 1897, incorporated with and form part of the special Act. Therefore section 33 of that Act forms part of the special Act and the dispute, having arisen under section 57, sub-section 5, of the special Act, arose under "this Act" within section 33. The dispute must therefore be referred to arbitration as required by that section, and the court has no jurisdiction in the matter: *Reg.* v. *Croydon and Norwood Tramways Co.*, 35 W. R. 299, 18 Q. B. D. 39; *London and North-Western Railway Co.* v. *Donnellan*, [1898] 2 Q. B. 7, 46 W. R. Dig. 147; *Crosfield* v. *Manchester Ship Canal Co.*, 54 W. R. 172, [1905] A. C. 421; *Municipal Permanent Investment Building Society* v. *Kent*, 32 W. R. 681, 9 App. Cas. 260; *Bristol Trams and Carriage Co.* v. *Mayor, &c., of Bristol*, 38 W. R. 693, 25 Q. B. D. 427. It is true that this point was not taken before Phillimore, J., but that does not give jurisdiction: *Foster* v. *Usherwood*, 26 W. R. 891, 3 Ex. D. 1; *London, Chatham, and Dover Railway Co.* v. *South-Eastern Railway Co.*, 37 W. R. 65, 40 Ch. D. 100; *Burgess* v. *Morton*, [1896] A. C. 136, 44 W. R. Dig. 130.

Macmorran, K.C., and *E. E. Wild*, for the plaintiffs—In every case the question of jurisdiction was raised either on the pleadings or in the court below. There is no case where it has been successfully raised in the Court of Appeal. In *Reg.* v. *Croydon and Norwood Tramways Co.* the objection was taken in the Divisional Court. In *Crisp* v. *Bunbury*, 8 Bing. 394, and *Bristol Trams and Carriage Co.* v. *Mayor, &c., of Bristol*, the point was also taken at once. The objection to the jurisdiction must be taken before judgment: *London, Chatham, and Dover Rail-*

way Co. v. *South-Eastern Railway Co.* In the case of prohibition, where the defect is not apparent on the face of the proceedings, but depends upon some fact in the knowledge of the applicant which he had an opportunity of bringing forward in the court below and did not do so and allowed the court to proceed to judgment, the court will decline to interpose: *Mayor, &c., of London* v. *Cox*, 16 W. R. 44, L. R. 2 H. L. 239, and *Broad* v. *Perkins*, 37 W. R. 44, 21 Q. B. D. 533. It is therefore too late to take the objection now. Section 33 of the Tramways Act, 1870, relates to differences between the promoters and the local authority as to their respective rights, and is only intended for the protection of the parties, and not of the public. Either of the parties can therefore waive their right to arbitration. Secondly, this is not a difference arising under "this Act" within section 33 of the Tramways Act, 1870. "This Act" means the Tramways Act, 1870, whereas this dispute arose under section 57, sub-section 5, of the Norwich Electric Tramways Act, 1897. Further, the question in this case is as to the obligation of this tramway company to do certain work. That does not come within section 33. Moreover, section 57, sub-section 5, gives the corporation a statutory right of action to recover this expense. By section 56 a breach of the provisions of section 28 of the Act of 1870 is made subject to a penalty. That shows that it is not intended to take away the jurisdiction of the courts. The objection to the jurisdiction, therefore, is not a good one.

Danckwerts, K.C., in reply.—Even if the words "this Act" in section 33 of the Tramways Act, 1870, do not include the special Act incorporating it, still section 57, sub-sections 1, 2, and 3, are the same as the provisions of section 28 of the Act of 1870, and sub-section 6 is only intended to make clear what was not made clear under section 28. The case therefore comes within section 33.

VAUGHAN WILLIAMS, L.J.—The point which has been raised here was not raised before Phillimore, J. It is said that the result of section 33 of the Tramways Act, 1870, is that this particular matter in dispute between the tramways company and corporation of Norwich ought to be disposed of by an engineer nominated by the Board of Trade. The first answer put forward to that objection is that it was taken too late, and that it ought to have been taken at the trial. I can only say that I have always thought that it is well-established law that, where the objection is that the tribunal has no jurisdiction to try the case, that is an objection which, at all events in proceedings in the High Court, may be taken at any time. I go further and say that, if the court itself is satisfied that it has no jurisdiction to entertain the matter, it is its duty to say so, if necessary itself taking the initiative. That is, in my opinion, well-established law. I asked upon what ground the proposition was based that the point could only be taken at the trial, as no authority was cited in support of it—the case of *Mayor, &c., of London* v. *Cox* not being in point—and it was said that the ground upon which that proposition was based was either waiver or something in the nature of estoppel. With regard to waiver, what is said to have been waived is the provision as to arbitration in section 33 of the Act of 1870, which is a public Act applying to all tramways and local authorities. The Act, however, is not in the nature of an agreement or Parliamentary bargain between parties. The provisions of section 33 are introduced for the benefit of the public, and no one can waive them. In *Reg.* v. *Croydon and Norwood Tramways Co.* Lord Esher said: "This restriction contained in the thirty-third section is not upon a particular local authority, it applies to them all; and when you consider what a number of local authorities there must be in the kingdom, with regard to these tramway roads at the present time, I should have expected that the Act of Parliament would put a bridle upon them to that extent, at all events." The dispute raised in that case was a dispute of the same character as that before us, and the argument is not open that there can be such a waiver as to give the court jurisdiction when the Act says that these particular matters must not be the subject of an action, but must be determined by an expert nominated by the Board of Trade. The same reasoning applies to the question of estoppel. But quite apart from that, it was not and could not be successfully argued that there was any estoppel at all.

It is said that some observations in *London, Chatham, and Dover Railway Co.* v. *South-Eastern Railway Co.* show that, if objection to the jurisdiction is not taken at the proper time, it is too late to take it afterwards. But if that case is looked at it is clear, as appears from the judgment of Bowen, L.J., that the section under discussion in that case did not oust the jurisdiction of the court, but gave either party the option to apply for an order which, if he did apply for it, the court would be bound to make. The doctrine of applying too late, which applied in that case, has no application to a case where the jurisdiction of the court is ousted without any application to the court at all.

I have now dealt with all the preliminary points in the case. It being, therefore, competent for the parties to take the point here, I do not think that it was denied on behalf of the corporation that, if section 33 of the Act of 1870 applies, it ousts the jurisdiction of the court, because it appoints a special tribunal to settle the matter in dispute. It is said that the section does not apply. That contention is based upon certain grounds. One ground is this. It is said that, though there are certain provisions in the Tramways Act, 1870, which must be read, as far as Parts II. and III. are concerned, as part of the special Act, yet it is right in dealing with section 33 of the Act of 1870 to distinguish between the special Act and that which is made part of the special Act, and that contention is based upon the contrast which occurs now and then in the Act of 1870 between the expressions the "special Act" and "this Act," the words "this Act" occurring in section 33. In my opinion we must read the incorporated parts of the Act of 1870 as if they had been printed as part of the special Act, and, if that is done, the objection that section 33 only applies to disputes as specified in section 33 cannot be maintained. The particular way in which the objection is sought to be worked out is this. Reference was made to section 57 of the special Act, which sets out various duties which are imposed upon the company and the consequence of not performing those duties. It is said that though sub-sections 1, 2, 3, and 4 refer substantially to matters which are mentioned in section 28 of the Act of 1870, and which, therefore, fall within the operation of section 33, yet if a distinction is drawn between the general and the special Act, it will be found that sub-section 5 does not come within the area of those duties which are imposed upon tramway companies generally by section 28 of the Act of 1870. It is said that in these circumstances section 33 of the Act of 1870 has no application to disputes arising under sub-section 5. I have already said that, in so far as the argument is based upon a distinction between the special Act and those provisions of the general Act which are made part of the speciol Act, I do not think that there is any foundation for it. But I go further and say that sub-section 5 deals with duties which

are part and parcel of those described in section 28 of the Act of 1870.

That only leaves me to deal with the operation of section 33. That section, by appointing a special tribunal to deal with disputes of this sort, has, in my opinion, ousted the jurisdiction of the court. The decision of the House of Lords in *Crosfield & Sons* v. *Manchester Ship Canal Co.* is really conclusive that this is a case in which the jurisdiction of the court is ousted.

STIRLING, L.J.—I am of the same opinion. I think that section 33 of the Act of 1870 ousts the jurisdiction of the court. That section in its terms closely resembles that in *Crosfield & Sons* v. *Manchester Ship Canal Co.* It is totally different from the section in *London, Chatham, and Dover Railway Co.* v. *South-Eastern Railway Co.*, and I may add that this point is covered by the decision of the Court of Appeal in *Reg.* v. *Croydon and Norwood Tramways Co.* Therefore, both upon principle and upon authority I think that the jurisdiction of the court is ousted. It is true that the objection to the jurisdiction comes at a very late stage in the proceedings, and it is said that as it was not taken in the pleadings or at the trial we ought to disregard it. The objection, however, is to the jurisdiction of the court, and I cannot see how the parties can by not taking it before give the court jurisdiction. I agree upon that with my lord. The only remaining question is whether this is a matter which comes within section 33. One contention is that by section 22 of the Act of 1870 Parts II. and III. of that Act are incorporated with and form part of the special Act, the special Act and the incorporated are made one Act in the sense that the reference in section 33 to "this Act" refers to the provisions of the special Act. I do not think it necessary to decide that, but I do not desire to say that that contention is not well founded. It is sufficient to say that the dispute in the present case falls within two of the matters expressly mentioned in section 33 of the Act of 1870—first, the propriety of or the mode of execution of any work relating to any tramway; and second, whether the work is such as ought reasonably to satisfy the local authority. The question therefore is not one to be decided by the courts. It is then said that section 57, sub-section 5, of the special Act is inconsistent with this view. I do not think so. If the dispute is as to the obligation cast upon the company or as to the expense reasonably incurred by the corporation, it must be decided as required by section 33. Upon these grounds I think that the appeal must be allowed.

MOULTON, L.J.—I am of the same opinion. I desire to add a few words with reference to the construction of section 33 of the Tramways Act, 1870. Though it is not necessary to decide it, in my opinion the words of section 22 of the Act of 1870 (the incorporating section) do not entitle us to give to the words "this Act" in section 33 a meaning so as to include a reference to the special Act. Those words, in my opinion, refer to the general Act itself. But it is not necessary to decide it, because I think that section 57, sub-section 5, is only a particular instance, embodied in the special Act, of an agreement contemplated in section 29 of the Act of 1870, which the local authority and the tramway company are empowered, or indeed expected, to make. That being so, the general words of section 33 are ample to cover the dispute, and as the words of reference to arbitration are peremptory the court has no option but to give effect to the objection whenever taken, and, if necessary, itself to take the objection.

Appeal allowed.

Solicitors for the plaintiffs, *Sharpe, Parker, & Co.*, for *A. H. Miller*, Norwich.

Solicitors for the defendants, *Crowders, Vizard, Oldham, & Co.*, for *Mills & Reeve*, Norwich.

From K. B. Div.
(Vaughan Williams, Stirling, and Moulton, L.JJ.) April 3.

FOSTER v. WARBLINGTON URBAN DISTRICT COUNCIL. (a.)

Fishery—Pollution—Oyster beds on foreshore—Occupation—Discharge of sewage into the sea—Damage to oyster beds through acts of sanitary authority—Right of occupier to sue sanitary authority for damages.

In an action to recover damages from an urban district council for discharging sewage into the sea so as to pollute the plaintiff's oyster storage beds, it appeared that the foreshore on which the beds were situate was part of the waste of a manor, and that the plaintiff and his predecessors had occupied and used the beds for fattening oysters for a period extending as far back as living memory went; that, when the plaintiff first acquired the beds, a sewer which had been made by a rural sanitary authority, the predecessors of the defendants, discharged an inconsiderable quantity of sewage into the sea close to the beds; that subsequently the defendants made new sewers and connected them with the old sewer, and thus greatly increased the quantity of sewage discharged from that sewer; and that the plaintiff's beds were thereby contaminated and the oysters therein rendered unsafe for human food.

Held, that the action was maintainable.

Appeal by the defendants from the judgment of Walton, J., at the trial of an action without a jury.

The plaintiff, James Duncan Foster, who carried on the business of an oyster merchant at Emsworth, near Chichester, claimed an injunction to restrain the defendants from placing or maintaining their sewer outfalls in the neighbourhood of his oyster storage beds on the foreshore of Emsworth Creek, and from delivering sewage on the said foreshore and into the water in the neighbourhood of his said beds, so as to contaminate the same and to cause the oysters therein to become infected and unsafe for human food, and to cause a nuisance to the plaintiff. The plaintiff further claimed damages for loss and injury to his business caused by the contamination of his storage beds and oysters.

The defendants, who were the urban council of the district in which Emsworth was situate, by their defence said that the plaintiff had no title to the oyster storage beds in question, and no greater right in the foreshore, channel, or storage beds, and no greater right to or property in the oysters stored in the beds than any other member of the public, and that the user of the beds by the plaintiff was subject to the right of the defendants to discharge sewage into the sea; and that the plaintiff was not in a position to maintain an action in respect of the discharge of sewage into tidal navigable waters.

The defendants further said that they had by more than twenty years' user acquired an indefeasible right to discharge sewage into Emsworth Creek.

The defendants further said that by virtue of sections 21 and 24 of the Public Health Act, 1875, the owners and occupiers of premises within the defendants' district had the right to cause their drains to empty into the defendants' sewers, and that the

(a.) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

defendants had no power to prevent the acts complained of.

The defendants further said that the plaintiff's remedy (if any) was under section 299 of the Public Health Act, 1875.

It appeared that in the year 1878 the plaintiff purchased thirteen oyster beds on the foreshore of Emsworth Creek from one James Cribb, together with the business of an oyster merchant then carried on by James Cribb. These beds had existed as far back as living memory went. The plaintiff subsequently purchased other similar beds from other persons. The plaintiff owned a number of vessels which he used for the purpose of dredging oysters from the sea, and those oysters he laid down in the beds to fatten for the market. He also procured oysters from abroad which he laid down in the beds together with those which he dredged from the sea. The beds, which were artificially constructed, some being boarded at the sides, and some having sides made of concrete, were advantageously situated, occupying such a high position that the oysters could be gathered almost at any time, irrespective of the state of the tides.

Documentary evidence was produced to show that the foreshore where the beds were situate had been part of the waste of the manor of Emsworth, and that the lord of the manor had owned a several fishery thereon.

The plaintiff had a very large trade in oysters, and during the last few years had sold on the market on the average over 2,000,000 oysters per annum.

In the year 1874 the guardians of the Havant Union, the rural sanitary authority of the district which then included Emsworth, had sought the advice of Mr. Ford, an engineer, with respect to the drainage of Emsworth. Mr. Ford found that there was no system of drainage at Emsworth, and devised a scheme, the effect of which was that a sewer discharged its sewage just above the oyster beds in question. The sewage was collected in a tank, which only discharged at low tide, being kept shut by means of a penstock for nineteen out of the twenty-four hours. The quantity of sewage discharged from this sewer was at first inconsiderable, and continued to be so during the time that the rural sanitary authority had jurisdiction in the district.

In 1894 the defendants were incorporated, their district being carved out of the Havant Union.

In 1895 and subsequent years the defendants extended the system of drainage by making new sewers whereby the discharge from the old outfall greatly increased. The plaintiff complained that this increased discharge of sewage constituted a nuisance, and alleged that the nuisance was further aggravated by the neglect of the defendants to make use of the penstock provided by Mr. Ford.

In 1896 a Dr. Bulstrode visited Emsworth and made a report on the sanitary condition of the place, in which he pointed out the danger which existed in regard to the plaintiff's oyster beds. In the same year the plaintiff made complaints as to the drainage system to the Board of Trade and the Local Government Board.

In the following year the plaintiff became a member of the defendant council and endeavoured to persuade the council to take steps to obviate the danger which threatened his oyster beds.

In November, 1902, the plaintiff supplied oysters for a banquet which was held at Winchester. After the banquet certain persons who were present were taken ill and died from typhoid fever.

An inquiry was held by the Local Government Board, and the conclusion arrived at was that the deaths were attributable to the consumption of oysters from Emsworth which were not free from sewage matter.

The plaintiff alleged that in consequence of the pollution caused by the defendants his trade was ruined, and he was unable to make use of his oyster beds.

Walton, J., was of opinion that the plaintiff had a good title to the soil of the oyster beds by virtue of the Statute of Limitations or otherwise, and that he had also acquired the right of several fishery, and that the oyster beds were his private oyster beds; and that the defendants could have no prescriptive right to discharge sewage into the sea so as to contaminate oysters in private oyster beds. He was also of opinion that, even supposing this were a public fishery, the defendants could not acquire by prescription a right to pollute a public fishery, and that the plaintiff was still entitled, as owner of the soil, to recover in respect of the injury done to him in the exercise by him of the public right of fishery. He accordingly gave judgment for the plaintiff for damages to be assessed.

The defendants appealed.

Sir Robert Finlay, K.C., and *Hohler*, for the defendants.

Macmorran, K.C., *W. Wills*, and *J. G. Pease*, for the plaintiff.

VAUGHAN WILLIAMS, L.J.—This is an appeal from the judgment of Walton, J., in favour of the plaintiff for damages to be ascertained. The plaintiff is an oyster merchant, and he brings this action to recover damages in respect of injury sustained by him in connection with his oyster beds at Emsworth, and with his business as an oyster merchant. The cause of damage alleged by him is that the defendants, who are the sanitary authority at Emsworth, have discharged near or on his oyster beds sewage to such an extent as to render his oysters unfit for human consumption. There is no dispute that unfortunately the oysters did become contaminated, some of them having been eaten at a banquet at Winchester with lamentable results.

The points raised on the appeal may shortly be stated in this way. In the first place it is said that the plantiff had no such property or interest in the oyster beds where he deposited his oysters as to give him any right of action against the defendants. Next, it is said that, even assuming the plaintiff had such a right or interest by way either of occupation or property in the oyster beds as might give him a right of action, yet, if regard is had to the history of the establishment and constitution of the defendant board, the defendant board are in the circumstances under no liability in respect of the oysters having been contaminated by the sewage. Further, a defence was raised which was based either on an alleged common law right to discharge sewage into the sea or on a prescriptive right alleged to be vested in the defendant board to discharge sewage into the sea at Emsworth. I will deal with these points one by one, and I propose to follow the judgment and the findings in fact and in law of Walton, J., and to express my views as to how far they can be justified. The first thing that Walton, J., finds is that the soil of the foreshore where the oysters were belonged to the lord of the manor. I think that that finding in fact is right. Walton, J., having found in fact that the soil of this foreshore belonged to the lord of the manor, being in fact part of the waste of the manor, this, of course, is not in itself sufficient to support any right in the plaintiff, because, to begin with, as Walton, J., points out, assuming the soil to be the soil of the lord of the manor, that does not give any property to the plaintiff unless he can show that either by grant or by the Statute of Limitations or in some other way a right has been established in him to the soil of the oyster beds. And then the question arises as

to what rights of fishery there are. Walton, J., properly points out that, if there is not a right of several fishery in the lord of the manor, the rights of the public to fish will have to be taken into consideration. But I agree again with Walton, J., that this would not prevent the plaintiff from acquiring a part of the fishery by possession under the Statute of Limitations provided the soil of the foreshore were vested in the lord of the manor. Walton, J., goes on to describe the character of the oyster beds, and as to this part of the case there is no dispute. The manner in which the plaintiff used the oyster beds was this. He either dredged oysters in deep water at some distance from Emsworth and brought them in and deposited them in the beds, or else he imported oysters from abroad and deposited them in the beds. He deposited them there for the purpose of being fattened. We have to consider whether, the oysters being in these beds under these circumstances and being injured in this way, the plaintiff has a good cause of action. It is necessary for him to prove at least an occupation of the beds. Walton, J., went through a great deal of documentary evidence of various sorts, and arrived at the conclusion that the lord of the manor not only had the soil of the foreshore vested in him, but also had a several fishery on the foreshore within the ambit of the manor. The importance of the existence of a several fishery in this case is that the court is thereby relieved from a difficulty which might arise from the existence of a public right of fishing. If it were necessary to prove a title to the beds, in my opinion the plaintiff would in the circumstances be able to prove a good title. But in any case I think that the plaintiff has been in such occupation of the beds and for such a length of time as would entitle him to sustain an action for the injury which is alleged to have been done.

The next question is as to the liability of the defendant board. The defendant board were established in 1894 for a district carved out of the larger district of their predecessors, the sanitary authority of the Havant Union. When the defendant board were established a confirmation order was made, by article 9 of which it was provided that on and after the day of the first meeting of the board all the duties, liabilities, obligations, and property attached to or vested in the sanitary authority of the Havant Union should, so far as concerned the newly-formed district, attach to and vest in the new board. With regard to the history of the sewers, the town of Emsworth is not one in which the population has largely increased. There was a time when, so far as houses were concerned, the sewage was largely disposed of by means of privies and cesspits, and the use of water-closets was very little adopted. But so far as the sewage was carried away in drains it was discharged into a tidal millpond which has been spoken of as the seaside millpond. During the time of the defendants' predecessors the seaside millpond began to be somewhat offensive in consequence of the discharge of sewage into it, and the Havant Union were minded to cure this if they could. They consulted Mr. Ford, an eminent engineer and expert in these matters, and on his recommendation they laid down a new sewer discharging at another point, the object being to prevent the water of the seaside millpond being polluted. This plan involved the use of a penstock, by which it was expected that the sewage would be held back for nineteen hours out of the twenty-four, and that it would be let loose at such a time before low water as would enable it to be carried out far into the sea and rendered innocuous. But for some reason or other the penstock was not successful, and on its use being discontinued the nuisance largely increased. I agree with Walton, J., in his finding that the amount of sewage which found its way into Ford's sewer, which was made in 1874, was at first inconsiderable, but that the defendants, after they were constituted, themselves altogether altered the working and operation of that sewer. They made new sewers and connected them with Ford's sewer, and so largely increased the amount of sewage introduced into that sewer. One of the new sewers, which has been spoken of as the "pick-up sewer," was in a sense a benefit to the oyster beds, because it picked up the sewage of two or three old sewers which had hitherto discharged directly into the midst of the oyster beds and carried it into Ford's sewer. But although the defendants did to that extent ameliorate the condition of the oyster beds by preventing sewage being discharged directly on to them, it must not be forgotten that the pick-up sewer was by no means the only sewer made by the defendants which carried additional sewage into Ford's sewer. In these circumstances I think there is ample evidence that the defendants brought about the result complained of by the plaintiff, and they did so by their own acts of commission as distinguished from acts of omission. I am therefore relieved from the necessity of considering whether they could be held liable for mere acts of omission to perform their duty, and also from the necessity of considering whether article 9 of the confirmation order would have the effect of making them liable for the inefficient works of their predecessors.

If we come to the conclusion that the defendants are *primâ facie* responsible for the damage done by their sewers through their own acts to the plaintiff's oyster beds, the question arises whether there is any ground on which the defendants can escape liability. They attempt to escape by saying that they have a prescriptive right to discharge sewage into the sea. I cannot agree to that. This is not a mere case of inhabitants using sewers to a larger extent than formerly. During the last ten years the user of these sewers has been altogether different in character as well as in quantity. The defendants cannot rely in this case on any prescriptive right arising under the Prescription Act. If they are to succeed on prescription at all it must be by common law prescription, based either on an assumed grant or on immemorial user. In my opinion the claim to prescription fails altogether. With regard to the alleged common law right to discharge sewage into the sea, I am of opinion that there is no such right, and this is a view which has been expressed by Buckley, J., in *Hobart* v. *Southend Corporation*, 75 L. J. K. B. 305.

On these grounds I have come to the conclusion that the judgment of Walton, J., is right, but I will add a few words as to the cases which are supposed to militate against this view. [His lordship referred to *Truro Corporation* v. *Rowe*, 51 W. R. 68, [1902] 2 K. B. 709, and *Reg.* v. *Downing*, 11 Cox. 580, neither of which, in his opinion, conflicted with the judgment of Walton, J., and to *Glossop* v. *Heston and Isleworth Local Board*, 28 W. R. 111, 12 Ch. D. 102, and *Attorney-General* v. *Dorking Union*, 30 W. R. 579, 20 Ch. D. 595, each of which was in substance an action brought to compel the defendants to perform their statutory duties, and neither of which showed that the present action for damages would not lie.] The result is that I think that this appeal must be dismissed.

STIRLING and MOULTON, L.JJ., concurred.

Appeal dismissed.

Solicitors for the plaintiff, *Stow, Preston, & Lyttelton*, for *Raper, Freeland, & Tyacke*, Chichester.

Solicitors for the defendants, *Palmer & Bull*, for *J. W. L. Cooper*, Emsworth.

Appeal.
(Collins, M.R., and Romer and Cozens-Hardy, L.JJ.) March 5.

In re R. (*a*.)

Lunacy—Vesting order—Criminal lunatic—Jurisdiction—Trustee Act, 1850 (13 & 14 *Vict. c.* 60), *s.* 5—*Lunacy Act*, 1890 (53 & 54 *Vict. c.* 5), *ss.* 136, 340, 342.

Under section 5 *of the Trustee Act*, 1850, *the court had power to make a vesting order when any person was entitled jointly with any lunatic or person of unsound mind, words which included a criminal lunatic. The Act of* 1850 *was repealed by the Lunacy Act*, 1890, *s.* 342: "*The Acts mentioned in the fifth schedule are hereby repealed to the extent set forth in the third column of the same schedule. Provided that this repeal shall not affect any jurisdiction or practice established, confirmed, or transferred, or salary or compensation or superannuation secured by or under any enactment repealed by this Act.*"

Sections 136 *and* 341 *of the Act of* 1890 *in substance re-enact section* 5 *of the Act of* 1850 *as regards any trustee who is a lunatic or person of unsound mind, but section* 340, *sub-section* 1, *of the Act of* 1890 *enacts that*, "*save as in this Act otherwise expressly provided, this Act shall not extend to criminal lunatics.*"

Held, that the court had jurisdiction to make a vesting order in the case of a criminal lunatic, inasmuch as the jurisdiction exercised under section 5 *of the Act of* 1850 *was preserved by the saving clause, section* 342 *of the Act of* 1890.

Under a marriage settlement a sum of India 3½ per cent. India Stock stood in the names of two trustees.

One of the trustees, R., committed a criminal offence, but being of unsound mind not so found he was sent to a criminal lunatic asylum.

A new trustee having been appointed in his stead, this was a summons taken out by the old trustee for an order vesting the said stocks in the joint names of himself and the new trustee.

The summons came before Cozens-Hardy, L.J., in chambers, as a judge in lunacy, who, doubting if he had authority to make the order, adjourned the summons into court for argument.

The new trustee was not represented.

The argument is fully referred to in the judgments of the court.

W. M. Cann for the applicant.

COLLINS, M.R.—The question in this case arises upon the application by one of two trustees, who is himself sane, to have the funds which are at present vested in him and his co-trustee, who is a criminal lunatic, transferred to himself and a new trustee; and the question is whether, under the present condition of the law, there is jurisdiction to make that order. Before the passing of the Lunacy Act, 1890, a matter of this kind was provided for by section 5 of the Act of 1850, which deals with the question of the transfer of stock from one trustee to another in cases of lunacy without expressly making any distinction between a criminal lunatic and any other class of lunatic. Therefore such a matter as the present could formerly have been dealt with under that section. But the difficulty here arises by reason of the repeal of that section by the Act of 1890. Now, the repealing section (section 342) commences thus: "The Acts mentioned in the fifth schedule are hereby repealed to the extent set forth in the third column of the same schedule." Then in Schedule 5 of the Act among the sections repealed is section 5 of the Act of 1850. So that, thus far, we find that the statutory provision which previously covered criminal lunatics is repealed. Then comes the clause which gives rise to the present difficulty—namely, the proviso in section 342, and the question is whether that proviso preserves the jurisdiction over criminal lunatics conferred by section 5 of the Act of 1850. The proviso is in these words: Provided that this repeal shall not affect any jurisdiction or practice established, confirmed, or transferred, or salary or compensation or superannuation secured by or under any enactment repealed by this Act." Now there has been no reported decision upon these particular clauses of this Act, and therefore Mr. Cann has assisted us by reference to cases having some analogy to the present. In the absence of any authorities having a direct bearing upon this Act, he has suggested that in other instances in which Acts of Parliament have been repealed, such as Lord Cairns' Act, the old jurisdiction has been preserved by a saving clause in the repealing Act. Now, no doubt there are existing decisions which have treated the jurisdiction under Lord Cairns' Act as remaining in force, notwithstanding its repeal, for by some accident the repealing Act contains a saving clause; and in *Sayers* v. *Collyer*, 33 W. R. 91, 28 Ch. D. 103, Baggallay, L.J., made the following observations with reference to Lord Cairns' Act and the saving clause in the repealing Act: "Our attention was called to the fact that Lord Cairns' Act had been repealed since the former hearing of this case, being included in the schedules to the Statute Law Revision and Civil Procedure Act, 1883 (46 & 47 Vict. c. 49), but that Act contains words preserving the jurisdiction of the court, notwithstanding the repeal. By section 5 it is enacted that any jurisdiction, or principle or rule of law or equity, established or confirmed, or right or privilege acquired, by or under any enactment repealed by the Act shall not be affected by the repeal. It is not, however, necessary to have recourse to Lord Cairns' Act, for it is clear that the court now has power to give damages as alternative relief. Before Lord Cairns' Act was passed a plaintiff who wished to enforce a restrictive covenant had two remedies—he might come into a court of equity for an injunction to restrain an infringement of his right, or he might have recourse to a court of common law to obtain damages, and Lord Cairns' Act gives the court of equity the power of giving a plaintiff damages by way of alternative relief. But since the Judicature Acts each division of the court has full power, apart from Lord Cairns' Act, to give either an injunction or damages." Whether that is a correct view or not of the law, for the reasons given by the Lord Justice, it cannot be regarded as an actual decision in point; but nevertheless it is an expression of opinion by a very learned judge that a particular saving clause, which does not appear to differ in any material respect from the saving clause in section 342 of the Act now before us, has the effect of keeping alive the jurisdiction under Lord Cairns' Act. A number of other cases to which Mr. Cann has referred certainly assume that the jurisdiction under Lord Cairns' Act has been preserved.

There were one or two other cases cited which have an important application to the present case—that is to say, cases where you find in an Act a repealing clause followed by a saving clause. There you have to see how far the two enactments can co-exist. It seems to me that the principle laid down in these cases is applicable to the present case. And that principle is this: where you have a repeal and you have also a saving clause, you have to consider whether the substituted enactment contains anything

(*a*.) Reported by MAURICE N. DRUCQUER, Esq., Barrister-at-Law.

incompatible with the previously existing enactment. The question is, aye or no, is there incompatibility between the two? And in these cases the judges, in holding that there was a saving clause large enough to annul the repeal, said that you must see whether the true effect was to substitute something incompatible with the enactment in the Act repealed, and that, if you found something in the repealing Act incompatible with the general enactments in the repealed Act, then you must treat the jurisdiction under the repealed Act as *pro tanto* wiped out. That is settled by the cases of *In re Bousfield*, 32 Ch. D. 123, and *Hume* v. *Somerton*, 25 Q. B. D. 239. In both those cases the judges relied upon the incompatibility of the substituted enactments with the old enactments, and held that in consequence of that incompatibility the jurisdiction under the old Act could not remain; but they were prepared to hold that the saving clause would, if there were no incompatibility between the enactments, have the effect of annulling the repeal.

In this state of the authorities it appears to me that there is enough here to enable us to hold that under this saving clause the useful jurisdiction under the Act of 1850 in the case of criminal lunatics has not been absolutely wiped out. It would be a public misfortune if there were no jurisdiction over funds held by criminal lunatics, and in my opinion we are not bound to hold that in consequence of the Act of 1890 no such jurisdiction now exists. On the contrary it seems to me to have been the intention of this saving clause to preserve that jurisdiction. Accordingly I am of opinion that the jurisdiction under the old Act remains, though the practice must be governed by the new Act.

ROMER, L.J.—I am of the same opinion. No doubt there is a difficulty with regard to criminal lunatics owing to the repeal by section 342 of the Lunacy Act, 1890, of section 5 of the Trustee Act, 1850. The position is this: Prior to the Act of 1890 there was undoubted jurisdiction on the part of the Lords Justices, in a case like the present, to make a vesting order even in the case of a criminal lunatic. Turning to the Act of 1890, it appears that the section which deals with the general jurisdiction of the court to make vesting orders (section 136) does not cover the case of a criminal lunatic owing to section 340, which enacts that "save as in this Act otherwise expressly provided this Act shall not extend to criminal lunatics." Now the old jurisdiction conferred by the prior Act was first of all swept away by the repealing section (section 342) of the Act of 1890, but this repealing section contains a specific provision that the repeal "shall not affect any jurisdiction or practice established, confirmed, or transferred . . . by or under any enactment repealed by this Act." I agree that these general words at the end of the section must have some little limitation; and I think the limitation is this, that you cannot set up by this provision anything that is inconsistent with the provisions of the Act of 1890. But, subject to that, I think that the plain words of section 342 must be given effect to. Therefore I look at the Act of 1890 to see whether it contains anything which shows that the jurisdiction of the court with respect to criminal lunatics is no longer to be exercised. Now I do not find that. There is power, no doubt, given by the Act of 1890 to make vesting orders of a general character; but the mere fact that section 340 says that the Act shall not extend to criminal lunatics does not, of itself, sufficiently show that it was the intention of the Legislature that this court should never exercise the jurisdiction it previously had as regards criminal lunatics. Let us test it in this way: Supposing there had been no repeal by section 342, does what is contained in the Act of 1890 amount to a repeal of the power of the court under the old Act? In my opinion certainly not. That being so, it appears to me that the old jurisdiction, so far as it concerns criminal lunatics, still exists. In my opinion the present case is exactly the kind of case the Legislature was aiming at which it put in the proviso in section 342. In my judgment, therefore, the order asked for can be made and should be made.

COZENS-HARDY, L.J.—I am very glad that the Master of the Rolls and Romer, L.J., can see their way to a decision which is highly convenient. I in nowise dissent from that decision, although this is, in my opinion, an extremely difficult case. I am pressed rather with the view that this decision will tend rather to make the work of statute law revision a matter of great difficulty, because it will be so difficult to say whether the time has arrived at which the powers contained in the repealed Acts put into the schedule of any particular revision Act have come to an end, for it may be that in some case like the present a state of circumstances may arise in which it may be doubtful whether the jurisdiction under one or other of the repealed Acts is still existing. But here the language of the saving clause in section 342 is undoubtedly very strong. It contains words that enable us to make such an order as is asked for, and to hold that, so far as criminal lunatics are concerned, that there being no provision in the Act of 1890 to meet such a case as the present, we have to go back to the Act of 1850. There appears to be no direct decision on the point, and probably this is the first case of the kind which has happened. The actual form of the order requires consideration, and I shall be happy to assist Mr. Cann in putting the order into the proper form. It appears to me that the order should be entitled "In the matter of R., a criminal lunatic and a person of unsound mind," &c., and also "In the matter of the Trustee Act, 1850," as well as "In the matter of the Lunacy Acts, 1890 and 1891."

I wish to say one word as to Lord Cairns' Act. As I follow Mr. Cann's able argument, to which, personally, I feel indebted, there is no express decision that the Act is still in force, though in some cases it seems to have been so treated. But I think the better view is expressed by Lord Esher in *Chapman, Morson, & Co.* v. *Auckland Union*, 23 Q. B. D. 294, 38 W. R. Dig. 141, where he says: "It is true that Lord Cairns' Act has been repealed since the passing of the Judicature Acts by 46 & 47 Vict c. 49, s. 3, but I am confident that the repeal was not with the intention of taking away any of the powers given by the Act in a Chancery action, but because it was considered that the Judicature Acts re-enacted those powers, and therefore that Lord Cairns' Act had become obsolete and might be repealed." That passage, however, is not really necessary for the decision of this case.

Upon the whole, I think the order in the present case may go. The summons should be amended so as to agree with the form of order I have indicated, and leave is given accordingly.

Solicitor, *F. Tiernay.*

High Court of Justice.

Chan. Div. }
Buckley, J. } April 27.

In re WHITEHORNE.
WHITEHORNE *v.* BEST. (*a.*)

Will — Codicil — Construction — Devise to father and children—Revocation—Extent of revocation—Acceleration of children's interests.

A testator devised freeholds upon trust (after events which had happened) as to one-fourth part for his son G. W. for life, and after his death (subject to a power of appointment to his widow, which was not exercised) for the children of G. W. equally; and as to the other three fourth parts upon trust for the other three sons of the testator respectively for life, and for their children, in manner corresponding with the trusts of the share of G. W. and his children. By a codicil reciting that he was dissatisfied with G. W. the testator revoked the gift "to or for the benefit of" G. W., and directed that every clause of his will purporting to entitle G. W. to any part of his estate should be construed, and the trusts thereof carried out, as if the name of G. W. had not appeared therein.

Held, that the words "for the benefit of" could be satisfied by other benefits given to G. W. by the will; that to revoke a gift by will the words of revocation must be plain; that the interests given by the will to the children of G. W. were not revoked; and that these interests were accelerated by the revocation of the interest of G. W.

Green *v.* Tribe, 27 *W. R.* 39, *followed.*
Tabor *v.* Prentice, 32 *W. R.* 872, *distinguished.*

Originating summons.

The question in this summons was whether a revocation in a codicil of a gift of a share of real property to a son for life, and then to his children, extended to the interests of the children as well as to those of the son.

George Whitehorne, by his will made in March, 1894, consisting of numbered paragraphs, gave his business to his trustees upon trust to carry it on for the benefit of his four sons until the youngest attained twenty-one years, with liberty to employ any son as manager or otherwise, and provided for the other sons purchasing the share of any son in the business who, upon the determination of the previous trust, should be dead or unwilling to join in carrying on the business. And (in paragraph 6) the testator devised to his trustees a freehold house and premises in Wandsworth-road and also a freehold house on the same road upon certain trusts as to occupation of part thereof which came to an end on his youngest son attaining twenty years, and also upon trusts for his widow for life, and for his daughters for their respective lives until they married. And after the death of his wife and the determination of the trust in favour of his daughters, "Upon trust as to one equal fourth part thereof for my son George William during his life, with power to my said son by deed or will to appoint the income of such share or any part thereof to his widow for her life or for any shorter period, and from and after his death, and subject to and in default of any appointment in favour of his widow, upon trust for his children or child in fee simple, in equal shares between them if more than one. Provided always that if any child of my said son George William, being male, shall die before attaining the age of twenty-one years, or being female shall die before attaining that age or marrying, then and in every such case the share of the deceased child, including any accrued share under this present clause, shall go and belong to the others or other of the children of my said son in equal shares between them, if more than one. And upon trust as to the other three several equal fourth parts or shares of the said premises for my other three sons, Alfred, Frederick, and Edward James, respectively for life, and for their respective children or child, and with the like power of appointment in favour of any widow in manner corresponding in all respects with the trusts hereinbefore declared with reference to the share of my son George William and his children or child."

By clause 7 the testator bequeathed to his trustees the residue of his property upon trust for his three daughters equally.

The testator made a codicil to his will dated the 31st of July, 1894, paragraph 1 of which was as follows: "Whereas I have reasons for dissatisfaction with my son George William Whitehorne, and I have ceased to employ him in my business, and he has by my desire ceased to occupy my house No. 133, Wandsworth-road. Now, therefore, I revoke the trust contained in the sixth paragraph of my said will for permitting my said son to occupy the said house so long as he shall desire; and I hereby also revoke each and every devise, bequest, gift, and legacy contained in my said will to or for the benefit of my same son, and I revoke and annul every provision and benefit thereby given, made, or intended to or for him; and I further direct that every clause of my said will purporting to entitle him to share any part or parts of my estate or of the proceeds, income, or profits thereof with any other person or persons shall be construed, and the directions and trusts thereof shall be carried out, as if the name of my said son George William Whitehorne had never appeared therein, and I direct that my same son shall not at any time be appointed manager of my business or be employed therein nor become a trustee of my will."

By paragraph 2 the testator directed his executors to set apart out of his residuary estate £500 and invest it, and hold the investments upon trust for the maintenance and benefit of the children living at his death of his son G. W. Whitehorne equally, and upon such children successively attaining the age of twenty-one, or marrying being females, upon trust to transfer to them their respective shares; and the testator declared that his executors should not pay the income of the said legacy or any part thereof to his son G. W. Whitehorne, pursuant to section 43 of the Conveyancing and Law of Property Act, 1881.

The testator died in October, 1894.

George W. Whitehorne died in 1899, leaving three infant children, the infant plaintiffs. He did not appoint or purport to appoint the trust property. At the time of the summons the testator's widow had died and his daughters were married. His sons Alfred Whitehorne and George Frederick Whitehorne had assigned their shares and interests under the will to their sister Mrs. Ebdon. The youngest son, Edward James Whitehorne, had lately attained his age of twenty-one years. Mrs. Ebdon and Edward James Whitehorne contended that the codicil had revoked not only the interest of George W. Whitehorne, but also the interests of his children; and that in consequence the shares of the remaining sons had become augmented, and that Mrs. Ebdon held two-thirds and Edward J. Whitehorne one-third of the devised property. Under these circumstances the three infant children of George W. Whitehorne by their next friend took out this summons against the trustees of the will and Mrs. Ebdon and the

(*a.*) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

other daughters of the testator for the determination of this among other questions.

Buckmaster, K.C., and *Stevenson*, for the plaintiff.—A gift in a will is only revoked by plain words in a codicil, and the revocation only extends as far as it makes the will inconsistent with the codicil: *Green* v. *Tribe*, 27 W. R. 39 47 L. J. Ch. 783. Here the only plain revocation is of the life interest of George W. Whitehorne. The interests of his children are not expressly or plainly revoked, and stand good. The cases of *Philipps* v. *Allen*, 7 Sim. 446; *Boulcott* v. *Boulcott*, 2 Drew. 25; and *Sanford* v. *Sanford*, 1 De G. & Sm. 67, which may be relied on against us, were cited in *Green* v. *Tribe*. [BUCKLEY, J., referred to *Alt* v. *Gregory*, 8 D. G. M. & G. 221.] The interests of the children of George W. Whitehorne are accelerated by the revocation of his life interest: *Green* v. *Tribe*.

J. A. Hay, for the trustees of the will.

Maw, for two of the daughters of the testator.—The words revoking the shares of the children are plain. If the name of George William Whitehorne is omitted from clause 6 as expressly directed, then his children cannot take. The case is substantially the same as *Tabor* v. *Prentice*, 32 W. R. 872, the words in the codicil revoking every devise or bequest "to or in favour of" the son, in that case being equivalent to the revocation of every gift "to or for the benefit of" the son which occur here; and in that case the children's interests were held to be revoked. The gift to the children of the son would be a gift "for his benefit," and consistently with that view the testator directs that the income of the £500 during the minority of the children shall not be paid to him.

Gatey, for Mrs. Ebdon, used similar arguments.

BUCKLEY, J.—The principle which in this case I have to apply is simply this, that if there is a plain gift by will the person who asserts that the gift is revoked must show a plain revocation by codicil—that is plain upon the construction of the language used. Further, I have to apply this principle, that a revocation only extends so far as the will is inconsistent with the codicil which is said to revoke it. In the present case the will contains certain provisions for the benefit of the testator's son George William, and also gifts for the benefit of his children. It is not the case of an original gift to the son with subsequent directions as to the manner in which that gift is to be enjoyed; there is a gift to the son for life, and then a gift to his children afterwards. In construing the codicil something turns upon the recital in it. The testator recites that he is dissatisfied with his son, and has ceased to employ him in his business. This relates to the son personally, and has nothing to do with his children. The testator then goes on to make a certain revocation, the effect of which I have to consider. There is no authority which lays down the principle of construction except as I have stated it. Three cases—*Philipps* v. *Allen*, *Sanford* v. *Sanford*, and *Boulcott* v. *Boulcott*—have been cited, in each of which not merely the gift to the person in question is held to be revoked, but the whole gift is held to be revoked. But in each of these cases the decision turned on the particular language and not upon any principle. So also was the case in *Tabor* v. *Prentice*, where also it was held that the gift to the persons in remainder was revoked. In *Green* v. *Tribe* and in *Alt* v. *Gregory* the gifts to the persons in remainder were held not to be revoked. From these cases can be obtained the principle to be followed. The observations of Turner, L.J., in *Alt* v. *Gregory*, on p. 236, are pertinent. I think that the testator here has made a recital which shows his intention to dispossess the son, but which stops short of dispossessing the son's children. Hence the case of *Green* v. *Tribe*, decided by Fry, J., is very like the one before me. In that case there was a gift in the will to the niece for life with remainder to her children, followed by a codicil which revoked every gift in the will "to or in favour of my niece." Fry, J., held that the revocation extended only to the interest of the niece and that the interests of the children were accelerated. In *Tabor* v. *Prentice*, Kay, J., in holding that the interests of the children were revoked, relied principally upon the words "to or in favour of" his son contained in the revocation, and also upon the fact that Knight-Bruce, L.J., had arrived at the same conclusion in an unreported decision. I am not pressed in the present case with the words "in favour of" or "for the benefit of," because the testator had in his will in addition to gifts given his son certain benefits. The words "for the benefit of my son" are satisfied by his having given to the trustees power to employ the sons in the business, and of purchasing the other shares and interests of his brothers. The actual words of revocation are "I hereby revoke each and every devise, bequest, gift, and legacy contained in my said will to or for the benefit of my same son." These words are satisfied without the children being intended at all. Then the testator goes on, "and I revoke and annul every provision and benefit thereby given, made, or intended to or for him," again stopping short of any reference to the son's children. Then he continues, "and I further direct that every clause in my said will" [His lordship read the rest of the paragraph.] It has been argued that the word "clause" refers to each numbered paragraph in the will. This, however, cannot be so, as it would make all the gifts to the brothers of George William fail. The word "clause" refers only to every sentence in the will in which anything is given to George William. Another argument made use of is based upon the provision in the will that George William Whitehorne is not to receive the income of the legacy of £500 given by the codicil to his children. That is true; but there is nothing in that provision to lead me to a different conclusion. I consider that the principle upon which the cases of *Green* v. *Tribe* and *Alt* v. *Gregory* were decided apply to this case, and I hold that the codicil does not revoke the interests given to the children of George William Whitehorne by the will, but that these remain and are accelerated.

Solicitors, *Faithfull & Sons; Paterson, Candler, & Sykes; Saw & Sons.*

Court of Appeal.

From K. B. Div.
(Lord Alverstone, L.C.J., Gorell Barnes, P., and Farwell, L.J.) } July 1.

GRUNNELL *v.* WELCH. (*a.*)

Landlord and tenant—Illegal distress—Trespass ab initio—*Right of landlord to make fresh levy.*

A landlord levied a distress for rent. The bailiff illegally entered the house by breaking the chain of the front door and seized furniture belonging to the plaintiff. . . . After remaining in possession some days he went out and was refused re-admission, and made no attempt to re-enter. Subsequently the landlord levied a

(*a.*) Reported by MAURICE N. DRUCQUER, Esq., Barrister-at-Law.

fresh distress for the same rent, whereupon the plaintiff brought an action for replevin against him.

Held, affirming the decision of the Divisional Court (ante, *p.* 216), *that the second distress was a legal distress.*

Appeal from the judgments of Kennedy and Ridley, JJ., on appeal from the Waltham County Court.

The appellant was the wife of a tenant of a house which had been let to the husband by the respondent.

At Midsummer, 1904, two quarters' rent were in arrears, and on the 19th of July the landlord put in a distress.

The bailiff entered the house by forcibly breaking the chain of the front door, and seized furniture which admittedly belonged to the appellant.

The bailiff remained in possession eleven days, and then left the house for two hours, was refused re-admission, and made no attempt to re-enter.

On the 5th of August a fresh distress for the same rent was levied by a different bailiff under a fresh warrant, and goods were seized which were to some extent different from those seized on the previous occasion.

The goods were removed and advertised for sale, whereupon the appellant took the necessary steps to replevy her goods, and in due course brought her action in the county court. Before the replevin became effectual the appellant and her husband had brought an action in the High Court against the respondent, in which they claimed damages in respect of the illegal entry on the 19th of July, and the appellant had brought a further action in the High Court in which she claimed the restoration of the goods seized on the 5th of August, together with an injunction against the respondent selling or dealing with them. These actions had not been pursued after the present action of replevin had been brought.

The county court judge held that the first proceeding was upon the authority of *Attack* v. *Bramwell*, 3 B. & S. 220, a trespass *ab initio* and void as a distress, and that the subsequent distress for the same rent was lawful. The Divisional Court affirmed the decision. The plaintiff now appealed.

Foa, for the appellant, repeated the argument advanced in the court below (54 W. R. 216).

Martin Smith and *Morle*, for the respondent, were not called upon.

THE COURT (Lord ALVERSTONE, L.C.J., GORELL BARNES P., and FARWELL, L.J.) dismissed the appeal, and adopted *simpliciter* the judgments of the learned judges below (54 W. R., p. 217).

Solicitors for appellant, *Lumley & Lumley*.

Solicitors for respondent, *Avery & Son*.

Appeal.
(Collins, M.R., and Romer and Cozens-Hardy, L.JJ.) May 24.

SMITH *v.* STANDARD STEAM FISHING CO. (LIMITED). (*a.*)

Master and servant—Employers' liability—Accident—Compensation—Shipwright—Ship moored to jetty of dock—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *ss.* 1, 7.

A workman employed to do repairs in a ship, which though attached to the jetty of a dock by a rope is wholly waterborne, and is not making use of the dock in any way, is not a workman entitled to the benefit of the Workmen's Compensation Act, 1897, *inasmuch as the person sued is not the occupier of a factory, and, therefore, not an "undertaker" within the Act.*

Houlder Line (Limited) *v.* Griffin, 53 *W. R.* 609, [1905] *A. C.* 220 *followed.*

This was an appeal from the Lincolnshire County Court, which raised the question whether a shipwright who had sustained an injury on the deck of a steam trawler while moored to the quay in Grimsby Docks was entitled to compensation from the owners of the vessel under the Workmen's Compensation Act, 1897.

The facts were as follow: The applicant, S. H. Smith, was at the time of the accident, and had been for some years preceding it, a shipwright in the employ of the respondents, who are steam trawler owners at Great Grimsby, and used to work for them either in the workshop or on the quay or on vessels in the dock, according to orders and as occasion might require.

On the 31st of October, 1904, the applicant was instructed to go on board the steam trawler *The Moravia*, which belonged to the respondents, to do some repairs. *The Moravia* was moored to the jetty or landing-stage of the fish dock at Grimsby, being fastened forward by her fore rope to the jetty and aft by her aft rope to other trawlers which were lying alongside of her; the fore end touched the jetty, and the applicant went on board of her by stepping from the jetty on to the trawler. While the applicant and two other men were pulling at a rope to get at the otter or trawl board, which the applicant was told to repair, the rope broke, the applicant fell on his back on the deck across the wheel chain-pipe and broke his leg in two places. The applicant claimed compensation, and eventually proceedings under the Workmen's Compensation Act, 1897, were taken in the Grimsby County Court. The county court judge held, on the authority of *Houlder Line (Limited)* v. *Griffin*, 53 W. R. 609, [1905] A. C. 220, that the applicant being on board a trawler in a wet dock, and the trawler not making use of the dock in any way, the trawler was not a "factory" within the decisions under the Act, and that the respondents were not "undertakers" within the meaning of the Act, and consequently they were not liable to pay compensation.

The applicant appealed.

Ruegg, K.C., and *Owen*, for the appellant, referred to *Flowers* v. *Chambers*, 47 W. R. 513, [1899] 2 Q. B. 142; *Bartell* v. *Gray*, 50 W. R. 310, [1902] 1 K. B. 225; *Raine* v. *Jobson*, 49 W. R. 705, [1901] A. C. 404; *Cattermole* v. *Atlantic Transport Co.*, 50 W. R. 129, [1902] 1 K. B. 204; *Houlder Line (Limited)* v. *Griffin*, 53 W. R. 609, [1905] A. C. 220; *Owens* v. *Campbell*, 52 W. R. 481, [1904] 2 K. B. 60; *Merrill* v. *Wilson*, 49 W. R. 161, [1901] 1 K. B. 35; and *Thompson* v. *Sinclair*, unreported.

Powell, K.C., and *Addington Willis*, for the respondent, were not called on.

COLLINS, M.R.—This is an appeal from the decision of the county court judge in a case where a trawler was moored (I think I may say) in a wet dock and was attached to the jetty by a rope. The plaintiff was a shipwright and was employed to mend trawl boards on board this trawler, and in the process he met with an accident which broke his leg. He was on the ship during the whole course of the employment and the accident, except that he had to get on board the ship, I presume, from the jetty, and therefore what happened to him happened to him while he was on board the ship. He then claims against the

(*a*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

owners of the trawler compensation under the Workman's Compensation Act, 1897. He is met at once by the decision in the House of Lords in the recent case of *Houlder Line (Limited)* v. *Griffin*. It is not perhaps quite easy to collect from the speeches of the learned lords what is the essential principle which governs them all, but I think there is one common factor or one common conclusion in all their judgments, whether arrived at by the same reasoning in each case I do not pretend to decide. I think that they all come to the conclusion that in that particular case the person sued was not the occupier of a factory, and therefore not an undertaker, and therefore that the plaintiff could not get compensation. It seems to me that the principle is common to all the judgments in that case. Lord Halsbury, on p. 222, says: "I do not think the ship owner was in any intelligible sense the occupier of the dock because his vessel was in the water surrounded by the structure of the dock." In this case this vessel was entirely waterborne, and it had no relation to the structure of the dock excepting the fact that there was a rope used for mooring it; but the actual work which the injured man was doing had no relation whatever to the structure of the dock. He had merely walked across it for the purpose of getting on to the ship, and the work he had to do was exclusively on the ship and had nothing whatever to do with the stone structure of the dock. Then comes Lord Macnaghten, who also, I think, bases his judgment on the same ground: "It is, I think, plain," he says on p. 224, "that by the expression 'dock' in the Factory Act, 1895, is meant the solid structure and body of the dock, not the water space within its limits. A corresponding meaning must be given to the word 'premises.' I do not think that a ship lying in a dock, whether afloat or not, can be included in the description of 'premises within the same or forming part thereof.' It follows, therefore, in my opinion, that the employment in which the injured person was engaged at the time of the accident was not an employment to which the Act of 1897 applies"; and he explains that a little further on by reference to *Raine* v. *Jobson*. "The case of *Raine* v. *Jobson* seems to me to be a different case altogether. There the vessel was not lying in the water space of the dock. It had been removed to and placed in a dry dock—in a berth in a dock—of which the persons sought to be made liable had the actual use and occupation." Therefore, it seems to me that he again treats the occupation as a crucial point, and holds that the persons sued in that case were not in occupation of the factory. and therefore not undertakers towards the plaintiff. Then Lord Lindley, on p. 228, says: "To treat the owner of a ship afloat in a dock, and waiting to get out to sea, as the occupier of a factory, and therefore an undertaker within the meaning of the Act, appears to me opposed to all good sense and not to be rendered obligatory by section 7." It seems to me that those observations apply to this case. In fact, the only difference between the two is that there was no doubt a rope physically connecting the trawler with the jetty, whereas in *Houlder Line (Limited)* v. *Griffin* the ship was entirely disconnected from the land; but the observations as to occupation of the dock appear to me to apply equally in both cases, because the place where this man was actually employed was not on the stone structure adjacent to the water, but in the ship which was entirely waterborne, and therefore I think that that principle, if it be a principle, applies as much to one case as the other. Therefore, in my judgment, the case fails, and this appeal must be dismissed.

ROMER, L.J.—I am of the same opinion. It is clear that if the fishing smack had been not inside a dock and had wanted the repair done to the trawling board, and had sent for a carpenter ashore and got him to come off and do this work on board the trawler, that fact would not in itself have made the trawler a factory within the meaning of the Workmen's Compensation Act, 1897. The question is whether it makes all the difference that the carpenter came on board for the purpose of repairing the trawler board when the trawler was afloat in the Grimsby Dock. Now, it appears to me that the case is really governed by the principle of the decision in *Houlder Line (Limited)* v. *Griffin*, for doing the best I can (and I hope I have been successful) to extract from the judgments of the majority of the lords who decided that case, the principles upon which they decided it, I think it appears that two principles were laid down — one, that seamen employed in performing their ordinary duties as seamen afloat and on board the ship were outside the general provisions of the Workmen's Compensation Act, 1897, unless, of course, there was anything special in their work to take them outside the ordinary position of seamen; and the second principle I think laid down in the decision in the House of Lords was this—that a ship afloat in a dock does not of necessity become part of the dock or premises within the dock so that the owner of a ship which was afloat within a wet dock would not merely because of that circumstance become "the person having the actual use or occupation of a dock or of any premises within the same or forming part thereof" so as to be deemed the occupiers of a factory. You must look, as I gather from that case, to the circumstances to see whether the owners have brought themselves or not by something special that they are doing within the operation of the Act. I think I am right in saying that those are the two principles which are pointed out for our guidance in the case of *Houlder Line (Limited)* v. *Griffin*. Now I apply them to the present case. Of course the first principle has no application because the present workman was not a seaman; but it appears to me that the second principle does apply. What are the circumstances of the case? You have here a trawler coming into the dock as a floating ship, and I cannot gather that it came in for any special purpose of being repaired so as, by occupation of any particular part of the dock, to use its position in any way except for the purpose of floating in the dock. It may be possible for all I know that it came in merely for the purpose of discharging its fish; I do not know. At any rate nothing special is made of what it was doing inside the dock. It was floating in the water. While there it sends for a carpenter to come and repair the trawling board. Does that circumstance alone justify us in holding that the owners of this trawler are "persons having the actual occupation of the dock or of any premises within the dock or forming part of it"? I think, having regard to what was said in the case in the House of Lords to which I have called attention, that we cannot say that. As my lord has pointed out, the mere circumstance of the rope going from the bow of the vessel to the side of the dock, as it always does in these cases of trawlers discharging cargo or being temporarily in a dock, cannot make a difference. That played a wholly immaterial part in the transaction the subject of this appeal. For these reasons I think the decision of the county court judge is right, and the appeal fails.

COZENS-HARDY, L.J.—I am of the same opinion. It would be, in my view, extremely difficult to extract any clear logical principles from the speeches in the House of Lords in the case of the *Houlder Line*

(*Limited*) v. *Griffin*. On the whole I think that those principles are those which have been stated by the Master of the Rolls and Romer, L.J. I would only add this with reference to the *Houlder case*, that the distinction which was painfully sought to be made in the present case, that here the fishing smack was in a sense connected with the structure of the dock by means of a rope, was really an element which existed in the *Houlder case*, because the vessel there was moored to a buoy in the dock, but even if I did not think as I do, that the case is governed by the *Houlder Line case*, having had my attention called to the case of *Thompson* v. *Sinclair*, I confess I do not think it is open to us in this court to take any other view than that which has been taken. *Thompson* v. *Sinclair* was a case very much more favourable to the workman than the present case. There the vessel had been taken into the dock, she had no crew on board, and she was moored to the side of the quay; and the county court judge thought that that distinguished the case from the *Houlder case*. Nevertheless this court held that it was governed by the principle in the *Houlder case*, the vessel being really afloat in the dock, and the work in which the man was engaged not being work which referred to or involved the conduct of business on the dock or the quay. For these reasons I think the appeal fails.

Solicitors, *F. W. Hill*, for *Locking & Holditch*, Hull; *J. C. Jackson*, for *W. M. Gichard*, Rotherham.

High Court of Justice.

Chan. Div. }
Warrington, J. } April 30.

TORRENS v. WALKER. (a.)

Landlord and tenant — Covenant to repair — Lessor's liability — Old building — Natural decay — Construction.

The principle of construction that, under a covenant to repair, the covenantor need not renew a building worn out by age or decaying from faulty construction applies to the case of a lessor as well as to the case of a lessee who has entered into such a covenant; and for the purpose of construing such a covenant there is in this respect no distinction between the two cases.

Action.

This was an action by the assignee of the lessee of an old house against the lessor (the assignee of the original lessor) for an injunction and for damages for an alleged breach by the lessor of a covenant binding her to keep the outside of the premises in repair.

By an indenture of lease made in 1890 the lessor demised to the lessee the first, second, and third floors, with two rooms and partial use of kitchen in the basement, and the yard of a messuage No. 8, Glasshouse-street, and No. 1, Sherwood-street, Regent-street, London, for eighteen years from the 25th of March, 1890, at the rent of £150.

The lessee covenanted that he would at all times keep the inside of the premises in good and substantial repair, and would permit the lessor twice or thrice during the term to enter upon the premises and view the condition thereof, and that the lessee would not during the term carry on or permit to be carried on any trade or business upon the premises, or permit the same to be occupied or used in any other manner than as a private hotel. The lease also contained the following covenant:

"And the lessor doth hereby for himself, his heirs, executors, administrators, and assigns, covenant with the lessee, his executors, administrators, and assigns, in manner following—that is to say, that the lessor, his executors, administrators, or assigns, will pay all rates, taxes, and assessments whatsoever (except gas and water rates) which now are, or during the said term shall be, imposed or assessed upon the said demised premises, or the landlord or tenant in respect thereof by authority of Parliament or otherwise; and also will at all times during the said term keep the outside of the said premises in good and substantial repair, and in particular will paint with two coats at least of good oil colour, and in a proper and workmanlike manner, the outside wood and ironwork of the said premises once in every four years of the said term."

It was upon this latter covenant that the question in the case turned.

By an indenture dated the 20th of January, 1905, the defendant, in whom the reversion had become vested, demised the premises for a further term of one and a-half years (less three days) to the lessee upon the same conditions as those of the first lease.

The plaintiff, Mrs. Torrens, was the assignee of the premises for the term as thus extended under an indenture dated the 21st of January, 1905.

On the 13th of July, 1905, the said plaintiff was served with a dangerous structure notice by the London County Council. She thereupon, by a letter of the same date, through her solicitors gave the solicitors of the defendant notice of what had happened, and of the state of repair of the building, and called his attention to the covenants on the part of the lessor in the lease. The house was so immediately dangerous that the council shored it up. Mrs. Torrens gave notice to her guests that they must leave, and they did so. Nothing, however, was done by either the said plaintiff or defendant, and, the surveyor of the council having certified that the structure was in a dangerous state, a magistrate's order was made in September, 1905, ordering the owner to take down the walls so far as they were decayed and out of form, and to secure the same to the satisfaction of the surveyor. By the time of the trial the council had pulled down part of the walls and left the house as a shell.

The plaintiff Mrs. Torrens had agreed to sell the premises to the Sherwood Hotel Co. (Limited), who were also joined as plaintiffs.

The plaintiffs brought this action against the assignee of the reversion claiming an injunction to restrain him from hindering their enjoyment for the business of a private hotel of the premises by keeping the outside thereof out of repair and unfit for occupation, and also claiming damages.

The defendant in his defence alleged that if the outside walls became cracked and the hereditaments unfit for use and uninhabitable, as alleged (which was not admitted), the same was due to the age of the premises and the natural operation of time and the elements thereon, and that he had merely a leasehold interest which expired in September, 1909.

Jenkins, K.C., and *Greenwood*, for the plaintiffs.—The defendant is bound to keep the buildings in repair, and must, if necessary, rebuild them: *Jacob* v. *Down*, 48 W. R. 441, [1900] 2 Ch. 156. Moreover, the lessor let the house for a particular purpose—namely, to be used as a private hotel, and he was bound to keep it in such a state of repair as to be fit for that purpose.

Upjohn, K.C., and *J. W. Manning*, for the defendant.

(a.) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

—The liability of a landlord to repair only arises after notice of the state of the premises being given him by the lessee: *Makin* v. *Watkinson*, 19 W. R. 286, L. R. 6 Exch. 25; *Huggatt* v. *Maclean*, 1 Cab. & Ell. 391, and on appeal 53 L. T. 94. The defendant did not receive notice of the state of the buildings until the 13th of July, 1905—that is, therefore, the material date. At that time the buildings could not be made safe by repairs, nothing could be done but to rebuild them from the first floor. The house was within a few years of being 200 years old. A covenant to repair does not extend to structural defects (*Huggatt* v. *Maclean*), nor to natural decay: *Gutteridge* v. *Munyard*, 1 M. & Rob. 334, 7 C. & P. 129; *Payne* v. *Haine*, 16 M. & W. 541; *Lister* v. *Lane & Nesham*, 41 W. R. 626, [1893] 2 Q. B. 212; *Wright* v. *Lawson*, W. N. 1903, p. 108. *Jacob* v. *Down* was the case of the duty of the tenant to build premises under a covenant to leave them in good repair, and was quite a different case.

Greenwood, in reply.—Although the notice was not given until July, 1905, yet the breach took place previously; the notice does not cause the breach, but merely calls the attention of the landlord to it. [WARRINGTON, J.—I think there is no breach until notice; Bramwell, B., in *Makin* v. *Watkinson*, L. R. 6 Exch, at p. 28, says that the covenant is equivalent to a covenant to repair on notice.]

WARRINGTON, J.—I find as a fact, in accordance with the evidence of the district surveyor, that the building, which is about 200 years old, is absolutely worn out and has come to the end of its time, and that its condition is not owing to any neglect on the part of the lessor, but to the effect of time and the elements on the materials of which it was composed. It was found on the survey that the front wall was beyond repair. The bricks had come to such a state that they could not be used again, and the mortar was perished. The back wall was not in such a bad condition. But I find as a fact with regard to the whole of the back wall above the first floor that nothing short of rebuilding could have been of any avail, and it was probable that when the work was begun it would have been found necessary to rebuild both walls from below the first floor. I find therefore as a fact that on the 13th of July, 1905, repairing the building was in the ordinary sense impossible. Nothing could be done but rebuild. It was not merely the course which a prudent owner would have adopted, but it was the only course practicable to make the structure stand. On these facts what is the law? It is settled—at least so far as I am concerned—that a covenant by a lessor to keep the external walls or any part of the building in repair means a covenant to repair upon notice, but not otherwise. This was decided in *Makin* v. *Watkinson*, and again by the Court of Appeal in *Huggatt* v. *Maclean*, where it was treated as settled law. As, therefore, the lessor had not notice of the state in which the building was until the 13th of July, 1905, there could be no breach of the covenant before that date. Was there, then, any breach of the covenant on or after that date? As to that I have already described the state of the buildings, and having regard to its condition I am of opinion that there was no breach of this covenant. It is sufficient for me to take the law from *Lister* v. *Lane & Nesham* and from *Proudfoot* v. *Hart*, 38 W. R. 730, 25 Q. B. D. 42. In the former case, where it was held that the defect having been caused by the natural operation of time upon a house the original construction of which was faulty, the lessees were not under their covenant liable to make it good. Lord Esher cited the passage in the judgment of Tindal, L.C.J., in *Gutteridge* v. *Munyard*, "When a very old building is demised, and the lessee enters into a covenant to repair, it is not meant that the old building is to be restored in a renewed form at the end of the term or of greater value than it was at the commencement of the term. What the natural operation of time flowing on effects, and all that the elements bring about in diminishing the value constitute a loss which, as far as it results from time and nature, falls upon the landlord"; and the learned judge subsequently said, "These cases seem to me to show that if a tenant takes a house which is of such a kind that by its own inherent nature it will in course of time fall into a particular condition, the effects of that result are not within the tenant's covenant to repair. However large the words of the covenant may be, a covenant to repair a house is not a covenant to give back a different thing from that which the tenant took when he entered into the covenant. He has to repair that thing which he took; he is not obliged to make a new and different thing; and, moreover, the result of the nature and condition of the house itself, the result of time upon that state of things, is not a breach of the covenant to repair." In *Proudfoot* v. *Hart* where it was a question of the tenant's obligation under his covenant Cave, J., said, at p. 45, "So with regard to the walls, the floor, the windows, and all the different parts of the house, the tenant is bound where there is a breakage, whether arising from his own fault or from some external accident, to repair it to the best of his ability; but he is never bound where a portion of the structure has become absolutely worn out and necessary to be replaced, to substitute a new structure in the place of it. All that he undertakes to do is to patch the thing up so long as it is, in the nature of things, right and reasonable that the thing should be patched up. But when it has got to such a state that patching up is of no avail—and we know that things do at last get to that state—then the tenant is not bound to put in anything new, or to pay any proportion of the cost of putting in the new thing, because the old one has become unfit to discharge its duty." I admit that there is some difference between those cases and this; but the principle there laid down governs the law I have to apply. But it has been remarked that those cases are cases upon the liability of a lessee, and it is contended that they do not apply to the case of a lessor. There is, however, in reality no distinction between the one case and the other. If the lessee is not bound to give back to the lessor a different thing from that which was demised to him, neither, in my judgment, is the lessor bound by a similar covenant to give to the lessee for the rest of the term a different thing from that which the lessee took from him at the beginning of his tenancy. If no such distinction exists then every word of what Lord Esher said in the passage I have read applies to the present case, and regard must be had to the state of things existing on the 13th of July, 1905. The house had fallen into the condition described by Cave, J., in *Proudfoot* v. *Hart*, when patching up was of no avail. Here we have a house which from its inherent nature had fallen into such a condition that to repair it was out of the question, and it was found necessary to rebuild the front walls and the greater part of the back wall, which is not within the covenant to repair. But it is said that there is another reason why *Lister* v. *Lane & Nesham* must be put out of account. It is said that there the condition of things in that case had arisen from faulty construction of the house. But in this case also in reality the state of the house was the ultimate result of faulty construction. A house may be built to last 300 or 400 years without becoming dangerous. The state of the house resulted from the effect of time upon the materials used. In this respect also, then, *Lister* v. *Lane & Nesham* is an authority in

the defendant's favour. Then it is said that this construction will inflict hardship upon the lessee. But to construe the covenant the other way would inflict equal hardship upon the lessor, who is herself a lessee. I put aside all questions of hardship and only consider the legal effect of the covenant. Upon the principle I have stated I hold that there has been no breach of the covenant by the defendant.

Judgment for the defendant.

Solicitors, *Richardson, Sowerby, Holden, & Co.; Claremont & Haynes.*

C. C. R.
(Lord Alverstone, L.C.J., and Kennedy, Ridley, Darling, Jelf, Bray, and A. T. Lawrence, JJ.) — May 26; June 12.

REX *v.* JOHN BOND. (*a.*)

Criminal law—Medical practitioner—Illegal use of instruments—Admissibility of evidence of felonious use of similar instruments on another woman some nine months before—"Mistake" or "accident"—Offences Against the Person Act, 1861 (24 *&* 25 *Vict. c.* 100), *s.* 58.

The prisoner, a medical man, was indicted for feloniously using certain instruments on a certain woman with intent to procure her miscarriage. At the trial the prosecution called as a witness another woman, whose evidence was to the effect that some nine months previously the prisoner had used similar instruments on her, with the avowed intention of bringing about her miscarriage, and that he had then used expressions tending to show that he was in the habit of performing similar operations for the same illegal purpose. The evidence was admitted, and the prisoner was convicted.

Held (*by* Kennedy, Darling, Jelf, Bray, *and* A. T. Lawrence, JJ., Lord Alverstone, L.C.J., *and* Ridley, J., *dissenting*), *that the evidence was rightly admitted, and that the conviction must be upheld.*

Case stated by A. T. Lawrence, J., for the opinion of the Court for the Consideration of Crown Cases Reserved.

"John Bond was tried before me at Chester at the winter assizes holden for the county of Chester on the 15th and the 16th of March, 1906, on an indictment under section 58 of 24 & 25 Vict. c. 100, for feloniously using instruments upon one Ethel Annie Jones with intent thereby to procure the miscarriage of the said Ethel Annie Jones on the 20th day of October, 1905. Evidence of admissions by the prisoner of the use of instruments upon the said Ethel Annie Jones was given by the witnesses for the prosecution, but it was suggested that such use was for a lawful purpose and with no criminal intent. The evidence of one Gertrude Sandles Taylor was tendered for the prosecution to show intent. It was objected to by the learned counsel for the prisoner on the ground that such evidence was inadmissible, inasmuch as there were other indictments awaiting trial against the prisoner for offences against the same statute in respect of acts alleged to have been done by the prisoner to the said Gertrude Sandles Taylor in January, 1905, that such acts had no reference to Ethel Annie Jones and were not evidence of the intent with which the prisoner had used the instruments upon the said Ethel Annie Jones. I was of opinion, upon the authority of *Reg.* v. *Geering*, 18 L. J. M. C. 215, and the other cases cited to me, that the evidence was admissible. The evidence of Gertrude Sandles Taylor was given. A copy of my note of such evidence accompanies this case, and may be referred to as part thereof. I left the question to the jury as to whether or not the prisoner had used the instruments with the intent alleged in the indictment, and told them that unless they were satisfied he had such intent they should find him not guilty. The jury found prisoner guilty. I sentenced him to three years' penal servitude, but respited the execution of the sentence until after the decision of this case. I admitted the prisoner to bail. The question for the opinion of the court is whether the evidence of Gertrude Sandles Taylor was admissible. If the evidence was admissible the conviction is to stand, if inadmissible the conviction is to be quashed.—A. T. LAWRENCE."

The evidence of Gertrude Sandles Taylor as shown on the judge's note appended to the case sufficiently appears in the judgments.

B. Francis Williams, K.C. (*Ellis Griffith* with him), for the prisoner.—The evidence was inadmissible. The broad principle is that in order to prove that a man has been guilty of one crime evidence that he has been guilty of another is not admissible: *Reg.* v. *Rearden*, 14 W. R. 663, 4 F. & F. 76. The only exceptions to this rule are where evidence of previous criminal acts has been admitted either to show malice, to prove guilty knowledge, to negative accident, or to shew that the prisoner was acting on a system. There was no system here. Only one other case is tendered in evidence, and that cannot create a system. Nor is there any nexus or connection between the cases of the two women. The case is not within the principle of any case in which similar evidence has been admitted: *Reg.* v. *Oddy*, 5 Cox C. C. 210, 2 Den. C. C. 264; *Reg.* v. *Ollis*, 49 W. R. 76, [1900] 2 Q. B. 758; *Reg.* v. *Rhodes*, 47 W. R. 121, [1899] 1 Q. B. 77; *Reg.* v. *Francis*, 24 W. R. 663, L. R. 2 C. C. R. 128; *Reg.* v. *Geering*, 18 L. J. M. C. 215; *Makin* v. *Attorney-General of New South Wales*, [1894] A. C. 57; *Reg.* v. *Heesom*, (1878) 14 Cox C. C. 40; *Reg.* v. *Dale*, (1889) 16 Cox C. C. 703; *Reg.* v. *Holt*, (1860) 8 Cox C. C. 411; *Reg.* v. *Winslow*, (1860) 8 Cox C. C. 397; *Rex* v. *Wyatt*, 52 W. R. 285, [1904] 1 K. B. 188. The ground on which the validity of the conviction was appealed against was that the judge had wrongly admitted the evidence of Taylor. In her evidence she had said that the prisoner had told her "he had put dozens of girls right," and that the instruments he used, which she recognized as similar to those he had used on Jones, would fetch away the child. The prisoner's defence to the charge was that Jones came to him suffering from a disease in the womb which justified him using certain instruments on her, and that if the miscarriage Jones charged him with having procured was due to his having used the instruments which he admitted having used on her, the instruments were not used by him for a criminal purpose and there being no evidence of any criminal intent to procure abortion he could not have been convicted but for the evidence of this witness, which he submitted was not admissible.

Abel Thomas, K.C. (*R. V. Bankes* with him), for the prosecution.—The evidence of Gertrude Taylor is admissible as showing that the prisoner admitted that he had done the act before for the purpose of getting girls out of trouble, and is therefore evidence of the design or intent with which he used the instruments and is also evidence of a system. It is impossible to prove system except by calling evidence of specific instances. The cases are summed up in Archibald's Criminal Pleadings (23rd ed.), pp. 308, 309; Roscoe's Criminal Evidence (12th ed.), pp. 85, 86. Where

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

there is a question whether an act was accidental, the fact that such act formed part of a series of similar occurrences in each of which the person doing the act was concerned, is deemed to be relevant: Stephen's Digest of Law of Evidence (6th ed.), article 12.

He also referred to *Rex* v. *Mogg*, 4 C. & P. 364; *Reg.* v. *Dossett*, 2 C. & K. 306.

B. Francis Williams, K.C., replied.

The case was argued first before five judges who disagreed. The court, having directed the case to be re-argued on the 26th of May, was differently constituted. Walton, J., who was present at the first hearing, being absent, and Jelf, Bray, and A. T. Lawrence, JJ., being invited to attend.

Cur. adv. vult.

June 12.—Lord ALVERSTONE, L.C.J., read the following judgment: In this case the defendant was indicted under section 58 of 24 & 25 Vict. c. 100 for feloniously using instruments upon one Ethel Annie Jones on the 25th of October, 1905, with intent thereby to procure miscarriage. It was not disputed that in fact the accused had used instruments, but it was suggested that they were used for a lawful purpose and with no criminal intent. At the trial the evidence of a girl named Gertrude Taylor was tendered and admitted. The evidence of this witness was to the effect that in January, 1905, she had been staying at the house of the accused; that he had connection with her; and that subsequently thereby she was pregnant, she had informed the prisoner, and that he used instruments of the same character upon her with a view to procure miscarriage. My brother Lawrence upon the authority of *Reg.* v. *Geering*, 18 L J. M. C. 215, *Reg* v. *Dale*, 16 Cox C. C. 703, and other cases cited before him, admitted the evidence, and the question raised is whether it was rightly admitted. The general rule of law applicable in such cases can, I think, be clearly stated. It is that, apart from express statutory enactments, evidence tending to show that the accused had been guilty of criminal acts other than those covered by the indictment cannot be given unless the acts sought to be proved are so connected with the offence charged as to form part of the evidence upon which it is proved: see *Reg.* v. *Reardon*, 14 W. R. 663, 4 F. & F. 76; or are material to the question whether the acts alleged to constitute the crime were designed or accidental: see *Reg.* v. *Gray*, 14 W. R. 671, 4 F. & F. 1102; or to rebut a defence which would otherwise be open to the accused: see *Makin* v. *Attorney-General of New South Wales*, [1894] A. C. 65. As is pointed out in the last-mentioned case, the statement of these general principles is easy; in applying them it is often very difficult to draw the line and decide whether a particular piece of evidence is admissible or not. In this case it was not disputed that the prisoner had in fact used the instruments upon the girl Jones either, as he suggested, for a lawful purpose or, as it was alleged by the prosecution, for an unlawful purpose. Can it be said that the fact that he had used instruments for an unlawful purpose upon another girl some nine months before has any bearing upon the purpose for which they were used on the occasion in question? It is, I think, easy to give illustrations of cases in which such evidence would clearly be admissible, as, for instance, if the prosecution alleged that the accused was carrying on the business of an abortionist, and had with that object, and with that object only, on several occasions used instruments or provided drugs for reward or remuneration to himself, or if the purpose for which the particular instruments could be used being doubtful, it was alleged that any injury caused by such use was accidental. In such cases it seems to me that evidence of the kind would be admissible, as was recently pointed out in this court in the case of *Rex* v. *Wyatt*, 52 W. R. 285, [1904] 1 K. B. 188, following *Reg.* v. *Rhodes*, 47 W. R. 121, [1899] 1 Q. B. 77, and *Reg.* v. *Ollis*, 49 W R. 76, [1900] 2 Q B. 753, at pp. 764-8. I have grave doubt whether the circumstances of this case are sufficient to render the evidence admissible upon the principle recognized in these cases. *Primâ facie* there was no necessary connection between the act charged in the present indictment and the act alleged in the evidence admitted. It might possibly be suggested that, inasmuch as it was proved or admitted that the accused had improper intercourse with the two girls Jones and Taylor, and that both of them as the result of such intercourse had become pregnant, the evidence tended to establish a system or course of conduct on the part of the prisoner in cases in which he had got girls into trouble. I think, however, that this ground is too dangerous and not sufficient to justify the admission of the evidence. I must not, however, be supposed to decide that there might not be cases in which the evidence would have been admissible on such grounds, but this does not appear to me to be one of them. Nor does it by any means follow that evidence will be inadmissible on the ground only that it goes to prove only one other criminal act and not of a number. There may be other circumstances showing the act sought to be proved to be part of a criminal practice or system of which the criminal offence charged in the indictment formed part. The mere fact that the evidence tendered pointed to only one act is not conclusive against the admissibility. I would point out that in the case of *Reg.* v. *Geering*, *Reg.* v. *Gray*, and *Makin* v. *Attorney-General of New South Wales* the evidence was clearly admissible in order to rebut the allegation of accident or mistake. In this case assuming as I have said the grounds upon which the evidence might be admitted not to apply, the case would appear to me to resemble *Reg.* v. *Oddy*, in which, before the statute 34 & 35 Vict. c. 112, s. 19, evidence of the possession by the prisoner of property other than that charged in the indictment stolen from other persons was held not admissible. It is necessary, however, that I should refer to the case of *Reg.* v. *Dale* tried at the Central Criminal Court on the 16th of August, 1889, when, upon an indictment under this section for using a quill to bring about a miscarriage, counsel for the prosecution referred in his opening statement to evidence he intended to call to prove that the person charged had made use of a quill for a similar purpose on other occasions. Charles, J., ruled that evidence of similar acts of the prisoner practised on different women, both prior and subsequent to the offence charged in the indictment, would be admissible. If that case is to be construed to authorize the admissibility of evidence of prior acts of a similar kind when the act is admitted, and the only question is the purpose for which it was done, it goes too far. The report is very meagre, but on reference to the report in the 115th vol. Sessions Cases I observe that the question was raised during Mr. Fulton's opening, and that at the conclusion of the opening the prisoner pleaded guilty, so that the point was never formally raised and argued. It may be that in that case the evidence was admissible upon some one or other of the grounds to which I have referred. My attention has been called by my brother Kennedy to the case of *Reg.* v. *Cooper*, (1849) 3 Cox C. C. 547. In my opinion the decision in that case may clearly be supported on the ground that the evidence tended to show that the accused knew the consequences of his act. If it is

supposed to lay down a wider principle, and one which would cover this case, I do not agree with it, and I may add that it does not appear to be cited as an authority upon the point argued before us. I think it right to add that, had I thought the evidence admissible, the fact that it would have tended to establish that the accused had been guilty of another crime would not have rendered it inadmissible: see *Makin* v. *Attorney-General of New South Wales*, *Reg* v. *Rearden*, and other cases. For the above reasons I think the evidence was inadmissible, and that the conviction should be quashed, but as the majority of the court are of a different opinion the conviction will stand.

KENNEDY, J., read the following judgment: In this case John Bond was charged with attempting to procure abortion by using instruments on the body of Ethel Annie Jones on the 20th of October, 1905. The question for the decision of the Court for Crown Cases Reserved is as to the admissibility of the evidence of another woman, Gertrude Sandles Taylor, who was called as a witness to depose that the accused nine months before had been guilty of the same crime upon her, and who in the course of her examination in chief stated that he had then used language to her indicating that previously he had been guilty of the same crime in many other cases.

In my judgment the question is one of great importance as affecting the fair trial of accused persons. It may be laid down as a general rule in criminal as in civil cases that the evidence must be confined to the point in issue: Roscoe's Digest of the Law of Evidence in Criminal Cases (12th ed., 1898), pp. 78, 79. When a prisoner is charged with an offence it is of the utmost importance to him that the facts laid before the jury should consist exclusively of the transaction which forms the subject of the indictment which alone he can be expected to come prepared to answer. It is therefore a general rule that the facts proved must be strictly relevant to the particular charge and have no reference to any conduct of the prisoner unconnected with such charge; therefore it is not allowable to show on the trial on an indictment that the prisoner has a general disposition to commit the same kind of offence as that for which he stands indicted: Russell on Crimes (6th ed., 1896), vol. 3, p. 403. Thus it was resolved by all the judges nearly one hundred years ago in *Rex* v. *Cole*, 1 Mich. T. 1810, and cited from M.S. Russell on Crimes (6th ed.), vol. 3, p. 403, note (*n*), that in a prosecution for an infamous crime an admission by the prisoner that he had committed such an offence at another time and with another person, and that he has a tendency to such practices, ought not to be received in evidence. The law of England, said Lord Campbell, L.C.J., in *Reg.* v. *Oddy*, does not allow one crime to be proved in order to raise a presumption that another crime has been committed by the perpetrator of the first, and the same law has twelve years ago been restated in a judgment of the Privy Council: "It is undoubtedly not competent for the prosecution to adduce evidence tending to shew that the accused has been guilty of criminal acts other than those covered by the indictment for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried": *Makin* v. *Attorney-General of New South Wales*, [1894], A. C. 57, at p. 65. Then follows the passage on which reliance was placed by the counsel for the prosecution, but which I think it is not necessary here to quote. Nothing can so certainly be counted upon to make a prejudice against an accused upon his trial as the disclosure to the jury of other misconduct of a kind similar to that which is the subject of the indictment, and, indeed, when the crime alleged is one of a revolting character, such as the charge against Bond in the present case, and the auditor is a person who has not been trained to think judicially, the prejudice must sometimes be almost insurmountable. Therefore, if, as is plain, we have to recognize the existence of certain circumstances in which justice cannot be attained at the trial without a disclosure of prior offences, the utmost vigilance at least should be maintained in restricting the number of such cases, and in seeing that the general rule of the criminal law of England, which to the credit, in my opinion, of English justice excludes evidence of prior offences, is not broken or frittered away by the creation of novel and anomalous exceptions. So sacred in our courts has been the observance of this general rule that, on the trial of a prisoner who was indicted for stealing a shilling which had been marked and was found in his possession, evidence of the prisoner's own statement to the constable who arrested him as to his possession of the moneys of the prosecutor was ruled to be inadmissible because it related to another felony: *Reg.* v. *Butler*, (1846) 2 C. & K. 221. Equally significant, I think, has been the recognition of the general rule on the part of our Legislature. The provisions of the Criminal Evidence Act, 1898 (61 & 62 Vict. c. 36), forbid, except in special circumstances, any question as to other offences committed by the prisoner or as to his past bad character; a series of earlier statutes—including the Larceny Act, 1861, the Coinage Offences Act, 1861, and the Prevention of Crimes Act, 1871—secure that when an indictment contains a charge relating to a previous conviction as well as a charge of a subsequent offence the prisoner shall, in the first instance, be arraigned upon so much only of the indictment as charges the subsequent offence, and the jury, in the first instance, be charged only concerning the subsequent offence. When the Legislature by the Prevention of Crimes Act, 1871 (34 & 35 Vict. c. 112), s. 17, provided that, on the trial of a person charged with having received goods knowing them to be stolen or having stolen property in his possession, evidence might be given of such person having in his possession other stolen property, and that such evidence might be taken into consideration for the purpose of proving that such person knew the property to be stolen which forms the subject of the proceedings against him, it qualified this provision by limiting the evidence to property stolen within a period of twelve months preceding the prosecution, and by the words "found in prisoner's possession" made it requisite, in order to show from such evidence a guilty knowledge in the prisoner, not merely to prove that other property stolen within the preceding period of twelve months had at some time previously been dealt with by the prisoner, but also to prove that such other property was found in the prisoner's possession at the time when he was found in possession of the property which is the subject of the indictment. The established limitations of the general rule, and the apparent exceptions to it (see *Reg.* v. *Carter*, 32 W. R. 663, 12 Q. B. D. 522) at common law—to use the language of Archbold's Criminal Pleading, Evidence, and Practice (23rd ed.), p. 306—are, I venture to think, at the present time reasonably plain and referable to definite and intelligible principles, although the discussion of the present case has amply shown it is not easy to say whether a particular case falls within the rule or within the apparent exceptions. The general rule cannot be applied where the facts which constitute distinct offences are at the same time part of the transaction which is the subject of the indictment. Evidence is necessarily admissible as to acts which

are so closely and inextricably mixed up with the history of the guilty act itself as to form part of one chain of relevant circumstances, and so could not be excluded in the presentment of the case before the jury without the evidence being thereby rendered unintelligible. So in a case cited by Lord Ellenborough in *Rex* v. *Whitley*, (1804) 2 Leach 983, at p. 985, where a man committed three burglaries in one night and stole a shirt at one place and left it at another, and they were all so connected that the court heard the history of all the three burglaries. Lord Ellenborough remarked that "if several and distinct offences do so intermix and blend themselves with each other the detail of the party's whole conduct must be pursued." Instances are cited in Russell on Crimes (6th ed.), vol. 3, pp. 405-11; Archbold's Criminal Pleading (23rd ed.), pp. 307, 308. *Reg.* v. *Firth*, 17 W. R. 327, (1869) L. R. 1 C. C. R. 172, is a recent example of this class; *Reg.* v. *Rearden*, 14 W. R. 663, 4 F. & F. 76, illustrates the limitation upon the general rule in the case of rape. Willes, J., who presided at the trial in *Reg.* v. *Rearden*, cited in support of his ruling a case on the Western Circuit—a case of larceny of grain from a barn—in which he had admitted evidence of the owner of the barn that he had watched and detected several stealings by the same person. Such prior acts formed, in point of historical and circumstantial connection, inseparable parts of the transaction which the jury had to investigate. Within this same limitation I think come the cases of trials for murder and wounding with felonious intent, in which evidence is admissible to show prior assaults by the prisoner upon the murdered or injured person or menaces uttered to him by the prisoner, or to show conversely irritating behaviour by the deceased to the prisoner, as in *Reg.* v. *Hagan*, (1873) 12 Cox C. C. 357. The relation of the murdered or injured man to his assailant, so far as it may reasonably be treated as explanatory of the conduct of the accused as charged in the indictment, is properly admitted to proof as an integral part of the history of the alleged crime for which the accused is on his trial.

In my view, if we pass from the consideration of the necessary limitations which I have just illustrated, we shall find that the cases to which Archbold refers as apparent exceptions at common law to the general rule are cases in which evidence of transactions other than that which forms the subject of the indictment has been admitted as relevant to the issue as negativing the defence of accident or mistake in cases in which accident or mistake, if proved, would constitute a complete defence to the accusation. This is, I think, the principle upon which, in the group of reported murder cases, of which *Reg.* v. *Geering*, 18 L. J. M. C. 215; *Reg.* v. *Cotton*, (1873) 12 Cox C. C. 409; *Reg.* v. *Roden*, 12 Cox C. C. 630; and *Makin* v. *Attorney-General of New South Wales*, [1894] A. C. 57, are familiar examples, evidence has been held admissible to prove the happening of like fatalities to persons other than the person with whose murder the prisoner is charged under circumstances in which these other fatalities may reasonably be connected with action on the part of the prisoner. *Reg* v. *Geering* may be taken as a type. On an indictment against a prisoner for the murder of her husband by arsenic in September, 1840, evidence was tendered by the prosecution of arsenic having been taken by the prisoner's two sons, one of whom died in December and the other in March subsequently, and also by a third son, who took arsenic in April following, but did not die. Proof was given of a similarity of symptoms in the four cases. Evidence was also tendered that the prisoner lived in the same house with her husband and sons, that she prepared their tea, cooked their victuals, and distributed them to the four parties. Held, that this evidence was admissible for the purpose of proving—first, that the deceased husband actually died of arsenic; secondly, that his death was not accidental; and that it was not inadmissible by reason of its tendency to prove or create a suspicion of a subsequent felony. In *Makin* v. *Attorney-General of New South Wales* the judgment of the Privy Council expressly approved the ruling in *Reg.* v. *Geering*, after a review of the cases; Lord Herschell, L.C. (who delivered judgment), remarking that it could not be denied that the decisions had not been completely in accord, and disapproving of the contrary ruling in *Reg.* v. *Winslow*, 8 Cox 397. It is really upon the same grounds that in a large number of cases, other than cases of murder, evidence of other prior acts of the prisoner, possibly themselves constituting crimes of the same nature as the charge upon which the prisoner is on his trial, has been admitted, although these prior acts do not historically form part of the circumstances of that charge. Here again the evidence has been admitted as negativing accident or mistake in regard to the occurrence which is the subject of the indictment. In all these cases it will, I think, be found that the occurrences of which evidence was admitted were occurrences connected with conduct on the part of the accused, so repeated and so closely linked in point of time as well as character with the offence for which the prisoner was on his trial, that according to the test of justice as well as of common sense there could be no serious challenge of its relevancy to the issue as to accident or mistake on the part of the accused in the particular case which formed the subject of the indictment. "When there is a question whether the act was accidental, the fact that such act formed part of a series of similar occurrences in each of which the person doing the act was concerned, is deemed to be relevant": Stephen's Digest of the Law of Evidence, art. 12. The principle was clearly stated by Lord Russell of Killowen, L.C.J., when delivering the judgment of this court in *Reg* v. *Rhodes*, 47 W. R. 121, [1899] 1 Q. B. 77, at p. 82. He quotes with approval the judgment of Lord Coleridge, L.C.J., in *Reg.* v. *Francis*, 22 W. R. 663, (1874) L. R. 2 C. C. R. 128. The evidence "tends to show that he was pursuing a course of similar acts, and thereby it raises a presumption that he was not acting under a mistake. It is not conclusive, for a man may be many times under a similar mistake, or may be many times the dupe of another; but it is less likely he should be so often, than once, and every circumstance which shows he was not under a mistake on any of these occasions strengthens the presumption that he was not on the last, and this is amply borne out by authority." So in a later case cited in argument in the present case—*Reg.* v. *Ollis*, 49 W. R. 76, [1900] 2 K. B. 758—Wright, J., expounded the principle in similar terms, dwelling upon the importance of the element of nearness in point of time and circumstance in determining the relevancy, and therefore the admissibility, of the evidence as to the acts of the accused. "The evidence," said the learned judge, "tended to show that the conduct of the prisoner in tendering drafts on a bank at which he had no living account was not inadvertent or accidental, but was part of a systematic fraud extending over a period immediately preceding and following the date of the offence charged, and the case in this respect seems to me to be governed by *Reg.* v. *Francis* and *Reg.* v. *Rhodes*." Bruce, J., one of the dissenting judges in the same case of *Reg.* v. *Ollis*, lays down the law to the like effect with even greater strictness—[1900] 2 Q. B., at p. 774: "A line of cases has

established the rule that when it becomes material to establish that an act charged in the indictment, and proved to have been done, was intentional and not accidental, evidence is admissible of similar acts done by the same person having no bearing upon or connection with the acts charged in the indictment save that the acts are similar and done by the same person. This rule is sometimes stated, I think accurately, to be a rule which admits indirect evidence of this class to prove guilty knowledge. The evidence is, I believe, admissible under the rule I have mentioned only on the ground that it tends to negative mistake or accident. It is quite true that in many cases to negative mistake or accident is to leave no other alternative but that the act was intentionally done with a criminal intent. But the ground on which this indirect evidence is admissible is that it tends to negative mistake or accident."

It is in strict accordance with the principles enunciated by the authorities that evidence of conduct of the prisoner on other occasions was admitted in cases of arson: *R.* v. *Gray*, 14 W. R. 671, 4 F. & F. 1102; of embezzlement: *R.* v. *Richardson*, (1860) 2 F. & F. 343; of false pretences: *R.* v. *Francis*, 22 W. R. 663, L. R 2 C. C. 128, and *R.* v. *Rhodes*, 47 W. R. 121, [1899] 1 Q. B. 77; of coining: *R.* v. *Fuller*, (1816) R. & R. 30, and *R.* v. *Weeks*, 9 W. R. 553, 30 L. J. M. C. 141; of forgery: *R.* v. *Whiley* (1804) 2 Leach 983, and *R.* v. *Colclough*, (1882) 15 Cox C. C. 92; of obtaining credit by fraud: *R.* v. *Wyatt*, 52 W. R. 285, [1904] 1 K. B. 188.

In all these cases it was necessary to negative accident or mistake; in all of them the multiplication of similar acts having some connection in time and circumstance and nature to the act which was the subject-matter of the trial was admitted to proof as evidence showing systematic conduct of the prisoner at the time of the offence charged against him, and, therefore, negativing accident or mistake on his part in the last case. But it must be admitted that apart from judicial *dicta* which, although deserving of respect, cannot be treated with the weight which attaches to a decision, I believe that these principles which I have been indicating govern most of the cases cited for the prosecution. There is authority which, speaking for myself, I am not prepared to overrule, that when the question of criminal intent is material, then although in strictness perhaps the case is not one of disproving merely accident or mistake, evidence of prior occurrences subject to the conditions which I have just mentioned may become admissible against against the prisoner. I say this with special regard to the authority of *Reg.* v. *Cooper*, (1848) 3 Cox C. C. 547, a case which has never been dissented from and in which the point was fully argued before Cresswell, J. It was not cited to us in argument, and therefore I think it well to state the salient facts and the reasoning of the eminent judge who presided at the trial which renders the case peculiarly relevant to the matter now before us, because he takes the case of a charge of abortion as an illustration of the admissibility of a number of similar acts to negative innocence of intent. The prisoner was charged with accusing a person of an unnatural crime with intent to extort money, and in the course of the trial an argument arose as to the admissibility of a question whether one of the witnesses had seen the prisoner, who was a soldier, come off guard on former occasions with money in his possession, and as to what he said as to the means by which he had obtained that money, and Cresswell, J., said, at pp. 549-550 of that report: "The evidence is not offered by way of proving simply that the prisoner had been guilty of the same crime before. The question is, whether on this occasion he did an act with a design of effecting a certain object. One step in the proof is to show that he would be likely to know that a certain result would follow. . . . Suppose a charge against a man that he had attempted to procure abortion; the same medicine might be administered with that intention or without it. If it could be proved that he had often given that medicine before, and that he knew that abortion had always followed, surely that would be evidence against him."

In the present case, as it appears to me, there is not in strictness a question of accident or mistake. It was not disputed that the accused, a qualified surgeon, as I understand the facts, but not at the time in active practice, had used the surgical instruments upon Ethel Annie Jones. Did he use them for a lawful or for an unlawful purpose? That was the sole issue. In other words, had he or had he not in using them the *mens rea*? In my opinion if the evidence here had consisted solely of the single act alleged by the witness Gertrude Taylor to have been done to her nine months before, it ought not to have been admitted. Such a single isolated act is not just ground for any inference, and an act from which no inference can justly be drawn ought not to be allowed to be before the jury. If such evidence were admissible, then in all cases involving the issue of *mens rea* (and most serious crimes do involve it), as it seems to me, it would be permissible to show that on any previous occasion within any reasonable limit of time the prisoner had been guilty of similar misconduct, and in effect we should be doing that which would be unfair to the accused, and which Lord Campbell condemned as proving one crime in order to raise a presumption that another crime had been committed by the perpetrator of the first. Peculiarly dangerous and to my mind unfair to the accused would the admission of such a single act be in the present case. The evidence which directly implicates the accused is the evidence of a woman who was herself party to the alleged crime, one who was morally, if not in the strict legal sense, an accomplice of the accused person. She was an adult person who knew, according to her account, for what purpose the operation was to be performed, and consented to its performance. The evidence which was admitted, and in regard to which the question for this court has arisen, was the evidence of a witness who, if her evidence was true, also was a consenting party to the illegal operation which the prisoner performed upon her, and so far an accomplice in his criminal conduct. It is needless to dwell upon the danger to innocence of evidence of this description. But the evidence given by Taylor was not confined to evidence of this single act. It included a statement by the prisoner to Taylor which might fairly be interpreted to mean that he had successfully performed a similar operation upon dozens of girls with similar instruments. In other words, that he had often used the same instruments before and had always found that abortion followed. Upon the reasoning of Cresswell, J., in *Reg.* v. *Cooper*, and upon the authority of that judgment it appears to me that such evidence is admissible, and that the ruling of Charles, J., in *Reg.* v. *Dale*, in which it was proposed to prove repeated acts of the same nature over a period including the period of crime, as well as the ruling of my brother A. T. Lawrence in this case, may be upheld.

RIDLEY, J.—I have had the opportunity of reading the judgment which has been delivered by my lord, and, as I thoroughly agree with both its reasoning and its result, I think it is unnecessary to give a judgment of my own.

DARLING, J., read the following judgment, in which, after stating the facts, he said: The direct

effect of Taylor's evidence is to prove that the defendant had been guilty of another crime than that charged in the indictment but similar in character. Now it is not to rejected on that ground. I have tried to ascertain the principle which must be relied upon as justifying its acceptance or rejection, and I find it in Foster's Crown Law, Discourse I., p. 246, where it is said: "The rule of rejecting all manner of evidence in criminal prosecutions that is foreign to the point in issue is founded on sound sense and common justice. For no man is bound at the peril of life or liberty, fortune or reputation, to answer at once and unprepared for every action of his life." The same rule is thus expressed by Lord Campbell in *Oddy's case*: "The law of England does not allow one crime to be proved in order to raise a probability that another crime has been committed by the perpetrator of the first." That he was speaking of a crime, evidence as to which would have been altogether "foreign to the point in issue"—to use Foster's phrase—appears, I think, by this observation of his lordship made in the course of counsel's argument: "In the French courts the case against an accused person is often commenced by evidence that he had previously committed offences of the same sort as that which forms the subject of inquiry. But it is not the practice of our law." Now the reason for the practice in the French courts of admitting evidence of many matters which we should certainly describe as "foreign to the point at issue" is that the Code d'Instruction Criminelle (Liv. 2, Tit. 9, s. 241) provides: "L'acte d'accusation exposera 1° la nature du délit qui forme la base de l'accusation: 2° le fait et toutes les circonstances qui peuvent aggraver ou diminuer la peine." By this means various matters are in France laid before the jury which have no connection with the crime charged, but are such, as in England, are brought to the knowledge of the judge alone (perhaps by means of the calendar) or are proved after verdict. The jury in France then find the fact with extenuating or aggravating circumstances for the purpose of affecting the sentence, which is heavier on an habitual evil liver.

I should greatly regret a close assimilation of our criminal procedure to that of France, but I think it well to note that the French rules as to evidence necessarily differ from ours by reason of the wide difference between the functions of judges and juries under French and English law. Indeed, it can hardly be said that in our sense the French courts are bound by rules of evidence at all. Yet subject to observance of the rule as laid down by Foster our law does undoubtedly allow evidence of another crime in order to negative some possible defence, such as accident or mistake, or to show a systematic course of conduct or guilty knowledge where that is material For each of these propositions there is ample authority in *Reg.* v. *Geering*, *Reg.* v. *Rhodes*, *Reg.* v. *Weeks*, *Reg.* v. *Francis*, and *Reg* v. *Wyatt*.

Still, it has been argued that such evidence may not be admitted to prove intent. It cannot be said that no evidence is admissible to prove intent, for declarations of a defendant's intention and unequivocal acts of his are every day given in evidence with that object. Moreover, accident is negatived merely in order to prove design which involves intent. System is proved for the same reason, and proof of scienter is merely a step towards that end. I do not quote a number of cases which have been decided on this point, because very many of them were reviewed in the case of *Makin* v. *Attorney-General of New South Wales*, and the Lord Chancellor there said: "It cannot be denied that the decisions have not always been completely in accord." In the same case, however, he thus laid down the law in delivering the judgment of the Privy Council: "It is undoubtedly not competent for the prosecution to adduce evidence tending to shew that the accused has been guilty of criminal acts other than those covered by the indictment for the purpose of leading to the conclusion that the accused person is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to shew the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental or to rebut a defence which would otherwise be open to the accused." I do not suppose that Lord Herschell meant that such evidence might be called to rebut any defence possibly open, but of an intention to rely on which there was no probability whatever. Here, however, the evidence objected to was called to overthrow a defence already set up and admitted to be the defendant's answer to the charge. It appears that the defence adopted by the defendant in this case was that he was performing a lawful operation in using instruments adapted to procure abortion. Where ignorance is the defence relied on, the cases I have cited shew that evidence is admissible to prove knowledge—where accident is suggested as a defence, evidence is equally admissible to disprove ignorance by showing design—and it follows that such evidence may go to prove further what particular design actuated the perpetrator of the act. Such evidence assuredly cannot be inadmissible merely because it is more cogent is so far as it shows not only the existence of some design, but also precisely what that design was. Here the defence suggested was that the act charged was done designedly, but that the design was lawful, and the reason of its being so is indicated. Then this evidence is tendered by the prosecution to the effect that, on another woman pregnant by him, the defendant had performed a similar act or operation with like instruments, and had then stated in effect that his design on that occasion was unlawful—viz., to procure abortion. In my opinion this evidence of Taylor is not irrelevant or foreign to the point in issue—that issue being, not what he did do, but with what object did he do it. That issue involves the state of his knowledge or belief as to the effect of such an operation. Taylor's evidence went to prove that, contrary to the defendant's allegation in defence as to his being engaged in doing a lawful act, he was doing a thing which, in his view, was apt to procure abortion, and that because it was so he had already done it with that unlawful avowed knowledge and purpose. This evidence, therefore, tends to prove that the defendant had in repeating his former conduct an intention different from that alleged by him in his defence, so it is not foreign to the point of it nor less relevant because it goes to prove the charge in the indictment. I have not affected to judge whether the case of *Reg.* v. *Dale* was rightly decided; for I do not think it necessary to rely upon that decision of Charles, J., in order to uphold this conviction. But even were that ruling wrong, I think this conviction can still be sustained. Nor does it appear to me advisable to strive for increase in the technicality of our rules of evidence so as to narrow yet more the approaches to the source of justice. Our law already, and for good reason, undoubtedly excludes evidence of many matters which anyone in his own daily affairs of moment would regard as important in coming to a decision. The observations of Lord Campbell show that much would be excluded at a trial merely because the defendant would in the then state of the law have found it hard to bring evidence in contradiction.

Now when the application of this doctrine is contended for, it seems to me important to bear in mind that a defendant on a criminal charge might not in Lord Campbell's day give evidence, nor could his wife. These disabilities no longer exist, and, provided he have due notice, an accused person may fairly be confronted with evidence relevant to the issue now that he may give his own testimony, although it would have been hard to admit it when the witness-box was forbidden to him. I believe that to quash this conviction would necessitate the interpretation of our rules of evidence so in favour of the accused as to exclude such proof of guilty knowledge as hitherto has been admissible, and might perhaps give occasion for the repetition of the bitter saying, "Il s'en faut bien que l'innocence trouve autant de protection que la crime."

Since writing my judgment I have had the advantage of reading my brother Bray's judgment, and I agree that the conviction can also be sustained for the reasons he gives to that effect.

The following judgment (written by JELF, J.) was read by BRAY, J.: "I am of opinion that the evidence was admissible, and that the conviction ought to stand. It is no doubt contrary to the law of this country (as it is repugnant to the British sense of justice) to admit against a prisoner who is on his trial for one offence evidence that he has on another occasion committed another, or even a similar offence, merely with the object of showing that he is on that account a person more likely to have committed the offence with which he is charged, except (and the exception is significant) that, if a prisoner endeavour to establish a good character as making it improbable that he should have committed the crime charged against him, the prosecution may rebut this inference by proving even a previous conviction: see as to this exception the cases collected in Archbold's Criminal Pleadings (23rd ed.), p. 313. But it often happens, both in civil and criminal cases, that evidence is tendered on several alternative grounds, and yet it is never objected that if on any ground it is admissible, that ground must not prevail, because on some other ground it would be inadmissible and prejudicial. In such cases it is usual for the judge (not always very successfully) to caution the jury against being biassed by treating the evidence in the objectionable sense. Now in regard to the class of evidence with which we have to deal, I think we all agree that the touchstone by which the evidence in question in the present case is to be deemed admissible or not is most carefully defined in the judgment of Lord Herschell in *Makin* v. *Attorney-General of New South Wales*, expressly approved and adopted ten years later by the Court for the Consideration of Crown Cases Reserved in *Rex* v. *Wyatt*. Those cases crystallize the doctrine laid down in the long series of decisions which have been cited to us—namely, that (apart from legislative enactments which deal with certain special cases) the common law test of admissibility is that "the evidence adduced is relevant to an issue before the jury," it being added that "it may be so revelant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would be otherwise open to the accused." The judgment in *Rex* v. *Wyatt* applies to that case the description of evidence spoken of by Lord Herschell in these words: "The evidence objected to was clearly admissible as tending to establish a systematic course of conduct on the part of the accused and as negativing any accident or mistake or the existence of any reasonable or honest motive." These last words are equivalent to and confirm Lord Herschell's expression "to rebut a defence which would be otherwise open to the accused." Now in the present case the use of the instruments upon Ethel Jones was admitted, but it was suggested on the prisoner's behalf that the use was for a lawful purpose, and not with any criminal design. In effect the prisoner set up the defence, "In using the instruments I had no design to procure a miscarriage; if the thing which I did procured or tended to procure a miscarriage" (a fact which I do not understand to have been denied) "that came about accidentally, and not designedly." This surely was "a defence open to the accused" which the prosecution might rebut—a defence, at all events, clearly *ejusdem generis* with the particular defences mentioned by Lord Herschell. It asserted "the existence of a reasonable or honest motive" which the prosecution might "negative." And upon the question whether there was or was not a design on the prisoner's part to procure the miscarriage of Ethel Jones evidence that on any other occasion he had done the same thing with similar instruments under similar circumstances with that design upon another girl seems to me to have a distinct bearing. The fact that only one other case was brought forward, and that case nine months old, goes, in my mind, only to the weight, and not to the admissibility, of the evidence. The subject of inquiry is the state of mind of the prisoner when he used the instruments upon Ethel Jones, and the improbability that on one occasion under precisely similar circumstances he should have the design to procure a miscarriage, and on the other occasion should have another and innocent object, would tend to show (and that is all that is necessary) that he had the bad design in regard to Ethel Jones. Of course, if instances are multiplied, the weight of the evidence is greatly increased, and if a system is shown may be irresistible. But to my mind it is quite unnecessary to show a system, which is only a question of degree. If it were necessary to go beyond the two instances, this can generally only be done by proving a series of instances, and if the opposite view prevails it would be impossible to prove such series, as the first instance (besides the one charged) would be shut out *in limine*, or else the court would have to decide according to the statement of counsel as to what he expected to be able to prove, and after they have admitted evidence of the first instance the rest might break down. In short, I cannot think that the admissibility of the evidence can depend upon the accuracy or astuteness of counsel's opening statement. If he tenders the evidence mainly on the right ground the ultimate bearing of it must depend upon what it turns out to be. For instance, if it wholly fails to come up to the proof suggested, it ought to be expunged, and in some cases, owing to the prejudice created by its inadvertent admission, the jury might have to be discharged and the case tried before a fresh jury. If the proof of the evidence afterwards given by Gertrude Taylor had been handed up to the judge he would, I think, have been bound to admit it. And this leads me to a final point, on which, if necessary, this case might be rested. While to my mind it is not necessary to prove a system, yet the evidence of Gertrude Taylor does abundantly prove a system on the part of the prisoner to procure miscarriage on girls in the way described. For when she said she was in the family way he said he would "put her all right," and proceeded to use these instruments, saying also on the same subject that "he had put dozens of girls right." If this does not establish against the prisoner out of his own mouth that he was systematically guilty of the crime which he was charged with committing against Ethel Jones, I fail to see what evidence would suffice. For all these reasons I think the

evidence was quite rightly admitted by my brother A. T. Lawrence, and that the conviction should be affirmed.

BRAY, J.—I will now read my own judgment. It is unnecessary for me to recapitulate the facts, as they have been already fully stated, and I come at once to the question whether the evidence of Gertrude Taylor was admissible. A careful examination of the cases where evidence of this kind has been admitted shows that they may be grouped under three heads: (1) Where the prosecution seeks to prove a system or course of conduct. (2) Where the prosecution seeks to rebut a suggestion on the part of the prisoner of accident or mistake. (3) Where the prosecution seeks to prove knowledge by the prisoner of some fact. The case of *Blake* v. *Albion Life Assurance*, 27 W. R. 321, (1879) 4 C. P. D. 94—a civil case—will illustrate the first class. Lord Lindley says at p. 106: "Nothing would seem, at first sight, more plain and straightforward, and there would be no appearance of fraud; but then the plaintiff proposed to adduce evidence to show that the transaction was one of a fraudulent class. Was he, or was he not, to be precluded from doing it? . . . The answer to the objection that evidence of frauds on other persons cannot be admitted, is that this transaction is one of a class, that there are features in common, the features in common being the false pretence and a knowledge of that false pretence on the part of the defendant company, and the moment that is shown the plaintiff's case is established." The word system implies a connection between the acts of which evidence is sought to be given and the act with which the prisoner is charged. A number of acts of theft do not as a rule consititute a system. They are isolated acts having no connection with one another. On the other hand, the transactions of a long firm are the result of a formulated scheme and part of a system. The ground on which in cases of this class evidence is admitted of acts not charged in the indictment is, in my opinion, that the case which the prosecution seeks to prove is that prisoner has in his mind a scheme or plan (say) for obtaining money by fraud, that the act with which the prisoner is charged is part of a planned fraud, and that the other acts of which evidence is sought to be given, when proved, will show the existence of the plan, and, therefore, the guilty mind of the prisoner. Other cases of this class are *Reg* v. *Rhodes* and *Reg.* v. *Ollis* (where see the judgment of Wright, J.). *Reg.* v. *Oddy*, on the other hand, shows that where there was no system and no connection between the acts the evidence is not admissible: see also *Reg.* v. *Holt*, (1860) 1 Bell C. C. 280. Of the second class *Reg.* v. *Geering* is a good example. In order to show that the prisoner administered the poison for the purpose of killing her husband the prosecution required to negative accident or mistake. For this purpose evidence was admitted of the death of two of the prisoner's sons from the same poison about the same time and while they were living with the prisoner and had eaten food prepared by her. The principle on which this evidence was admitted is not expressly stated further than by saying that it was admissible to disprove accident or mistake, but it obviously is this: If there had been but one case charged in the indictment it was possible, though not probable, that the arsenic might have got into the food by accident or mistake, but when two other cases are proved where death happened on previous occasions to two other inmates under similar circumstances, accident or mistake becomes so improbable as to be almost impossible. The proof of each additional case increases the improbability of accident or mistake, and therefore tends to disprove it. It was necessary, of course, to show that the other deaths happened under similar circumstances, but it was not necessary to prove a system or that the prisoner had conceived a plan to poison all her family. One other death under similar circumstances would tend to show the improbability of accident or mistake, and would on that ground be admissible. There are several other cases decided on the same principle, such as *Makin* v. *Attorney-General of New South Wales*, *Reg.* v. *Dorsett*, 2 C. & K. 306, *Reg.* v. *Gray*, and *Reg.* v. *Francis*, and the cases of uttering counterfeit coin will come under the third class, and to some extent also fall within the other two classes. It was necessary for the prosecution to show that the prisoner knew that the articles of jewellery which he was pawning, or endeavouring to pawn, were false, and that the coin he was uttering was counterfeit; and one other act beyond the acts charged in the indictment might tend to prove knowledge, and would therefore be admissible. It remains to be considered whether the evidence of Gertrude Taylor comes within any of these three classes. I will take the third class first. The prosecution no doubt had to prove that the prisoner knew that these instruments which he used were capable of being used for the purpose of procuring abortion, and the evidence of Gertrude Taylor went to prove such knowledge on the part of the prisoner; but the case does not show that the knowledge of the prisoner was here really in dispute, and if the prosecution had claimed at the trial that the evidence should be admitted on these grounds, I think the prisoner's counsel would have stated that it was no part of his defence that the prisoner did not know, and that his case was that the prisoner was a doctor, and, therefore, of course, knew that such instruments might be used to procure abortion as well as for lawful and proper purposes, and that the whole question was whether they were in fact used for an unlawful purpose. In that event I think the evidence would not have been admissible. The prosecution could not under such circumstances as those say that the evidence was required to prove knowledge; it would be obvious that it was wanted for some other purpose. I think, bearing in mind the strong prejudice that would necessarily be created in the minds of the jury by evidence of this class, which shows that the prisoner has been guilty on another occasion of a similar offence, the greatest care ought to be taken to reject such evidence, unless it is plainly necessary to prove something which is really in issue. It is true that in *Makin* v. *Attorney-General of New South Wales* Lord Herschell says, at p. 65, "or to rebut a defence which would otherwise be open to the accused"; but I do not think his mind was directed to such a case as I have assumed, and indeed it could hardly be said that such a defence would be open after such a statement from the prisoner's counsel. In my opinion, if the prosecution sought to justify the admission of the evidence of Gertrude Taylor solely on this ground, we ought to hold that it was not admissible. I come now to the second class. In my opinion it cannot be said that this evidence went to negative accident or mistake in the case charged in the indictment. The prisoner's case was that he used these instruments for a lawful purpose and not by accident or mistake. It was said, however, that, according to the prisoner's case, miscarriage followed accidentally the use of these instruments, and that is true; but in Taylor's case miscarriage did not follow the use of these instruments, and her evidence did not tend to show that such instruments might not have been lawfully used. It merely showed that in her case they were used with an unlawful intention, but without any result. I see nothing inconsistent in a doctor one day using these instruments for an unlawful purpose

and in another case many months afterwards using them for a lawful purpose, unless you can show a course of conduct, and not merely one or two isolated cases. It follows, from what I have stated, that if the evidence of Taylor was admissible it must be because it falls under the first class. It is here that, in my opinion, the principal difficulty arises. I have no doubt that, according to the principles laid down in cases in this class, it would be permissible to call evidence to show that the prisoner carried on the business of an abortionist, but I think it would also be permissible to show something perhaps a little short of this—viz., that he was in the habit of treating women in a state of pregnancy with a view to procure abortion. I think this would be a system or course of conduct within the cases. But I do not think that the proof of but one similar case, without any special connection with the case charged in the indictment, would prove, or indeed would be evidence of, such a system. Of course it may be said that if two cases will not do, how many will? But this is a difficulty which always arises in such cases. To prove that a man was twice drunk and nothing more will not prove that he is an habitual drunkard. I think, when evidence of this class is tendered, the judge should require an assurance from the counsel for the prosecution that in his opinion he has evidence of a sufficient number of cases to prove a system. In criminal trials no real difficulty can arise, because the judge has before him the depositions of the witnesses called before the magistrates and the proofs of any additional witnesses proposed to be called. He can therefore see for himself whether the evidence is sufficient; and before admitting evidence of this kind the judge should satisfy himself that the evidence tendered will, if true, establish, or tend to establish, what I have called a system. If, therefore, all that Taylor proved was that the prisoner had attempted to procure abortion in her case, such evidence should not, for the reason stated, have been admitted. In my opinion, however, Taylor's evidence, when looked at, went, if true, to prove much more. Mr. Thomas called our attention to her statement that the prisoner had told her "that he had put dozens of girls right," and to other statements that she said he had made, viz., "that he was a doctor and would put me all right," and "that it"—referring to the instrument—"would fetch it away." In my opinion Taylor's evidence, when looked at as a whole, is evidence of a system on the part of the prisoner. It may be said that such evidence as this from a girl of bad reputation may be untrue and nearly worthless, and so it may be in some cases, though not here, but it is evidence which must be weighed by the jury. When once it is seen that a part of her evidence tends to shew a system, the whole evidence becomes admissible. When evidence has been given of a system it becomes permissible then to prove any case which forms part of the system, and the operations which the prisoner attempted on her tended to corroborate the evidence she gave as to the statements he made to her. Therefore the whole of Taylor's evidence was admissible. But it is said that it was not tendered on this particular ground, and Mr. Thomas very fairly admitted that he did not expressly put forward this argument. This admission of Mr. Thomas, however, forms no good ground for quashing the conviction if we can see that no ground for its rejection could have been successfully put forward by the counsel for the prisoner. The case states—and, in my opinion, rightly states—that if the evidence was admissible the conviction is to stand. Further, it does not state, and, in my opinion, also rightly, any particular ground as the ground on which the evidence was either tendered or admitted. The standing or quashing of the conviction ought not to depend on whether the counsel for the prosecution put forward the right or the wrong ground. If there was a right ground on which this evidence could be admitted, no injustice has been done to the prisoner by admitting it, and to allow the prisoner to escape owing to a possible mistake—and I do not admit that there was a mistake—on the part of the prosecuting counsel would be to allow him to escape on the merest technicality, and would work great injustice. My answer, therefore, to the question asked in the case—viz., whether this evidence was admissible, must be in the affirmative, and that the conviction should stand. Since writing this judgment my attention has been called by my brother Kennedy to the case of *Reg.* v. *Cooper*, which, though not precisely in point, I think strongly confirms the opinion I have given. Cresswell, J., sums up the position when he says: "His whole conduct is to be interpreted with reference to the charge made against him, and I think what was said by him under similar circumstances to the present is admissible."

The judgment of A. T. LAWRENCE, J., was read by DARLING, J., as follows: I am of opinion that the evidence of the girl Taylor was admissible, and that the conviction should be affirmed. The general rule is stated by Lord Herschell in these terms: "It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental or to rebut a defence which would otherwise be open to the accused." The relevance depends upon the issues actually in contest; whenever it is in issue whether the prisoner, though he did the act alleged, did it without any intention—*i.e.*, accidentally, or without any criminal intention—*i.e.*, innocently, such evidence may be given.

By showing that the prisoner did an act of the same character under similar circumstances on other occasions accident becomes improbable. That the same accident should repeatedly occur to the same person is unusual, especially so when it confers a benefit on him.

The degree of improbability will depend upon the number of times it is shown to have occurred and the similarity of the circumstances on each occasion. If the act charged is manifestly an intentional act, but the defence is that it was honestly or properly done, such evidence is admissible to rebut this defence by showing knowledge of some fact essential to guilty knowledge or by showing that in other cases similar acts have been committed by the prisoner by the like means under the like circumstances.

The number and the peculiarity of the circumstances tend to show the improbability of the innocent intention.

It is for this reason that in cases of fraud, where it is necessary to show a fraudulent intent in the prisoner, that other acts of the like character are briefly described as a system. There is no special rule of the law of evidence applicable to accident or to system. These are merely convenient phrases indicative of cases in which evidence of this character is admissible. A system is not necessarily criminal—

most men carry on business on a system; they may even be said to live on a system. Where, however, acts are of a character that, taken alone, may be innocent, but which result in benefit or reward to the actor and loss or suffering to the patient, repeated instances of such acts at least show that experience has fully informed the actor of all their elements and details, and it is only reasonable to infer that the act is designed and intentional, and its motive the benefit or reward to himself or the loss or suffering to some third person.

The mind of the prisoner can only be revealed by his words or by his acts. It is in many cases impossible to form a sound conclusion upon the state of his mind at a given moment, unless his words and acts under similar circumstances are subjected to investigation. It is for this reason that I think the words of Lord Herschell—"to rebut a defence which would otherwise be open to the accused"—are an essential part of the proposition of the law.

This idea is also expressed by Lord Alverstone, L.C.J., in *Rex* v. *Wyatt* when he says that such such evidence is admissible "as negativing any accident or mistake or the existence of any reasonable or honest motive."

Any statement of the law which omits this latter part of the proposition would seriously cramp the administration of justice, and cannot be supported upon principle.

Roscoe in his Digest of Evidence in Criminal Cases (12th ed.), p. 80, says: "There are cases in which much greater latitude is permitted, and evidence is allowed to be given of the prisoner's conduct on other occasions, where it has no other connection with the charge under inquiry than that it tends to throw light on what were his motives and intention in doing the act complained of."

The authorities, in my opinion, support this view.

In *Blake* v. *Albion Life Assurance Society* it was necessary to show that the defendant company knew of the fraud of Howard at the time they received the plaintiff's money. The acts of the company towards the plaintiff were all, taken alone, ordinary business transactions; in order to show knowledge of the fraud it was necessary to show that they had had other transactions of a similar character with other persons, and that "Howard" was sometimes "Gard," and sometimes "Rogers" and other assumed names, but that on each occasion the premium went to the company and no loan to the assured. In *Reg.* v. *Francis* guilty knowledge that a certain ring was falsely described as a diamond ring was shown by evidence of a previous dealing with a chain and several attempts to deal with other rings within a short space of time. Here the connection between the several acts lay in the nature of the goods, trinkets or jewellery, and the class of persons defrauded or attempted to be defrauded—viz., pawnbrokers. This rendered a plan or scheme of fraud probable.

In *Reg.* v. *Rhodes* evidence of two instances of obtaining eggs by the false pretence of an advertisement was admitted, although these eggs were obtained subsequently to the acts charged in the indictment. The business to which this advertisement related was said by the prosecution to be a sham or bogus business, and these two instances were held to throw a light back upon the prisoner's state of mind when he obtained the eggs for which he was indicted, the nexus or connection being the same advertisement of the same business.

In *Reg.* v. *Ollis* the prisoner was charged with obtaining money by false pretences on three cheques on the 24th of June, the 26th of June, and the 6th of July. At the trial evidence was admitted relating to a cheque which the prisoner was alleged to have obtained fraudulently by giving another valueless cheque dated the 5th of July for it. The prisoner had already been tried and acquitted of this fraud. It was held to be rightly admitted as evidence of guilty knowledge. Bruce, J., differed because he considered the important question was the prisoner's knowledge of the state of his banking account, and it was not shown that the cheque of the 5th of July had been returned dishonoured before the 6th of July, when he gave the last of the cheques mentioned in the indictment.

Inasmuch as the prisoner had been adjudicated a bankrupt in the previous May, and the account at the bank upon which all the cheques were drawn showed a credit balance of only 3s. 6d., and nothing had been paid into or drawn out of it for three years, the majority of the court thought the evidence admissible, Lord Russell of Killowen, L.C.J., saying that the criticism of Bruce, J., went rather to the weight of the evidence than to its admissibility.

In *Reg.* v. *Wyatt* the prisoner was charged with obtaining credit (for lodgings and food) by fraud. Evidence was admitted of his having obtained lodgings, &c., at several other places and having left without paying for them.

Evidence of the same character has been admitted for many years in coining cases, in uttered forged documents, in embezzlement, and in murder.

The cases relied upon as opposed to this view are not so when looked into.

In *Reg.* v. *Oddy* the charge was one of larceny and receiving of cloth; evidence was tendered that other cloth which had been stolen was found in the house of the accused. This evidence was rejected as not being admissible to show guilty knowledge when receiving the cloth covered by the indictment.

There was here no connection between the charge and the fact tendered in evidence except that both related to cloth. Each was found shortly after it was stolen, and several months had elapsed between the two larcenies. Recent possession of stolen goods is evidence of the larceny of the goods in question. It would be illogical to hold that the same fact, viz., recent possession, can be evidence of two crimes so widely different in the detail of their circumstances as theft and receiving knowing the thing to be stolen.

In *Reg.* v. *Holt* evidence of facts alleged to constitute a similar pretence to that charged was rejected.

It was inadmissible, for the pretence charged was that the prisoner had pretended that he had authority to receive money on behalf of his principal when he had not; the only defence raised was that in fact he had such authority. It was not relevant to that issue to show that he had received other money on the same statement. It tended to support the defence quite as much as the prosecution: see Blackburn, J., in *Reg.* v. *Francis*.

In *Reg.* v. *Dale* as reported, the admissibility of evidence of this class would seem to have been carried too far.

The report lends colour to the view that this evidence was admissible when the only issue raised was as to the fact of the prisoner's having used the instrument.

In such a case such evidence would not be admissible. It is to be observed, however, that the only ruling of the learned judge was one given during the opening statement of counsel for the prosecution. The evidence never was in fact admitted, for the prisoner pleaded guilty before any evidence was tendered.

In all cases in order to make evidence of this class admissible there must be some connection between the facts of the crime charged in the indictment and the

facts proved in evidence. In proximity of time, in method, or in circumstance there must be a nexus between the two sets of facts, otherwise no inference can be safely deduced therefrom.

In the present case the prosecutrix Ethel Jones was an inmate of the prisoner's house. He had induced her to have sexual connection with him by promising to "keep her right." When she feared she was in trouble he said he would do so, and he used instruments upon her which he said would "bring it away." When arrested he stated that he had used the instruments for a lawful purpose, and that when she became very ill in consequence he administered drugs to allay the pain.

In support of this defence it was suggested that he used the instruments when examining her for leuchorrhœa, and that the subsequent illness was neither foreseen nor intended by him. The evidence of Taylor was tendered to rebut this defence.

It was shown that she too was an inmate of his house, that he had induced her to have sexual connection with him, that when her periods should have arrived and before she left for home he used the same instruments in the same way, saying he would "put her right, as he had put dozens of other girls before." If evidence of system were needed, this was such evidence. So also was the evidence as to a statement made by Nellie Cornes, a servant of the prisoner who was present at the operation, which statement was to the effect that the prisoner had "put her all right." The operation was unsuccessful in the case of Taylor; but that was due not to the nature of the operation, but to the stage of the pregnancy then reached, for the defendant told the witness that if she did not get right not to go more than six weeks and then he would operate again. In due time a child was born, for the maintenance of which the prisoner consented to an affiliation order. It is impossible, without reversing a long series of cases, to say that the evidence of Taylor was not admissible.

It showed that the illness of the prosecutrix was the result of design and not of accident; it showed that the prisoner's scheme or system when the indulgence of his passions had got girls into trouble was to use these instruments upon them to relieve himself from the burden of paternity.

It tended to rebut the defence he set up of an innocent operation, and to negative any reasonable or honest motive for its performance.

Conviction affirmed.

Solicitors for the prosecution, *Frederick Cooke & Son*, Crewe.

Solicitors for the prisoner, *Flux, Leadbitter, & Co.*, for *H. W. G. Garnett*, Crewe.

House of Lords.

From C.A. (England). April 6.

GARBUTT v. STANDING JOINT COMMITTEE, &c., OF DURHAM. (a.)

Police — Pension — "Approved service" — Continuous service—Diligent and faithful service—Police Act, 1890 (53 & 54 *Vict. c.* 45), *ss.* 1, 4, *sub-section* 12.

By section 1 *of the Police Act*, 1890, "*every constable in a police force if he has completed not less than twenty-five years' approved service . . . shall . . . be entitled without a medical certificate to retire and receive a pension for life.*" *By section* 4, *sub-section* 1, "*approved service*" *means* "*such . . . as may be certified by the police authority to have been diligent and faithful service*"; *and by sub-section* 2 *a certificate of the chief officer of the police force, as to the period of a constable's approved service, is to be sufficient evidence thereof.*

Held, that the twenty-five years of service entitling to a pension might be made up of two or more distinct periods, that the chief officer's certificate was conclusive as to the duration of that service, but that the police authority had to certify as to the character and nature of the service, and might produce evidence to support their contentions.

Decision of the Court of Appeal (52 *W. R.* 678, [1904] 2 *K. B.* 514) *reversed.*

Appeal *in formâ pauperis* from a judgment of the Court of Appeal (Collins, M.R., and Stirling, L.J., Mathew, L.J., dissenting) (52 W. R. 678, [1904] 2 K. B. 514), affirming that of the King's Bench Division, upon a case stated by quarter sessions.

The case is set out in the report in the Divisional Court (52 W. R. 527, [1904] 1 K. B. 522), and the facts are shortly given in the Lord Chancellor's judgment.

The courts below had held that the approved service of a constable to entitle him to pension must be a continuous and not broken service.

A very full argument is given in the report below.

Pickersgill and *R. I. Simey*, for the appellant.

Shearman, K.C., and *Meynell*, for the respondents.

Lord LOREBURN, L.C.—In this appeal it appears that Mr. Garbutt, the appellant, served as a constable for twenty-five years and upwards in the county of Durham police force. There were two interruptions of his service. On one occasion he resigned for a few months, and upon another occasion he was asked to resign and did so, also for a few months; but on both occasions he was reinstated. At the end of his service he claimed a pension under the Police Act of 1890, but the police authority, that is, the standing joint committee, who are now the respondents, refused his claim. He then appealed to the court of quarter sessions under section 11 of the Act. At the quarter sessions the police authority advanced two contentions. The first was that service to entitle men to a pension under the Act must be continuous service, and it was so held in the Court of King's Bench and in the Court of Appeal, with, it must be added, the express dissent of one of the learned judges and very grave doubts expressed by others of the learned judges. It is indisputable that this Act is so unfortunately drawn that there is room for a good deal of doubt and ambiguity with regard to its true meaning, but in my opinion the Act does not require the service to be continuous. It does not say so, and if you speak of twenty-five years' service, it seems to me that this means *primâ facie* that the man has served for twenty-five years, and none the less so because he happens to have allowed an interval to elapse, or more intervals than one, throughout the period of that service. It appears to me that only one section—namely, section 4, sub-section 5, can be said to be inconsistent with this view. That particular sub-section does seem to have been drawn either in the thought or in the apprehension that the service required must be continuous service. But I think it is a superfluous section inserted *ex abundanti cautelâ*, and that the natural significance of the language used at the commencement of the Act ought not to be affected by the presence of a clause like that. With regard to the second contention urged by the respondents at quarter sessions, a much more serious point was raised. The police authority

(a.) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

claimed a right on that appeal to give evidence in order to show that the service had not been "diligent and faithful service" within the meaning of the Act. They had given no certificate under section 4, sub-section 1, of the Act. On the appeal, which was really and in substance an appeal against them for refusing to give and act upon a certificate, they proposed to give proof in support of their contention that the service had not been "diligent and faithful," but that evidence was rejected on the ground, as I understand it, that the certificate which had in fact been given was conclusive. It was a certificate under sub-section 2 of section 4, which has to be signed by the chief officer as distinguished from the police authority. In the first place, in my opinion, the certificate of the chief officer was not conclusive. It was sufficient evidence—that is to say, the court might act upon it if they thought fit. In the second place, I think that that certificate had no bearing upon the point of "diligent and faithful service," and was only evidence of the period of approved service, and not of the fact whether it had been in the true sense of the word approved or not. If it were otherwise the chief officer would, as it seems to me, in these matters completely supersede the police authority. This second point was not decided in either of the courts below because upon the view which they took upon the first point it became immaterial. It is necessary for us to decide it now. The answer which I propose to give to the two questions put in the case stated is this: The first is, "whether we" (that is, the court of quarter sessions) "were right in dismissing the application on the grounds stated"—that is, that the service must be continuous—I think that they were wrong. The second question is "whether we" (that is, the court of quarter sessions) "were right in rejecting the evidence tendered on behalf of the respondents." I think also in that case that they were wrong. This case must therefore now, after the litigation which has already taken place, go down to be re-heard by the court of quarter sessions. I can only express my deep regret that a case involving matter of great moment to a poor man should in consequence of the difficult language used in an Act of Parliament have put him to so much anxiety and to so much expense.

Lord MACNAGHTEN.—I agree with my noble and learned friend on both points.

Lord DAVEY.—On the first point mentioned by my noble and learned friend I confess that the inclination of my mind—I cannot say it is more than that—is rather in favour of the view taken by the Court of Appeal and by Lord Alverstone, L.C.J. My doubts, however, are not sufficiently strong to lead me to dissent from the motion which has been made upon that ground. With regard to the second point I entirely agree with what the Lord Chancellor has said, and I should not add anything if it were not for what seems to me to be the entirely fallacious argument which has been used in support of the opposite view. If I understand the argument rightly, the effect of the second sub-section of section 4 is said to be that "a certificate signed by the chief officer of a police force" is "sufficient evidence" both of the constable's service being "approved service" and also of the period of it. In my opinion that is not the construction of the language, and in my opinion, according to the English language, that cannot be taken to be the meaning without violence to the words. It seems to me to be based upon an entire mistake as to the first and second sub-sections of the Act. The first sub-section says that the expression "approved service" is to be defined, and it defines it in this way: "'Approved service' shall for the purposes of this Act means such service as may after such deductions as aforesaid (if any) be certified under the order of the police authority to have been diligent and faithful service." Therefore you must first have a certificate under the order of the police authority, which the certificate contained in the appendix before us is not. You must have a certificate under the order of the police authority of diligent and faithful service. Then in order to ascertain what the period of that service is, you must look at the other sub-sections of the section, sub-sections 2 and 3. Taking sub-section 3 first, you find that certain deductions may be made from the period which counts for approved service for "sickness, misconduct, or neglect of duty." As regards those the chief constable is made the arbiter. The chief constable is therefore the proper person to certify what is the length of the period which you are to count as approved service. Therefore he is the proper person to sign the certificate to that effect under sub-section 2. I cannot read sub-section 2 as Mr. Pickersgill does, as meaning the same certificate as is to be made under sub-section 1. If I understand his reading of the two sub-sections it is this—true it is that the approved service requires to be certified under the order of the police authority, but by sub-section 2 a certificate signed by the chief constable is "sufficient evidence that that authority has been given." I cannot read it in that sense. I think that sub-sections 1, 2, and 3 form a consistent whole showing what evidence is required—first, that it is approved service, and secondly, what the period which will count for approved service is to be.

Lord JAMES OF HEREFORD.—As this case is apparently to be remitted to the court of quarter sessions I think it well that those who have to hear the case should be clear as to what the judgment of your lordships is. The Lord Chancellor and Lord Macnaghten have already expressed the view that the service need not be continuous in order to entitle the appellant to his pension. In those opinions I entirely concur. The section on which we have the claim made for this pension says that "if the constable has completed not less than twenty-five years' approved service" and is of the prescribed age he shall, after due notice of his desire to retire, "be entitled without a medical certificate to retire and receive a pension for life." Those words are absolute and distinct, and I cannot understand how it could be supposed that if it was the intention of the Legislature that that service should be continuous, the word "continuous" should not have been inserted in that section. I have listened to the able arguments which have been put before your lordships as to the effect of certain other sections in the Act, but I am bound to say that the words of Lord Selborne in *Hough* v. *Windus*, 32 W.R. 452, 12 Q. B. D., at p. 224, appear to me to be the correct and governing authority. Those sections were probably, or possibly, not put in when the Act was framed, but have come into the Act in this way. Those who have been in either House of Parliament know full well what occurs when a Bill is in committee. Someone wishes a particular point to be made quite clear, and he asks that a certain section or certain words shall be inserted. Then it is said, "We do not need it because the general words cover it." The answer is, If the general words cover it why should not we have the section to make it clear?" The Minister in charge of the Bill, following expediency, says, rather than continue the discussion, "You shall have the clause"; and then that clause is produced afterwards before those who have to deal with the matter judicially as a proof that the first clause is to be done away with, or that its principle is to be done away with. I admit

that the judges are placed in a very unfortunate position, but before the express words of a statute can be altered and changed so as to have a different meaning, that alteration and change ought to be clearly expressed. Therefore in this case I follow the words of the section which speaks of this certificate, in sub-section 1, and I say that no continuous service is necessary. The second point is one on which I am compelled, with very great regret, to arrive at the same conclusion as my noble and learned friends. I do not quite appreciate the argument that was addressed to us as to the meaning of the words, when it was said that a general order might be supposed to exist. I had not quite in my mind at the time of the argument that the effect of section 4 is that the first certificate which is mentioned there shall be under the order of the police authority. Therefore the proposition that was put before us in argument was that an order to the chief constable may be presumed to exist. I wish that I could give effect to it, but I do not think that is a sound argument, for this reason: it is a question of fact whether the order was given or not. If the statute requires the order to be given, and that thereupon the chief constable should give his certificate as to the period which has been found to be approved service, that order must be in existence as a matter of fact, and could easily have been produced before the court if it had been in existence. If that evidence has not been given I think it absolutely necessary, although I regret it, that an opportunity should be afforded to the police authority of showing that the service for the required period of twenty-five years had not been diligent and faithful, and therefore this case must be remitted to the court of quarter sessions.

Lord ROBERTSON.—On the first point I do not differ; on the second point I entirely agree. The relative functions of the police authority and the chief constable may, I think, be thus stated. The quality of the service has to be ascertained by the police authority, and the chief constable, taking the word of the police authority for its quality, is then, on that footing, to certify its period.

Lord ATKINSON.—I think that the words of section 1 in their natural meaning are not confined to continuous service, and I do not think that there is any such repugnancy between that construction of them and the provisions of the other sections of the Act to which reference has been made as would oblige this House to confine them to continuous service. With regard to the second point, I think it clear upon the construction of sub-sections 1 and 2 of section 4 that the functions of the police authority and the chief constable are respectively that the chief constable certifies to the length of the service, and the police authority has to certify to its character and nature. In arriving at its character and nature they were, I think, entitled to receive the evidence which was tendered but rejected.

Order appealed from reversed; case remitted to the court of quarter sessions; respondents to pay to the appellant his costs in the courts below and in this House.

Solicitors for the appellant, *Bell, Brodrick, & Gray*, for *A. Geipel*, West Hartlepool.

Solicitors for the respondents, *Maude & Tunnicliffe*, for *L. S. Iliff*, Sunderland.

Court of Appeal.

From K. B. Div.
(Collins, M.R., Cozens-Hardy, L.J., and Sir Gorell Barnes, P.) June 21.

SMITH AND OTHERS v. JUSTICES OF PORTSMOUTH. (a.)

Licensing law—Renewal of licence—Order for "alterations" in premises—Structural alterations—Order to keep entrance door locked—Licensing Act, 1902 (2 *Edw.* 7, *c.* 28), *s.* 11, *sub-section* 4.

Section 11, *sub-section* 4, *of the Licensing Act*, 1902—*which empowers licensing justices, on renewing a licence, to order that such alterations as they think reasonably necessary to secure the proper conduct of the business shall be made in that part of the premises where intoxicating liquor is sold or consumed—only gives power to the justices to order structural alterations.*

Upon an application for the renewal of a licence the licensing justices, purporting to act under section 11, *sub-section* 4, *of the Licensing Act*, 1902, *made an order that the entrance door from one of two streets upon which the licensed premises abutted should be kept locked and not used except for certain purposes, the object being to confine the sale of liquor to that part of the premises which opened on to the other street.*

Held, that this was not an order for a structural alteration, and was not within the power of the licensing justices under section 11, *sub-section* 4.

Appeal from the judgment of the Divisional Court (Lord Alverstone, L.C.J., and Ridley and Darling, JJ.) on a case stated by the Recorder of Portsmouth sitting at quarter sessions. The appellants at quarter sessions were the licensed occupier and the owners of a public-house, called the Naval Hotel, Portsea, who appealed against an order made by the licensing justices of Portsmouth.

The appellant, Alfred Arthur Smith, was the holder of a full licence at the Naval Hotel, and in accordance with a notice served upon him in that behalf, he deposited with the clerk to the respondent justices, on applying for a renewal of his licence, a plan of the licensed premises, showing the several entrances to the premises from two parallel streets known as Wickham-street and Havant-street respectively, with the dimensions and description of each room and the position of every counter, screen, and partition. The respondent justices at the adjourned annual licensing meeting, held on the 8th of March, 1905, purporting to act under section 11 (4) of the Licensing Act, 1902, made an order that the following alterations, which the justices therein stated that they thought reasonably necessary to secure the proper conduct of the business, should within the space of six months be made by the said Alfred Arthur Smith in that part of the premises where intoxicating liquor was sold or consumed, that was to say: "With a view to confining the sale or consumption of intoxicating liquor to the Wickham-street end of the said premises, the entrance door to the bottle and jug department of the said premises in Havant-street shall be nailed up, and the entrance door to the public bar of the said premises in the same street shall be kept locked and not used except for domestic purposes or for delivering intoxicating liquor, coals, or other goods when necessary, or for the private use of the licensee or his household or *bonâ fide* lodgers on the said premises, and the key of such entrance to the said public bar in Havant-street shall be kept by the licensee." The plan showed that the premises had public bars and bottle and jug

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

entrances in two distinct parallel streets—Wickham-street and Havant-street. The premises were 136ft. in length from one street to the other, and did not exceed 14ft. 3in. in width at the parts occupied at the bars.

Counsel for the respondent justices contended, first, that the alterations directed by the order to be made were structural alterations and properly directed in accordance with section 11 (4) of the Licensing Act, 1902, on which they cited *Bushell* v. *Hammond*, 52 W. R. 453, [1904] 2 K. B. 563; and, secondly, that the justices could make an order for any alteration, structural or non-structural, in the licensed premises, and that the correct interpretation of the Act was that, if such order directed structural alterations, then no other requisition for structural alterations could be made within the next five years.

Counsel for the appellants contended that the order of the justices was without jurisdiction; that the things therein ordered under the name of alterations to be made in that part of the premises where intoxicating liquor was sold or consumed were not alterations, or alternatively were not alterations within the meaning of section 11 (4) of the said Act; that the order, under the pretence of ordering alterations, in fact sought to impose upon the appellant, Alfred Arthur Smith, an undertaking to keep and observe certain conditions with reference to the conduct of his licensed premises contrary to law; and that the order, under the pretence of ordering things necessary to secure the proper conduct of the business in fact prohibited all the business theretofore legitimately carried on at the Havant-street entrance to the premises.

The recorder held that section 11 (4) only conferred on the justices power to order alterations in the licensed premises and alterations of a structural character, and that, while the part of the order as to nailing up one door might be within the section, the rest of the order was not, as it did not purport to order structural alterations or any alterations in the premises at all, and that the latter part of the order was, therefore, *ultrà vires*, and he quashed the whole order, as in his judgment the first part by itself was unnecessary and useless. Apart from this, he thought the order reasonable and within the justices' jurisdiction.

The question for the High Court was whether the justices had jurisdiction to make the order.

The Divisional Court were of opinion that the justices had jurisdiction to make the order, and they accordingly reversed the decision of the recorder.

The appellants appealed to the Court of Appeal.

Pickford, K.C., and *S. H. Emanuel* (*H. Brodrick* with them) for the appellants.—The word "alteration" in section 11, sub-section 4, of the Licensing Act, 1902, means a structural alteration. The alteration must be an alteration in the premises, and not in the mode of carrying on business in the premises. The closing of an entrance door cannot be called an "alteration" in the premises. Nor is it an alteration in the means of access to that part of the licensed premises where intoxicating liquor is sold or consumed, within the decision in *Bushell* v. *Hammond*, 52 W. R. 453, [1904] 2 K. B. 563. The physical means of access is not altered; the only alteration is that certain persons alone can use it. In *Bushell* v. *Hammond* the point was not taken that an order to close a back entrance to licensed premises was not an order for a structural alteration. It was assumed that the alteration was structural, and the only question was whether it was an alteration in that part of the premises covered by the Act. In *Rex* v. *Dodds*, 53 W. R. 559, [1905] 2 K. B. 40, it was held that under the Licensing Act, 1904, licensing justices have no power to make the renewal of an on-licence conditional on the applicant giving an undertaking as to the conduct and management of the business in respect of matters not covered by the grounds for refusing the renewal specified in section 1. That throws light on the earlier Act of 1902, and shows that an order for an alteration there contemplated must be something different from an order as to the conduct and management of the business. The decision of the Divisional Court was therefore wrong.

Horace Avory, K.C., and *C. Tyrrell Giles*, for the respondent justices.—An "alteration" within the meaning of section 11, sub-section 4, need not be a structural alteration. In *Bushell* v. *Hammond* an order that the back entrance to licensed premises should be closed by means of a gate to be kept locked was held to be within the power of licensing justices under section 11, sub-section 4, of the Act. The closing of the door as a means of access to the licensed premises was taken to be an "alteration" within the meaning of section 11, sub-section 4. It is obvious that if the present point was a good one it would have been taken in that case. That case, therefore, shows that an "alteration" within that sub-section need not be a structural alteration in the strict sense of the term. The order in the present case was for an alteration in the premises within sub-section 2, and it therefore comes within sub-section 4. The words "structural alteration" do not occur in the section until towards the end of sub-section 4, and those words are satisfied by saying that they mean that if the alteration ordered is of a structural character, no further structural alteration shall be ordered for five years. Sub-section 5 is intended to provide for notice being given to the owner of the premises when an order for structural alterations is made, so as to enable him to appeal against the order. The alteration in this case was an alteration which the justices thought reasonably necessary to secure the proper conduct of the business. If the licensee opened a door, which was formerly used for domestic purposes only as a means of access to the licensed premises for trade customers, that would be an alteration in the premises for the purpose of giving increased facilities for drinking within sub-section 2, and therefore an alteration within sub-section 4. The converse happened here, but still it is an alteration in the premises. Secondly, if section 11, sub-section 4, only applies to a structural alteration, this was an order for a structural alteration. The order to keep locked a door which had before that time been used as a means of access to the licensed premises is an order for an alteration in the character of the premises from a trade point of view, and the alteration may therefore be properly described as a structural alteration. No distinction can be drawn between nailing up a door, which is admitted to be a structural alteration, and locking a door. The words ought not to be construed so strictly as in a case between landlord and tenant, but should receive a wide interpretation so as to give effect to the policy of the Legislature to give the justices power to see that the business is properly conducted.

Pickford, K.C., replied.

COLLINS, M.R.—This is an appeal from the Divisional Court overruling the decision of the Recorder of Portsmouth. The recorder stated a case for the opinion of the court, and the question turns upon the construction of the Licensing Act, 1902. The question is whether a certain order made by the licensing justices of Portsmouth was within their powers. The case came before the licensing justices upon an application for the renewal of a licence for a public-house. The licensed premises opened on to two streets,

"Preliminary" contracts are for the purpose of carrying on the business of the company as well as other contracts, otherwise they would be *ultrà vires* of the company.

BUCKLEY, J.—The question to be determined is whether Mr. Jenkins, who claims to be a creditor of the company, can, having regard to section 6, sub-section 3, of the Companies Act, 1900, be heard to say that he is a creditor. Section 6 is one which provides that a "company shall not commence any business"—it is not shall not commence "its business," but "any business"—unless certain conditions are complied with. The word "provisional" in the sub-section means, I think, this, that the contract is to be read as if it contained a provision that it shall not be binding on the company unless and until the company becomes entitled to commence business. Now this company never did become entitled to commence business; therefore any contract made by the company was provisional and not binding on the company. But Mr. Coldridge has argued that the Act of Parliament does not mean what it says, that it does not mean any contract, but any contract of a certain kind; and his next difficulty is to define of what kind. He says that it means any contract entered into for the purpose of carrying on its business, and that there are some contracts which are not entered into for the purpose of carrying on the business, but which are what he calls "preliminary"—expenses incurred with a view to the future carrying on of business. I think that argument is altogether unsound. A company of this kind has no purpose of existence other than the carrying on of its business, and every contract which it enters into must be a contract entered into for the purposes of its business in some form or other; whether it is preliminary or final, or one in the course of carrying on its business, makes no difference. All its contracts must be with relation to its business; and I repeat that the language of the section is that "the company shall not commence any business" until certain conditions have been complied with. We are all familiar with the fact that under a previous system of legislation there was what was known as "provisional registration" and "complete registration." I think this sub-section is intended as a return to some extent to the provisions which were contemplated by that system of legislation. The intention here is that, if the company never becomes entitled to commence business, nobody shall be able to say that he can sue the company in contract; the contract must be one which impliedly contains a provision that, unless and until the company is entitled to commence business, the company is not bound. Those being the general questions, the exact facts here are these. The claimant, Mr. Jenkins, to take one instance, went to a furniture dealer, bought furniture, and had it put into an office which he took for the company. He says that he has paid the furniture dealer in respect of that the sum of £240, and he says: "I claim payment of that by the company." How does he claim? Obviously in contract; and he claims upon this ground—that, expressly or by implication, the company promised to pay him for the furniture if he would pay the furniture dealer for it. Of course that is a contract. The Act of Parliament says that that contract is not binding on the company, and he cannot sue here. The other claims are for moneys which he advanced to a man to come up to town when he was going to serve the company, and other payments of a like kind. They are all claims in contract. In my judgment he cannot be heard to say that there was such a contract; the Act of Parliament forbids it. I declare that as the company was never entitled to commence business no contract entered into by it is binding on the company, and that Mr. Jenkins' claim, which is the only one before me, must be disallowed.

Solicitors, *G. T. B. S. Thurnell; Lowndes & Son.*

Chan. Div. }
Joyce, J. } June 13, 27.

In re SLATER, DECEASED.
SLATER *v.* SLATER. (*a.*)

Will—Legacy—Specific gift—Ademption—Wills Act, 1837 (7 *Will.* 4 & 1 *Vict. c.* 26), *s.* 24.

A testator by his will bequeathed the interest on his money invested in a certain security to his wife for her life. During the testator's life the security in question, which was held by the testator at the date of his will, was taken by a statutory authority and a new security given in its stead.

Held, that the new security held by the testator at the date of death did not pass under the bequest, the will speaking from the death.

Adjourned summons.

This was a summons by the testator's widow, Mrs. Catherine P. Slater, to determine the validity of a bequest contained in the will.

The testator by his will dated the 3rd of February, 1904, made the following bequest: "To Catherine P. Slater I bequeath the interest for life arising from money invested as follows:" Then followed a list of securities, one of which was stock in the Lambeth Waterworks Co.

At the date of his will the testator was possessed of £1,075 10 per cent. Lambeth Waterworks Stock.

The Metropolitan Water Act was passed on the 18th of December, 1902, and on the 24th of June, 1904, the day appointed by that Act, the Metropolitan Water Board took over the undertaking of the Lambeth Co.

On the 7th of June, 1904, the Lambeth Co. passed a resolution to take payment for their undertaking in stock of the Metropolitan Water Board instead of in cash, and £3,379 Metropolitan Water Board "B" stock was allotted to the testator in respect of his said holding in the Lambeth Co. This stock was held by the testator at the date of his death.

The testator died on the 15th of May, 1905, and his will was duly proved.

Badcock, K.C., and *Methold*, for the plaintiff.—This is a gift of money invested in a certain way; if the money can be traced into the new investment it passes under the bequest. Here the money can be so traced, and there is no ademption: *Le Grice* v. *Finch*, 3 Merivale 53; *Sidney* v. *Sidney*, 22 W. R. 101, 17 Eq. 65.

Younger, K.C., and *Newton*, for the residuary legatee.—This is a specific bequest; the subject-matter is not in the testator's possession at the date of the death, and the will speaks from the death. The gift therefore fails: *In re Grey, Dresser* v. *Grey*, 36 Ch. D. 205; *Page* v. *Young*, 23 W. R. 479, 19 Eq. 501; *Harrison* v. *Jackson*, 7 Ch. D. 339, 26 W. R. Dig. 262; *McClellan* v. *Clark*, 32 W. R. Dig. 228, 50 L. T. 616; *In re Robe, Slade* v. *Walpole*, 38 W. R. Dig. 211, 61 L. T. 497; *Goodlad* v. *Burnett*, 1 K. & J. 341, 3 W. R. Dig. 121.

Vernon appeared for the trustees of the will.

Badcock, K.C., replied.

(*a.*) Reported by H. WOLCOTT WARNER, Esq., Barrister-at-Law.

JOYCE, J., in giving judgment, after reading the terms of the bequest, said: The question I have to decide is the effect of the gift as to money of the testator's invested in Lambeth Water Stock at the date of the will, which stock was subsequently, in the testator's lifetime, converted into Metropolitan Water Board "B" Stock. Both parties assert that the bequest is specific, and certainly it is not general or demonstrative; but the parties differ as to what is given; some say the bequest gives the investment or security as at the date of the will, and that as that no longer existed at the date of the death that the legacy is adeemed; other parties say that the amount or value of the investment or security is given, and that what can be traced into another investment passes under the bequest.

In cases of this kind the first questions to be decided are, What does the will mean? and What is it, and where is that, which was bequeathed? No doubt a bequest may be so worded as to show that the subject-matter is to pass apart from the state of investment, and that depends on the question whether the testator intended to make the gift irrespective of the state of investment.

But section 24 of the Wills Act makes a will, in effect, comprise property at the death of the testator. This section is often difficult to apply. If the subject-matter of a gift be not a specified sum, but be described as general, it may from its nature be capable of increase or decrease during the testator's lifetime. In *Goodlad* v. *Burnett* Wood, V.C., says: "The testatrix here says 'my New Three-and-a-quarter per cent. Annuities,' not using any words defining the particular amount—not defining the stock in any way, except that which the court, before the Wills Act, held to point to specific stock which was at the time of making the will in the possession of the testator or testatrix. . . . But then the Wills Act was passed, and that Act must have some sense given to it as regards personal estate. It is true that, as regards general personal estate, there was no doubt before the passing of the Wills Act that the will spoke from the death in most cases, but not in all; and it is precisely to the particular class of cases, of which the present is an instance, that the Wills Act would seem to have application."

In the present case the bequest is not of a definite sum nor of Lambeth Water Stock, and on the words of the will I come to the conclusion that this is one of the class of cases referred to by Wood, V.C., and therefore as a matter of construction, and of construction only, I hold that the bequest passed only so much money as the testator had invested in Lambeth Water Stock at the date of his death, and consequently that the stock which was converted into Metropolitan Water Board Stock in the testator's lifetime does not pass. There must be a declaration accordingly.

Solicitors, *Maude & Tunnicliffe; Gery & Brooks.*

Chan. Div.
Swinfen Eady, J. } June 27.

In re TATTERSALL.
TOPHAM *v.* ARMITAGE. (*a.*)

Trustee—Investments—Nominal debentures under Local Loans Act, 1875 (38 *&* 39 *Vict. c.* 83)—*Trustee Act,* 1893 (56 *&* 57 *Vict. c.* 53), *s.* 1 (g); *s.* 5, *sub-section* 3; *s.* 50.

Trust funds were invested on a mortgage of rates executed by a corporation. The mortgage was a nominal debenture. The trustees under the will had not any express powers of investing in nominal debentures, but they were not expressly forbidden to do so by the instrument creating the trust.

Held, that section 5 (3) *of the Trustee Act,* 1893, *extends only to trustees having express power in the instrument authorizing the investment, and is an enlargement of the express power, and not a further enlargement of the general powers conferred by section* 1.

The nominal debenture was not an authorized investment.

Originating summons.

This was an application to distribute the residue of a testator's estate on the assumption that proper appropriation had been made for certain legacies settled by the will and directed to be appropriated.

A question was raised as to whether a particular investment was authorized or not, and the matter was referred to the court.

The Trustee Act, 1893, provides: Section 1. "A trustee may, unless expressly forbidden by the instrument (if any) creating the trust, invest any trust funds in his hands, whether at the time in a state of investment or not, in manner following, that is to say: . . . (*g*) In the debenture or rent-charge, or guaranteed or preference stock of any railway company in Great Britain or Ireland incorporated by special Act of Parliament, and having during each of the ten years last past before the date of investment paid a dividend at the rate of not less than three per centum per annum on its ordinary stock."

Section 5 (3): "A trustee having power to invest money in the debentures or debenture stock of any railway or other company may, unless the contrary is expressed in the instrument authorizing the investment, invest in any nominal debentures or nominal debenture stock issued under the Local Loans Act, 1875."

Section 50: "The expression instrument includes Act of Parliament."

J. G. Wood, for the trustees.

T. T. Methold, for the residuary legatees.

SWINFEN EADY, J., in giving judgment, said: This is a summons to proceed under the order dated the 26th of October, 1905. Upon the proceedings in chambers a question was raised as to whether a particular investment was authorized or not, and it is upon this point alone that the summons has been adjourned to me,

The will of the testator, W. Pratt Tattersall, is dated the 6th of December, 1884. It contains a trust to invest the proceeds of his real and personal estate "upon real securities in England or upon any such Government, Parliamentary, or other stocks, funds, debentures, or other securities as trustees are by law authorized to invest trust funds upon, with power to call in or change such investments at their discretion." The testator died on the 8th of December, 1886. A part of trust funds, about £10,000, has been invested on a mortgage of rates, executed by the corporation of Bradford under the powers of section 107 of the Public Health Act, 1848. The mortgage is by deed and in the form authorized by section 111 of the same Act, and otherwise complies with the statutory requirements, and the only question is whether such a mortgage is authorized as regards funds settled by the will of this testator.

By the Local Loans Act, 1875, s. 4, a local authority shall be deemed to borrow subject to the provisions of that Act whenever it raises a loan by the issue of debentures purported to be created under its powers. By section 5 a debenture under that Act shall be an instrument taking effect as a

(*a.*) Reported by PAUL STRICKLAND, Esq., Barrister-at-Law.

deed and charging the local rate on property in such debenture specified with payment, as in the debenture mentioned, of the principal sum and interest therein specified. A debenture in which the principal sum is made payable to a person named therein, his executors, administrators, or assigns, is in the Act referred to as a "nominal debenture."

The mortgage in question fulfils these requirements and is therefore a nominal debenture. But the question is, can trustees of this will invest in nominal debentures issued under the Local Loans Act, 1875. Section 27 of that Act, enabling trustees with certain powers of investment to invest in loans under that Act, was repealed by section 51 of the Trustee Act, 1893, but was re-enacted by section 5, sub-section 3, of the same statute, with a verbal modification.

It was decided by Bacon, V.C., in *In re Maberly*, 34 W. R. 771, 33 Ch. D. 455, that trustees having the powers of investment authorized by section 21 of the Settled Land Act—that is to say, entitled to invest in the debentures or debenture stock of any railway company "having for ten years next before the date of investment paid a dividend on its ordinary stock or shares" may not invest in debentures or debenture stock issued by a local authority under that Act. This decision, however, does not determine the present case, as the Vice-Chancellor laid stress upon the words "have the same power of investing" which occur in section 27 of the Local Loans Act, but are not repeated in section 5 (3) of the Trustee Act.

The trustees of this will have not any express power of investing in nominal debentures, and can only do so if they come within section 5 (3) of the Trustee Act, 1893. In order to bring them within this sub-section it was contended that under the Trustee Act, s. 1 (*g*), as they are not expressly forbidden by the instrument creating the trust, they may invest in the debenture stock of any railway in Great Britain or Ireland, incorporated by special Act of Parliament, and having during each of the ten years last past before the date of investment paid a dividend at the rate of not less than three per centum per annum on its ordinary stock, and that the trustees are therefore trustees "having power to invest money in the debenture stock of any railway company" within section 5 (3). It may be doubted whether trustees having power to invest in the debenture stock of certain railway companies only, which fall within a particular category, have power to invest "in the debenture stock of any railway company," but the true answer to the argument is that section 5 (3) extends only to trustees having express power in the instrument authorizing the investment, that it is an enlargement of the express power, and not a further enlargement of the general powers conferred by section 1. Section 5 (3) assumes the existence of an instrument authorizing the investment in railway debenture stock. Again, the powers conferred by sections 1, 2, and 3 are, by section 4, extended to trusts created before the passing of the Act, and are to be in addition to the powers conferred by the instrument (if any) creating the trust. There is no such provision as to the powers in section 5. Moreover, if all trustees, unless forbidden, are to have the power of investing in nominal debentures, I see no reason for separating this power from the other powers comprised in section 1.

Section 5 is a re-enactment of provisions extracted from six different Acts of Parliament, and is difficult to construe, as there does not appear to be any uniformity in its several parts. But in my opinion section 5 (3) is as much an enlargement of express powers, as distinguished from general statutory powers, as section 5 (4) obviously is. I arrive at this conclusion on the construction of the various sections of the Act, notwithstanding that the word "instrument" includes "Act of Parliament" in the definition clause.

I may add that the provision enabling cash under the control of the court to be invested in nominal debentures of a particular description does not avail the applicants, as all the nominal debentures in question on this application are liable to be redeemed within a period of fifteen years from the date of investment.

I therefore determine that the mortgage of rates by the Corporation of Bradford is not an authorized investment.

Solicitors, *Nussey & Fellowes*, for *Vint, Parkinson, Hill, & Killick*, Bradford.

K. B. Div.
(Lord Alverstone, L.C.J., and Ridley and Darling, JJ.) April 26.

SIVEWRIGHT (*Appellant*) *v.* ALLEN (*Respondent*). (*a.*)

Ship—Seaman—Wages—Termination of service by loss—Capture—Destruction—Merchant Shipping Act, 1894 (57 & 58 *Vict. c.* 60), *s.* 158.

Section 158 *of the Merchant Shipping Act*, 1894, *provides that where the service of a seaman terminates before the date contemplated in the agreement by reason of the wreck or loss of the ship, the seaman shall be entitled to wages up to the time of such termination, but not for any longer period.*

Held, by Lord Alverstone, L.C.J., *and* Ridley, J., *that a "loss" of the ship occurs when the ship ceases to exist as a ship; by* Darling, J., *that a "loss" occurs when the vessel is captured and the owner deprived of her, and that the fact that the vessel was subsequently destroyed was immaterial in considering whether the capture of the vessel was a "loss" within the meaning of the above section or not.*

A seaman signed articles for a voyage to places including ports in Japan, Manchuria, and Siberia. Russia was then at war with Japan, and the ship was captured by a Russian man-of-war, and a few days later was destroyed by the Russians. There was no evidence that she was carrying contraband of war or that her capture was justified. The seamen were sent to England as distressed seamen, and claimed wages up to the time of their arrival in England.

Held, per Lord Alverstone, L.C.J., *and* Ridley, J., *that the ship was "lost" at the time when the ship was destroyed, and, therefore, that the seamen were only entitled to wages up to that time;* per Darling, J., *that wages ceased when the ship was captured.*

Austin Friars Steam Shipping Co. *v.* Strack, 53 *W. R.* 661, [1905] 2 *K. B.* 315, *distinguished.*

Special case stated by a stipendiary magistrate for the City of Manchester.

On the 14th of September, 1905, the respondent, a seaman, took out a summons under section 134 of the Merchant Shipping Act, 1894, against the appellant, who was the owner of a vessel called *The Oldhamia*, claiming the sum of £18 15s. 11d. as wages alleged to be due in respect of his services on board the vessel, which was captured and destroyed by the Russians during the recent war with Japan.

The respondent's claim covered a period from the 23rd of March until the 5th of September, 1905, upon which day he returned to this country.

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

The appellant admitted the respondent's claim up to the 18th of May, 1905, the day of the capture, but claimed to be exempted from further payment under the provisions of section 158 of the Act of 1894.

The magistrate made an order that the appellant should pay to the respondent wages from the 23rd of March, 1905, to the 5th of September, 1905, and costs.

The following facts were admitted or proved before the magistrate:

The respondent was a seaman serving on board the British steamship *Oldhamia*, of which the appellant was the owner. On the 10th of March, 1905, at the British Consulate at New York, the respondent signed the articles of *The Oldhamia*, then at New York, to serve as able-bodied seaman on the vessel at the rate of £4 per month. The articles, which were read over to the respondent, contained provisions by which he agreed to serve for a voyage not exceeding three years in specified latitudes, Japan, Manchurian, and Siberian ports included. At the time the articles were signed a state of war existed between Russia and Japan. *The Oldhamia* left New York on the 26th of March, 1905, and her first port of call was stated to be Hong Kong for orders. There was no evidence of what the cargo of *The Oldhamia* consisted, nor that the subsequent capture by the Russians was justified, nor that her destination was to any belligerent port, and the defendant did not in fact know of what her cargo consisted, or her destination beyond Hong Kong. On the 18th of May, 1905, *The Oldhamia* was proceeding through the China Sea, and when north of Hong Kong and approaching the Straits of Formosa was captured by the cruiser *Oleg*, belonging to the Russian Baltic Fleet, and the crew attached to *The Oldhamia*, including the respondent, were taken on board the Russian cruiser *Dneiper*, and *The Oldhamia* steamed away in charge of a Russian prize crew. On the 2nd of June, 1905, *The Oldhamia* was destroyed by the Russians, and on the 5th of June the respondent was landed at Swatau, taken thence to Hong Kong, and finally sent to England as a distressed seaman, arriving on the 5th of September, 1905. In these circumstances it was contended before the magistrate on behalf of the respondent that he was entitled to wages as a debt to the 14th of September, 1905.

On behalf of the appellant it was contended that the respondent's right to wages terminated with the capture of the vessel on the 18th of May, 1905, she then being lost within the meaning of section 158 of the Merchant Shipping Act, or at latest on the 2nd of June, 1905, when the vessel was destroyed. The magistrate decided that the vessel was not lost within the meaning of section 158, and that consequently the respondent was entitled to wages and costs.

J. A. Hamilton, K.C., and *Dawson Miller*, for the appellant.

S. T. Evans, K.C., and *Morgan-Morgan*, for the respondent.

Lord ALVERSTONE, L.C.J.—This case raises an important and, from some points of view, a novel question under section 158 of the Merchant Shipping Act, 1894, which provides that where the service of the seaman terminates before the date contemplated in the agreement, by (*inter alia*) the wreck or loss of the ship, he shall be entitled to wages up to the time of such termination, but not for any longer period. *The Oldhamia*, which started from Cardiff, was arrested by the Russian fleet while on a voyage from America to Hong-kong. No question arose as to any shipment of contraband of war, nor was it suggested that the owners themselves had done anything which entitled the seaman to say that his contract was broken on that ground or by conduct on their part justifying the seaman in declining to continue the venture.

The claim was made under section 134 of the Merchant Shipping Act of 1894, which would enable the seaman to recover wages up to the time of his arrival in England, but for the protection, if any, afforded to the owner by section 158, to which I have already referred. The question, therefore, is the construction to be placed by the court on the words "wreck or loss." The magistrate seems to have assumed that he acted, in deciding that the vessel was not "lost" within the meaning of the section, on a passage which occurs in the judgment of *Austin Friars Steam Shipping Co.* v. *Strack*, 53 W. R. 661, [1905] 2 K. B. 315, where it was said, "It seems to us very doubtful whether the word 'loss' would in any case include a capture such as this, which is not in the same category as wreck, fire, or stranding, or such termination of a voyage as are brought about by the perils of the seas." When the rest of the judgment is considered, in view of the nature of the case, it cannot be contended that the statement was intended to be or was an exhaustive statement of the law. It was merely a preliminary statement leading up to the judgment. We have been referred to several definitions of the word "loss." I myself do not desire to give an exhaustive definition, but it is quite plain that all the definitions cited would include the common case of loss of a ship by fire, and I have no doubt many others might be found. I am not prepared to go so far as the contention put forward by the learned counsel for the appellant, and to hold that any possible cause rendering the completion of the contract no longer possible was to be regarded as a loss. I think that is too wide a view, and that the words have reference to the existence of a ship as a ship; but whether there can be said to be a loss when the ship continues as a ship, and therefore but for the capture alone might have continued her voyage, I am not bound to consider here, nor do I desire to express any opinion on it. Taking the narrower view I have expressed as the true construction, then we have here an occurrence which is practically contemporaneous with the capture of the ship that destroyed the ship. To hold in such a case as this that the ship, which was in fact destroyed by a cause for which the owners were in no way responsible, was not a "loss" within the meaning of the Act would, in my opinion, be wrong.

The conclusion I have come to is, that this ship was lost at the time that she was destroyed within the meaning of section 158, and that the appeal must be allowed.

RIDLEY, J.—I concur. I do not think that a mere capture by an enemy or the seizure by a pirate would necessarily be construed as a loss within section 158, for one among other reasons that the vessel might be retaken. Many cases of capture, which were followed by recapture, might be cited. There was a French-built ship in the British lines at Trafalgar. She had been taken by the British, but no one could say that she was not a lost ship so far as the French were concerned. The capture of a vessel might result in the loss of the vessel to the owner, without necessarily being a "loss," in my opinion, within the meaning of the section, because I think the word "loss" there is used to mean something equivalent to the destruction of the ship.

In *The Austin Friars case* the vessel had been confiscated by the prize court, and it is in relation to that fact that the expression, I think, was used in the judgment upon which reliance has been placed. In that case it was not necessary to decide whether the ship had been lost within the meaning of the section.

we are now considering. The real point to be decided in each case is whether that which is relied upon as being the loss is equivalent to the destruction of the ship. For that reason I think the fact that the ship was taken possession of by an enemy or a pirate does not alone constitute a loss within the section.

DARLING, J.—I have come to the same conclusion as the other members of the court in thinking that this vessel was a loss within section 158, but I am also prepared to go further than my learned brothers have done, and to hold that the ship became a loss from the time that she was captured. If the question were merely an academic one I should not trouble to give an additional judgment. But my decision makes a difference in this respect—that the amount the seamen would be entitled to if the "loss" occurred when *The Oldhamia* was destroyed would be greater than if the "loss" occurred when she was captured. The whole question we have to consider under section 158 is whether the ship was lost to the owner within the meaning of that section. The ship was a British ship, and there was no evidence that she was carrying contraband or was a proper subject of capture by any belligerent. If she had been a proper subject of capture she might have been arrested and taken before a prize court, and then have been either released or condemned. That was not done. She fell in with some ships which as a matter of fact were commanded by persons bearing the commission of Russia, and these ships were at war with Japan. That gave them no sort of right such as that exercised with regard to this ship. What they did was this: One of the Russian ships captured the British ship; they took the crew out of her and put them in a Russian ship, and took *The Oldhamia* away with them. After some days they destroyed her, and the judgment of the other members of this court would give her crew their wages down to the time that the ship was destroyed. If my view were to prevail, the crew would be entitled to wages only up to the time the vessel was captured. I think that loss under the section means loss by the owner of the ship being permanently deprived of it. Whether she still continues to exist if the owner was permanently deprived of her does not enter into the question; the loss might even be greater if she was not destroyed, because the person who took her away might use her against the people from whom he took her. In the instance mentioned by my brother Ridley, Lord Nelson used the ship which he had taken from the French for firing shots from her against the French from whom he had taken her. It is well known that the same thing happened in the war between Russia and Japan, and to my mind such ships were just as much lost as if they were sunk in battle. They were lost to the owner to whom they belonged and were of no further advantage to him, and if in addition they became a positive disadvantage, I cannot say they were not lost within the meaning of this Act of Parliament. I am unable to see that anything has happened in the present case which would distinguish the case from one of piracy so far as the incidents are concerned. If goods were lost by reason of the dangers of the sea, the carrier was no longer responsible for them, and it has been held over and over again that the acts of pirates come within the exception of dangers of the sea. In the case of the *Attorney-General for Hong-kong* v. *Kwok-a-Sing*, 21 W.R. 825, L. R. 5 P. C. App. 179, Mellish, L.J., quoted the definition of piracy given by Sir Charles Hedges in *Rex* v. *Dawson*, 13 State Trials 454, as follows: "Piracy is only a sea term for robbery, piracy being robbery within the jurisdiction of the Admiralty. . . . If the mariners of any ship shall violently dispossess the master and afterwards carry away the ship itself or any of the goods, with a felonious intention, in any place where the Lord Admiral hath jurisdiction, that is robbery and piracy." The essential element of piracy is that the master is violently dispossessed of the ship, and that afterwards the ship itself or any of the goods were carried away with felonious intent. In the present case I should not call the action of the Russians piracy in the strict sense, because there might not have been any felonious intent. It is very probable that the ship was taken because otherwise she might have carried information to the Japanese, and therefore the felonious intent was probably absent. It is the reason why I should not call it piracy, but all the other incidents were present. The master was violently dispossessed, and there was no occasion, in order to constitute piracy, to destroy the ship. My recollection of reading about pirates is that they were much too wise to sink a ship when they had taken her. They sank the crew and then painted the ship a different colour and used her for their own purposes. In such a case the owner lost the ship just as much as if she were destroyed. In the present case there was every element making this a loss, the ship having been seized and never given back. If she had been arrested and held in some way in suspense and afterwards given back into the owners' possession, I should not go the length of saying that that would constitute a loss. But, seeing that she was arrested unlawfully by force and that she never got back to the possession of her owners, I think that it was a loss within the Act of Parliament quite irrespective of whether she afterwards floated or whether she was destroyed.

Lord ALVERSTONE, L.C.J.—After hearing the judgment of my brother Darling I think I ought to add that in my opinion, having regard to the rights of belligerents as defined by international law, I do not agree that this case can at all be compared to a case of piracy or that the same considerations apply as would apply if it were a case of piracy.

RIDLEY, J.—I desire to say that my opinion on the question of piracy is the same as that expressed by the Lord Chief Justice.

Solicitors for the appellants, *Botterell & Roche.*

Solicitors for the respondents, *Chivers & Co.*

House of Lords.

From C. A. (England). } May 3.

LEWIN AND OTHERS *v.* END. (*a.*)

Local government—Rector's rates—Metropolis—House— 12 *Car.* 2, *c.* 37—51 *Geo.* 3, *c.* 150.

By the 51 *Geo.* 3, *c.* 150, *the houses of the parish of St. Paul's, Covent Garden, were charged with a certain rate,*

Held, that a house which by internal alterations had been made into a warehouse, and was still capable of reconversion into an ordinary dwelling-house, though not actually used as such at the present time, was liable to be charged under the above Act.

Decision of the Court of Appeal, 53 *W. R.* 406, [1905] 1 *K. B.* 669, *reversed.*

Dicta *in* Surman *v.* Darley, 14 *M. & W.* 181, *not approved.*

(*a.*) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

Appeal from an order of the Court of Appeal (Vaughan Williams, Romer, and Stirling, L.JJ.) affirming the Divisional Court.

The action was brought by the appellants to recover the amount of one quarter and certain arrears of the rector's rate whereby the respondent was rated as occupier of certain premises in the parish of St. Paul, Covent Garden, in pursuance of the provisions of 12 Car. 2, c. 37, and of 51 Geo. 3, c. 150.

The county court judge found the following facts: That the three houses were in the occupation of the respondent; that they communicated by means of a door or doors—11, York-street communicating with 28, Wellington-street, and 28, Wellington-street with 30, Wellington-street; that the houses were occupied as counting-houses and warehouses; that the fireplaces were taken out when the alterations were made by the respondent to make them suitable for the purposes of his business; that there was a gas stove at No. 28, Wellington-street for the warmth of the clerks; that there was a fireplace left in No. 30; and that there were rooms the size of living-rooms, but no rooms fitted up or furnished as bedrooms; that the premises were not, in their then condition, capable of being occupied as dwelling-houses. It was not disputed that the premises had originally formed a single mansion, and had been divided into the premises above described. It was admitted that the respondent employed salesmen and assistants in this business, and that in the church of St. Paul a midday religious service was held during a considerable part of the year for the benefit of shop assistants and others working in the neighbourhood, and that the respondents' premises were within the parish.

By section 3 of 12 Car. 2, "the yearly sum of two hundred and fifty pounds shall from thenceforth be charged upon the houses of the inhabitants of the said parish of St. Paul's, Covent Garden (except the house commonly called Bedford House with the appurtenances)." By section 2 of 51 Geo. 3, c. 150, a sum of £520 "is hereby charged upon all houses within the said parish of Saint Paul, Covent Garden."

The Court of Appeal held itself bound by certain *dicta* of the court in *Surman* v. *Darley*, 14 M. & W. 181.

Macmorran, K.C., and *Clarke Hall* (*F. Barrington Ward* with them), for the appellants.

John Sanderson and *Walter Frampton*, for the respondent.

Lord LOREBURN, L.C.—The point arising on this appeal is quite a short point. It is whether the occupier of a building which consists of 11, York-street, and 28 and 30, Wellington-street, in the parish of St. Paul, Covent Garden, is liable to a rector's rate made under an Act of 51 Geo. 3, c. 150, following upon an Act of 12 Car. 2. Under the first-named Act the rate is to be borne and paid by the occupiers of all houses within that parish. If these premises are a house or houses within the meaning of this Act, then the appellants must succeed. Otherwise they must fail. The Court of Appeal (and I am sure the Divisional Court also) considered themselves bound by certain *dicta* in *Surman* v. *Darley*, from which they did not feel at liberty to dissent. This was evidently the governing consideration which influenced their judgment. Your lordships are not so bound. The premises in question, of which we have a photograph, certainly bears the external aspect of a house, and except in a court of law one could hardly describe them as anything else. They consist of buildings which communicate with another by doors, and are used as counting-houses and warehouses. All the fireplaces are taken out except one. There are no rooms fitted up or furnished as bedrooms, nor does any one sleep on the premises. In fact, these are former dwelling-houses which have been adapted for their present use by internal changes. The learned judge of the county court has described these changes. And from what he and the witnesses say, it seems clear that slight internal alterations, of which the principal would be restoring the fireplaces, could make them quite capable of being occupied as a dwelling-house again. In their present condition, without those slight alterations, they could not be so used, at all events not in the ordinary way. The Act does not give any definition of what is meant by the word "house," but imports that it shall be a place of residence. If a building is dwelt in—I do not mean the mere presence of a caretaker—no point can arise. If it be not so used, then, in my opinion, the structure and character of the building as a whole should be regarded in order to see whether it is fit or can readily be fitted for such use by any class or condition of persons in the ordinary way of living. Applying that test, I think this building falls within the Act of Parliament, and that therefore the appellants must succeed.

Lord JAMES OF HEREFORD.—I concur in the judgment which has been given by the Lord Chancellor. The judgment given in the case of *Surman* v. *Darley* can in no way be affected by the judgment which has been delivered by my noble friend. The word "dwelling-house" in *Surman* v. *Darley* was used probably only by way of contrast with the Opera House, Covent Garden, or the Play House, Drury-lane. But still we are in this position, that no definition is given in the *obiter dicta* in that case of what is meant by "dwelling."

In the statute itself the word "dwelling" is not to be found. We have therefore to see whether this edifice which has been rated is a house, and whether there is an occupier. If those two things are found to exist as a fact, then I assume that it will be agreed that the ratability attaches under the statute. I must say that it seems to me, as a matter of common sense, looking at this building as constructed and as shewn in the photograph, that it is a house. A man can carry on a business in a house as well as in a warehouse or an office, but if there remains a structure which can be applied for the purposes to which a house is usually applied, I think the words of section 2 of the Act of Geo. 3 are satisfied.

Lord ROBERTSON: I agree in the judgment proposed. I may add that the conclusion arrived at derives substantial support from the occurrence in section 8 of the Act of Charles of the word "dwelling-house," for this shews that when the narrower conception was present to the minds of the Legislature and was intended, it received distinct expression not by the word "house" but "dwelling-house."

Lord ATKINSON: I concur. I think the question turns upon the meaning of the word "house" in these two statutes. I think they must mean "dwelling-house." By a dwelling-house I understand a house in which people actually live, or which is physically capable of being used for human habitation and may be devoted to that purpose.

It was said in argument that people were actually inhabiting the upper portion of the house, the whole structure of which could be treated as a dwelling-house, notwithstanding the alterations made on the ground floor. I think the trivial alterations made in the upper portion of the house do not change its character; on the contrary, it could be easily restored to its former state, and when so restored would be fit

for human habitation. I therefore think that it comes within the statutes.

Appeal allowed.

Solicitors for the appellants, *Bartlett & Large.*

Solicitors for the respondent, *Harry Wilson & Co.*

Court of Appeal.

From K. B. Div.
(Collins, M.R., Cozens-Hardy, L.J., and Sir Gorell Barnes, P.) June 25.

THOMAS *v.* BRADBURY, AGNEW, & CO. (LIMITED). (*a.*)

Defamation—Libel—Fair comment—Privilege—Malice—Extrinsic evidence.

In an action of libel a plea that the words are fair comment on a matter of public interest may, like a plea that the words were published on a privileged occasion, be rebutted by proof of malice, and the plaintiff may prove such malice by extrinsive evidence.

Campbell *v.* Spottiswoode, 11 *W. R.* 569, 3 *B. & S.* 769, *and* Merivale *v.* Carson, 36 *W. R.* 231, 20 *Q. B. D.* 275, *discussed.*

Application by the defendants for a new trial or judgment in an action tried before Darling, J., and a jury.

The action was for libel. The plaintiff, Frederick Moy Thomas, was a journalist and critic, and the author of a book entitled "Fifty Years of Fleet Street; being the Life and Recollections of Sir John R. Robinson." The defendants were Messrs. Bradbury, Agnew, & Co., the publishers and proprietors of *Punch*, and Henry William Lucy, who was a contributor to *Punch* under the name of "Toby, M.P."

The plaintiff had been at one time the private secretary of Sir John Robinson, who was the editor and manager of the *Daily News*. The defendant Lucy was for many years connected with the *Daily News*, and was well acquainted with Sir John Robinson and the plaintiff.

The alleged libel, which was written by the defendant Lucy, and published in *Punch* of the 23rd of November, 1904, was as follows: "Mangled Remains. Extract from the Recess Diary of Toby, M.P. Been reading 'Fifty Years of Fleet Street,' just issued by Macmillan. Purports to be the 'Life and Recollections of Sir John Robinson,' the man who made, and for a quarter of a century maintained at a high level, the *Daily News*. The story is written by Mr. F. M. Thomas, who has added a new terror to death. There are biographies of sorts ranging in value with the personality of the subject and the skill of the compiler. The former occasionally suffers from the incapacity of the latter. But at least his individuality is scrupulously observed. Like Don José, what he has said he has said, his observations and written memoranda not being mixed up with what his biographer thinks he himself thought, uttered and recorded. Mr. Thomas goes about the biographer's business in fresh fashion, complacently announced by way of introduction to the volume. 'I have not thought it necessary or desirable,' he writes, 'to indicate in all cases what is his (Sir John Robinson's) and what is my own. If there is anything amusing or entertaining in these pages, I am quite content that my dear old chief should have the credit of it. The dulness I take upon myself.' Here be generosity! Here magnanimity! It is true that in the performance of his task Mr. Thomas occasionally falls from this high estate. More than once he airily alludes to 'our diary' and 'our notes,' as if he had prepared them in collaboration with his chief. Possibly conscious for a moment of this indiscretion, and reverting to more generous mood, he, approaching a particular narrative, introduces it with the remark, 'the incident may be given in the diarist's own words.' The procedure is perhaps not unusual with earlier biographers. With Mr. Thomas the lapse is rare. When he does let the hapless subject speak for himself, he is relegated to small type. For the rest, it is Mr. Thomas who *loquitur*, retelling poor Robinson's cherished stories as if they were his own, sometimes with heavy hand brushing off the bloom. Even in these depressing circumstances there is no mistaking Robinson's sly humour, his gift of graphic characterization. The worst of it is that, happening in the very same page upon some banal remark, some pompous platitude, the alarmed reader, recognizing Mr. Thomas, hastily turns over half-a-dozen pages, and possibly misses a handful of the genuine ore. These are hard lines, unjust to Robinson, unfair to the public. It is plain to see, from the few unmutilated extracts from Robinson's manuscript which illuminate the book, that the materials at hand for a delightful biography were abundant. For nearly forty years the manager of the *Daily News* lived in the very heart of things. He was behind most scenes of public life, was more or less intimately acquainted with the principal personages figuring in it. His sympathies were bountifully wide, his observation alert, his sense of humour keen. He loved his newspaper work with almost passionate affection. For him fifty years of Fleet-street were worth a cycle of Cathay. That he habitually made notes of what he saw and heard with the view to publication in biographical form is undoubted. Mr. Thomas, impregnable in the chain armour of complacency, positively admits it. 'Robinson,' he says, 'did leave some diaries'—'our diaries'—'more or less fragmentary, and a number of thick, closely-written volumes of jottings in his own handwriting, descriptive of events of which he had been an eye-witness and people he had seen and known.' Where is this treasure trove? Presumably portions the biographer was good enough to regard as worth adapting are filtered through the wordy pages of larger type. Happily the material is so good, its original literary form so excellent, that even this unparalleled atrocity cannot quite spoil the book. We who knew Robinson on his throne in Bouverie-street and at the well-known table in the dining-room of the Reform Club, rich in recollections of William Black, Payn, and Sala; who watched him enjoying himself like a boy at theatre first nights; who recognized his rare capacity as a newspaper man; who knew the kind heart hidden behind a studiously cultured severity of manner in business relations—we, perhaps jealously, cherish his memory, and regret the surprising chance that has made possible this slight upon it."

The defence was that the words complained of were incapable of a defamatory meaning, and further, that they were published as a criticism and fair comment upon the plaintiff's book, and were a fair and *bonâ fide* criticism and comment upon the book, which was a matter of public interest.

The case for the plaintiff at the trial was that the article bore on the face of it evidence of malice, and reliance was also laid on extrinsic evidence of malice—viz. proof of unfriendly relations between plaintiff and the defendant Lucy before the publication of the libel, certain observations made by the defendant

(*a.*) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

Lucy in the witness-box, and the adoption of the unusual course of devoting the whole of an article in *Punch* to the review of a book.

The jury returned a verdict for the plaintiff for £300 damages, and judgment was entered accordingly.

Scrutton, K.C. (*J. R. Atkin* with him), for the defendants, in support of the application for a new trial or judgment.—The defendants are entitled to have judgment for them on authority of *McQuire* v. *Western Morning News Co.*, 51 W. R. 689, [1903] 2 K. B. 100. No reasonable jury could say that this article was not an honest criticism on the merits of a book and the merits of the writer as an author. Criticism on a book is not actionable unless the critic either makes a misstatement of fact, or going beyond the limits of criticism attacks the personal character of the author, or uses the occasion of criticism as a cloak for mere invective: *McQuire* v. *Western Morning News Co.*; and *Merivale* v. *Carson*, 36 W. R. 231; 20 Q. B. D. 275. In *Togert* v. *Cycle Trade Publishing Co.*, [1904] 2 K. B. 292, Vaughan Williams, L.J., said, "Even in the case of a criticism of a literary production, if the writer goes on to make suggestions and reflections disparaging the character of the author, even as an author, he cannot rely upon the defence of fair comment." That goes too far. It is almost impossible in criticizing a book not to criticize the author as an author. To say that a man has written a bad book is to say that, so far as that book is concerned, he is a bad writer. Where the defence to an action of libel is concerned, he is a bad writer. Where the defence to an action of libel is fair comment, the motive of the defendant in publishing the words complained of is immaterial and the question of malice does not arise. The law as to fair comment is not a branch of the law of privilege: *Campbell* v. *Spottiswoode*, 11 W. R. 569, 3 B. & S. 769, from Crompton and Blackburn, JJ. This view was affirmed by the Court of Appeal in *Merivale* v. *Carson*, notwithstanding the contrary opinion of Willes, J., in *Henwood* v. *Harrison*. 20 W. R. 1000, L. R. 7 C. P. 606.

Dickens, K.C., and *E. F. Spence*, for the plaintiff.—The case was for the jury. In *McQuire* v. *Western Morning News Co.*, Collins, M.R., said: "No doubt in most cases of this class there are expressions in the impugned document capable of being interpreted as falling outside the limit of honest criticism, and therefore it is proper to leave the question to the jury, and in all cases where there may be a doubt it may be convenient to take the opinion of a jury." This article, besides containing untrue statements, as—*e.g.* that the plaintiff passed off Sir John Robinson's work as his own, and that the plaintiff had abundant materials for a biography at hand, attacked the plaintiff as an author generally. It is not permissible to attack an author even as an author, if the attack goes outside the particular book in question. This article conveys the impression that the plaintiff was such an incompetent author that he ought not to have been selected to write the book at all. The law as to fair comment is part of the law of privilege, and the question of malice is material: *Henwood* v. *Harrison*, and *Wason* v. *Walter*, 17 W. R. 169, L. R. 4 Q. B. 73.

Cur. adv. vult.

June 25th.—COLLINS, M.R., read the following judgment: This is an appeal by the defendants from the verdict and judgment for the plaintiff in an action of libel tried before Darling, J., and a special jury based on a critique of a book written by the plaintiff. The critique was written by the defendant Lucy, and appeared in *Punch*, of which the first defendants are the publishers. The defence was fair comment. The learned judge refused to withdraw the case from the jury, who found for the plaintiff, with £300 damages. The defendants do not complain of misdirection other than that involved in holding that there was any evidence fit for the consideration of a jury. They ask for judgment on the ground that there was nothing in the article which any reasonable jury could find to fall outside the limits of fair comment, or in the alternative they ask for a new trial on the ground that the verdict was against the weight of evidence. They pressed us strongly with the case of *McQuire* v. *Western Morning News Co.*, a decision of this court in an action for libel in respect of an article criticising adversely a play of which the plaintiff was the author, where the court set aside a verdict and judgment for the plaintiff on the ground that there was no evidence on which a rational verdict for the plaintiff could be founded. There were, however, two distinctions between that case and the present. There was admittedly in that case no evidence of actual malice unless it could be inferred from the terms of the article itself, and there was some reason for supposing that the direction was misleading. In the present case the plaintiff's counsel strenuously contended that there was extrinsic evidence of malice in the proved relations of the parties before the action; the special manner in which the particular article appeared in *Punch*; and in the expressions which fell from the defendant Lucy, coupled with his demeanour in the witness-box, and they relied also on the terms of an apology subsequently printed as fortifying their contention. They urged besides that the language of the article itself raised a question for the jury as to its meaning, and that upon their view of its meaning would depend the question whether it exceeded the bounds of fair comment or not. The question, therefore, for our decision is whether there was any evidence upon which a rational verdict for the plaintiff could be founded. If so, the learned judge was bound to leave it to the jury. I have already said that extrinsic evidence of malice, which I have attempted to summarize, was allowed to go to the jury. The defendants contended that this evidence amounted to nothing, and that no reasonable jury could act upon it, but they also raised a contention which alone, as it seems to me, gives any importance to this case. Their point was that if the article itself, apart from the extrinsic evidence, did not raise a case for the jury that the bounds of fair comment had been overstepped, proof of actual malice on the part of the writer could not affect the question or disturb his immunity. This is a formidable contention. It involves the assertion that fair comment is absolute, not relative, and must be measured by an abstract standard; that it is a thing quite apart from the opinions and motives of its author and his personal relations towards the writer of the thing criticised. It involves the position also that an action based on a criticism is wholly outside the ordinary law of libel, of which malice, express or implied, has always been considered to be the gist. The basis of this contention, such as it is, appears to be a misconception of the effect of the gloss, if I may so phrase it, first put upon the law of libel in relation to fair comment in the *dicta* of Crompton and Blackburn, JJ., in *Campbell* v. *Spottiswoode*, decided in 1863, and subsequently approved in *Merivale* v. *Carson*, decided in 1887. I have already had occasion to examine the effect of these views upon the law of libel in *McQuire* v. *Western Morning News Co.* In my opinion the substance of the matter remains unchanged and malice remains exactly where it did. The *dicta* no doubt assert the etymological inexactitude of the word privilege as connoting a right common to the public at large, and the limits of the right itself are pointed out which, whether it be called privilege or

by any other name, does not extend to cover misstatements of fact however *bonâ fide*; but they in no degree affect the standard by which the fairness of the comment is to be judged or relieve the commentator from liability, if the comment be malicious, if indeed it can then be described as comment at all. The right, though shared by the public, is the right of every individual who asserts it, and is, *qua* him, an individual right whatever name it be called by, and comment by him which is coloured by malice cannot from his standpoint be deemed fair. He and he only is the person in whose motives the plaintiff in the libel action is concerned, and if he, the person sued, is proved to have allowed his view to be distorted by malice, it is quite immaterial that somebody else might without malice have written an equally damnatory criticism. The defendant, and not that other person, is the party sued. This seems to me quite clear in point of principle; but, as already pointed out in *McQuire* v. *Western Morning News Co.*, the law continued to be administered after *Campbell* v. *Spottiswoode* just as it always had been before, down to and since *Merivale* v. *Carson*. That case decided nothing inconsistent with the law of libel as thus administered though each of the learned judges expressed an opinion in favour of the view taken in the *dicta* I have referred to of Crompton and Blackburn, JJ., in preference to that of Willes, J., in *Henwood* v. *Harrison*. But, as already pointed out, in *McQuire* v. *Western Morning News Co.* the difference between the two views is, in the language of Bowen, L.J., in *Merivale* v. *Carson*, a difference in the "metaphysical exposition" of the right and "is rather academical than practical." I think the head note in the case is to some extent the cause of what seems to me an erroneous impression as to the effect of the decision. The words of that note seem to suggest a difference of right, under the general law of libel, in respect of communications made on a privileged occasion and communications made in the shape of criticism on a matter of public interest. In cases of privilege, properly so called, nothing that falls outside the privilege is protected by it, and if defamatory must be otherwise justified. The occasion being privileged, the extent of the privilege may vary according to the nature of the case and the limits of the right or duty which is the basis of the privilege. But this is precisely the position in the case where the right exercised is one shared by the rest of the public and not one limited to an individual or a class. The extent of the right has to be ascertained, and in respect of any communication which falls within it, the immunity, if it be not absolute, can be displaced only by proof of malice. In the case of comment on literary works the occasion is created by the publication, and a right then arises to criticize honestly, however adversely. No such occasion would arise in respect of a private unpublished letter. If a writer were to get hold of a private letter of a well-known author and publish a damnatory article on the author's literary style and taste, as evidenced by the letter, it seems to me that he would have no immunity from the ordinary law in respect of defamatory writings. The only difference, then, in the legal incidents of ordinary privilege, limited to individuals on the one hand and the right in the public to criticize on the other, would seem to be that the one might, with somewhat less latitude than the other, though not, perhaps, with perfect accuracy, be described as "privilege." Now, the headnote might possibly suggest, at first sight at all events, particularly when it adds, "*Henwood* v. *Harrison* dissented from," that not merely an academical difference in the analysis of rights had been expressed, but that there was a difference of substance in the bearing of malice in the two cases in respect of communications or criticisms falling *primâ facie* within the right or privilege. The limits of the right, as I have already pointed out, may be, and are, different, but the law with respect to communications that *primâ facie* fall within them is the same. Proof of malice may take a criticism *primâ facie* fair outside the right of fair comment, just as it takes a communication *primâ facie* privileged outside the privilege. The particular allegation which was unprotected in *Merivale* v. *Carson* was never within the "right" when the facts were ascertained by the jury in interpreting the passage impugned. Proof of *bonâ fide* belief was therefore irrelevant; nothing but proof of the truth could justify the allegation. If the analysis be strictly carried out it will be found that the two rights, whatever name they are called by, are governed by precisely the same rules. The only practical difference is that in an action based on a criticism of a published work the transaction begins by the admission, on the part of the plaintiff, implied from the averment by him of publication of the work criticised, that the comment came into existence on a protected occasion. He is placed, therefore, in precisely the same position as he would have been in had he sued in respect of a defamatory writing *primâ facie* unprotected and therefore actionable, but had gone on to aver facts which created a privilege strictly so called. Beginning thus at this stage in the transaction, he would have accepted the *onus* of proving malice in fact. If he had veiled the fact that the writing criticized had become matter of public interest by publication it would have been *primâ facie* libellous, and the defendant would have had to plead such a publication as would let in the right to comment on a matter of public interest in order to bring himself within the protection. This shows that acceptance of the *dicta* under discussion does not in the slightest degree affect the place of malice in the law of libel, and that it is only by leaving out one step in the analysis that the public right, as distinguished from the privilege, may appear to carry with it different incidents. There is not even any decision that the word privilege, as used in *Henwood* v. *Harrison*, to which Lord Esher was himself a party, is not as good a word as any substitute that can be suggested to express the right by which, in certain circumstances, writings defamatory of another person may be published with impunity, because the presumption of malice is negatived. For the reasons I have given, the difference is one of words only and could not be a matter of legal decision. I have thought it worth while to sift this contention somewhat elaborately, as it is apparently based upon a misconception which seems to have a tendency to repeat itself as to the effect of *Merivale* v. *Carson* on the law of libel. But the contention of the defendants can be met not by reference to principle only, but also by direct authority. To go back to the source itself of the supposed new departure, *Campbell* v. *Spottiswoode*, Blackburn, J., says, at p. 781: "Honest belief may be an ingredient to be taken into consideration by the jury in determining whether the publication is a libel, that is, whether it exceeds the limits of fair and proper comment." In *Merivale* v. *Carson* itself, Lord Esher, M.R., at p. 281, deals with the question. He says: "It is said that if in some other case the alleged libel would not be beyond the limits of fair criticism, and it could be shown that the defendant was not really criticising the work, but was writing with an indirect and dishonest intention to injure the plaintiffs, still the motive would not make the criticism a libel. I am inclined to think that it would, and for this reason, that the comment would not then really be a criticism of the work. The mind

of the writer would not be that of a critic, but he would be actuated by an intention to injure the author." Though the learned judge in this passage expresses only an inclination of opinion, the reason given seems to me to be conclusive. But, in a very recent case in this court, the point is actually decided: *Plymouth Mutual Co-operative and Industrial Society* v. *Traders' Publishing Association*, *ante*, p. 319, [1906] 1 K. B. 403. The question there was whether an interrogatory addressed to the state of mind of the defendant, who had pleaded fair comment in an action of libel, was admissible. The court decided that it was, following a previous decision of this court in a case of privilege strictly so called. Vaughan Williams, L.J., referring to *Elliott* v. *Garrett*, 50 W. R. 504, [1902] 1 K. B. 870, says: "It seems to me that that case shows that an interrogatory of this kind is just as relevant and admissible in a case where the defence is fair comment as in one where it is privilege. In either case the question raised is really as to the state of mind of the defendant when he published the alleged libel, the question being in the one case whether he published it in the spirit of malice, in the other whether he published it in the spirit of unfairness. In either case, I think such an interrogatory as the one now in question is admissible." Moulton, L.J., says: "I am clear that both in cases in which the defence of privilege and in those in which the defence of fair comment is set up, the state of mind of the defendant when he published the alleged libel is a matter directly in issue." It is, of course, possible for a person to have a spite against another and yet to bring a perfectly dispassionate judgment to bear upon his literary merits; but, given the existence of malice, it must be for the jury to say whether it has warped his judgment. Comment distorted by malice cannot in my opinion be fair on the part of the person who makes it. I am of opinion, therefore, that evidence of malice actuating the defendant was admissible, and that the learned judge was right in letting the evidence in this case go to the jury. But I am also of opinion, on a close examination of the alleged libel, that, apart from the extrinsic evidence of malice, the learned judge could not have withdrawn the case from the jury. One point made by the plaintiff would, I think, of itself suffice to establish this position. The defendant Lucy says in the alleged libel "it is plain to see from the few unmutilated extracts . . . that the materials at hand for a delightful biography were abundant." This statement was described by the plaintiff in a letter to the editor of *Punch* as "simply untrue." A short statement was thereupon published in the issue of the 7th of December, in which the defendant, while accepting the plaintiff's statement as to the paucity of materials, quotes a passage from the preface to the book dealing with the existence of materials, and concludes thus: "Toby, M.P., had at the time of writing no knowledge of the subject beyond the definite statements quoted in the biographer's own words. He regrets that, accepting them in their ordinary sense, he received and conveyed an impression of Mr. Thomas's literary methods which turns out to have been erroneous." He is thus in the difficulty of having to admit a misstatement of fact in respect of which, to put it at the lowest, a question must arise for the jury whether the passage he relied upon justifies the statement. I think also that the learned judge could not have properly held that there was no evidence fit for the consideration of the jury as to some of the innuendoes averring imputations of discreditable motives. I am of opinion, therefore, that we could not direct judgment for the defendants without usurping the functions of the jury. Neither can we say that the evidence is so slight as to justify us in ordering a new trial on the ground that the verdict is against the weight of the evidence. A point was made by the defendants' counsel that the plaintiff had admitted that he did not rely upon evidence of malice outside that which was to be inferred from the article itself. Something to this effect certainly appears in the *Times* report, but it has not found its way into the judge's note, and the point of personal spite was forcibly put by the plaintiff's counsel throughout the whole case, which the judge refused to withdraw from the jury without any limitation as to any of the evidence given. I think, therefore, that we should not be justified in treating this answer as excluding all extrinsic evidence of malice from the discussion. Libel or no libel, I need hardly add, is pre-eminently a question for the jury where there is any evidence fit for their consideration.

COZENS-HARDY, L.J., and GORELL BARNES, P., concurred.

Application dismissed.

Solicitors for the plaintiff, *Smiles & Co.*

Solicitors for the defendants, *Lee & Pembertons.*

High Court of Justice.

Chan. Div.
Buckley, J. } June 15.

BRADFIELD v. GUARDIANS OF CHELTENHAM UNION. (a.)

Local government—Guardian of the poor—Disqualification—County court administration order—Composition or arrangement with creditors—Local Government Act, 1894 (56 & 57 *Vict. c.* 73), *s.* 46 (1) (c).

A person who has made a request for and obtained an order in the county court under section 122 *of the Bankruptcy Act*, 1883, *for the administration of his estate and payment of his debts by instalments, has "made a composition or arrangement with his creditors" within section* 46 (1) *of the Local Government Act*, 1894, *and has therefore become disqualified from holding the office of guardian of the poor.*

Motion.

This was a motion to restrain the defendants from interfering with the plaintiff in the exercise of his office of guardian of the poor.

In March, 1904, the plaintiff, George Bradfield, was elected guardian of the poor for the North Ward of the Borough of Cheltenham.

In December, 1905, judgment having been previously obtained against him in the Cheltenham County Court, he preferred a request to the county court to make an order under section 122 of the Bankruptcy Act, 1883, for the administration of his estate and for the payment of his debts, stating that he proposed to pay his debts to the extent of 10s. in the £.

Upon such request the county court judge made an order under the above section for the payment of the plaintiff's debts as specified in the schedule to the

(a.) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

request to the extent of 10s. in the £ by instalments of 8s. per month.

In February, 1906, the Board of Guardians passed a resolution that the plaintiff had become disqualified for holding the office of guardian, and that the office held by him was vacant.

Notice was posted to that effect, and an election was held in April at which another person was elected to the office.

The plaintiff brought the above action against the guardians of the North Ward, claiming a declaration that he was not disqualified for holding or exercising the office, and for an injunction to restrain the guardians from interfering with him in the exercise of the office, and now moved for an interim injunction to the like effect.

It was stated at the trial that this form of legal proceeding had been adopted as being that by which a judicial decision upon the question could be most speedly obtained.

Corrie Grant, for the plaintiff.—It is said that the plaintiff is disqualified under section 46 (1) (*c*) of the Local Government Act, 1894, on account of the order made by the county court for the administration of his estate upon the ground that he has, in the words of the section, "been adjudged bankrupt or made a composition or arrangement with his creditors." But he is not adjudged bankrupt: *Lowe* v. *Lowrie*, 18 Times L. Reps. 553. Nor has he compounded or arranged with his creditors. The composition mentioned in section 46 is a voluntary bargain between the debtor and his creditors, and not an order made by the court. A person is only disqualified by clear words in a statute. Disqualification will not be inferred: *King* v. *Chitty*, 5 Ad. & El. 609. Upon this principle a municipal councillor in *Aslatt* v. *Corporation of Southampton*, 29 W. R. 117, 16 Ch. D. 142, and a member of a local board of health in *Queen* v. *Cooban*, 18 Q. B. D. 269, 35 W. R. Dig. 124, were held not disqualified under the Municipal Corporations Act, 1835, and the Public Health Act, 1875, respectively. In his judgment, in *Lowe* v. *Lowrie*, Phillimore, J., expressed a doubt whether a debtor who had obtained a county court administration order had compounded with his creditors or not.

Macmorran, K.C., and *C. Lacey Smith*, for the defendants.—The words of the section are quite general, and cover all kinds of compositions: *Corregan* v. *Allison*, 64 J. P. 678. The doubt expressed by Phillimore, J., is not well-founded. The debtor put the law in motion for compelling his creditors to take a part of their debts and attained a discharge from the rest, and in that way he has made a composition with them as much as if he had called them together outside the authority of the court.

BUCKLEY, J.—The question for decision is whether the plaintiff under those circumstances is a person who has made a composition or arrangement with his creditors within the language of section 46 (1) (c) of the Local Government Act, 1894. Now, no doubt, in the words of Lord Denman in *The King* v. *Chitty*, 5 Ad. and El. 609, "The court would clearly not be justified in raising any inference of an intention to disqualify when such an intention is not expressed." I must look to see whether on the true construction of the Act the Act has provided that there shall be a disqualification in such a case as this. The clause to be construed is a penal clause, and therefore to be construed strictly, and the question is, Has the debtor made a composition? Now, when I come to look at section 122 of the Bankruptcy Act, 1883, I find that it is a section which enables the county court upon an application by the debtor to make an order providing for the administration of his estate and for the payment of his debts, "either in full or to such an extent as to the county court, under the circumstances of the case, appears practicable," and sub-section 7 provides that "the order shall be carried into effect in such manner as may be prescribed by general rules." Sub-section 13 provides that when the amount received under the order is sufficient to pay each creditor scheduled to the extent thereby provided and the costs of the administration, the order shall be superseded and the debtor shall be discharged from his debts to the scheduled creditors. Rules have been made under sub-section 7, the relevant rules being rules 2 and 3 of December, 1888. By Rule 2, "a debtor against whom a judgment has been obtained in a county court desiring to obtain an administration order under section 122 of the Act shall file" a certain "request and statement." By Rule 3, "the debtor shall state in his request whether he proposes to pay his creditors in full or whether he proposes to pay a composition." Then there are forms which are scheduled to the rules for the purpose of carrying them into effect. The machinery, therefore, is this—that the case being shown to be one falling within section 122, the debtor approaches the county court with the request that the court will make an order, the result of which will be that all his creditors will be bound to take, in this case, 10s. in the pound in satisfaction of their debts, and when that is done the debtor will be discharged from his debts to the scheduled creditors. Is a person who has availed himself of that machinery a person who has "made a composition or arrangement with his creditors"? It appears to me that he is. He could not make it without the concurrence of the court, I agree, but he is a person who avails himself of a certain statutory means of making a composition with his creditors, and he makes the composition by applying to a court of competent jurisdiction to make at his request an order which by force of the Act of Parliament will bind his creditors to take 10s. in the pound. Now I am not aware—counsel have not been able to show me—that anywhere in the Bankruptcy Act is "composition or arrangement with creditors" defined, and, even if it were, the language of the Local Government Act, 1894, is not, as was the language of the previous Act, addressed to compositions or arrangements under the Bankruptcy Act. There are no such words at all. The words of the Act of 1894 are simply that the debtor "has made a composition with his creditors," which I conceive are words that are wide enough to cover every composition, howsoever made, which the debtor has made with his creditors. It seems to me that when he approaches the county court under this section he applies the jurisdiction which enables the order to be made, and makes a composition with his creditors. The decision of the Divisional Court in *Lowe* v. *Lowrie* was not really a decision on the point which I have to decide; it was a decision on the words "adjudged bankrupt," and there is nothing in the words of my brother Phillimore at the end of his judgment which binds me on the matter which I have to decide. That matter was not before the court in that case, and did not arise for decision. I do not find anything in that decision which relieves me from the necessity of deciding that point for myself. I think that there was a composition here with the creditors, and that the plaintiff's action fails, and must be dismissed with costs.

Motion dismissed.

Solicitors, *C. T. Courtney Lewis*, for *G. T. Wellington*, Gloucester; *Crowders, Vizard, Oldham, & Co.*, for *Ticehurst, McIlquham, & Wyatt*, Cheltenham.

Chan. Div. Joyce, J. May 11, 29.

In re THOMPSON, DECEASED. (*a*.)
THOMPSON *v.* THOMPSON.

Will—Power of appointment—Special power—Exercise by will—Remoteness.

A testator gave a life interest in his estate to his wife, and after her death he gave the estate to such of the children of his brother C. T. as his wife should appoint, and in default of appointment to the children of his brother and sister in equal shares after life estates to his brother and sister. The wife of the testator by her will appointed the estate to C. T. for life, and after his death to the children of C. T. who had attained or should attain twenty-five if born in her lifetime, or twenty-one if born after her death, or, being a female, had attained twenty-five if born in her lifetime, or twenty-one if born after her death, or should be previously married, and if more than one in equal shares. C. T. survived both the testator and his wife. All the children of C. T. were born in the lifetime of the testator's wife, and had attained twenty-five prior to her death, and one of them had attained twenty-five prior to the death of the testator.

Held, that the appointments were not void for remoteness, as the persons who would take under the will, and the shares they would take, would necessarily be ascertained and their shares vested, not later than twenty-one years from the death of C. T., who was alive at the death of the testator, the person by whose will the power was created.

Adjourned summons.

The testator, John Carby Thompson, by his will dated the 14th of May, 1872, appointed his wife, Mary Thompson, his brother Charles Thompson, and Frederick Craven to be the executors and trustees thereof; he devised and bequeathed his freehold messuage called Inholm and all his other real estate and all his personal estate not otherwise disposed of to his executors upon trust to pay the income thereof unto his wife during her life, and from and after her decease "upon such trusts for or for the benefit of all or any one or more exclusively of any others or other of the following persons—viz.: my said brother C. Thompson and his present wife M. A. Thompson and his present and future issue of whatever degree, and my sister Elizabeth Insull and her present and future issue of whatever degree, in such shares or proportions, if more than than one, and for such interest or interests, and at such time or times, and subject to such conditions, restrictions, and limitations over for the benefit of them or some or one of them, and with such powers of maintenance, education, and investment and management, and generally in such manner within the limits of remoteness allowed by law as my said wife M. Thompson by any deed or deeds with or without power of revocation and new appointment or by will or codicil shall appoint." In default of appointment, or so far as no such appointment should intend in trust to divide the capital into two portions, one of which should bear to the other the like proportion as the children or child living at his decease of his brother, Charles Thompson, should bear in number to the children or child living at his decease of his sister, Elizabeth Insull, and to stand possessed of the first portion in trust for his brother, C. Thompson, for life, and after his decease in trust for his wife, and after the death of the survivor upon trust for the children or child of C. Thompson living at his decease or born afterwards who had attained or should attain the age of twenty-one years in equal shares, and to stand possessed of the second portion in trust for Elizabeth Insull for life, and then in trust for her sons Charles Insull and Walter Horace Insull in equal shares, or, if only one should be living at his decease, then for such one alone.

The testator died on the 6th of July, 1872, and his will was duly proved by the executors. Charles Insull had predeceased him, having died on the 23rd of June, 1872.

Mary Thompson, the wife of the testator, by her will dated the 8th of July, 1879, appointed the income of the estate of her husband, the testator, over which she held the power of appointment, to Mary Ann Thompson, the wife of Charles Thompson, for her life for her separate use, and from and after the decease of Mary Ann Thompson "in trust for all and every the children or child of the said Charles Thompson who, being male, have attained or shall attain the age of twenty-five years if born in my lifetime, or twenty-one years if born after my decease, or, being female, have attained or shall attain the age of twenty-five years if born in my lifetime, or twenty-one years if born after my decease, or shall, being females, be previously married, and if more than one such child in equal shares."

The testatrix appointed £3,500 to Elizabeth Insull, and after her decease to Walter Horace Insull, and after his decease to his children on attaining twenty-one years. The testatrix also appointed £2,000 to each of the three daughters of Charles Thompson and £500 to each of the six sons of Charles Thompson who should be living at her decease and should attain the age of twenty-five years, or die under that age leaving issue. She also appointed £500 to Walter Horace Insull, son of Elizabeth Insull.

By a codicil dated the 1st of April, 1891, Mary Thompson revoked the appointment in her will in favour of Mary Ann Thompson, and appointed that the trustees should hold the investments in trust for Charles Thompson the elder during his life and after his death for such children or child of his as were in that behalf specified in the will.

Mary Thompson died on the 1st of February, 1893, and her will and codicil were proved by Charles Thompson and John Carby Thompson, two of the executors therein named.

Elizabeth Insull died on the 4th of May, 1882, and her son, Walter Horace Insull, died on the 13th of January, 1891, leaving his wife, Caroline Insull, who was one of the defendants in the present action, and nine children.

Mary Ann Thompson, the wife of Charles Thompson, died on the 8th of October, 1892.

By a deed dated the 29th of March, 1894, John Carby Thompson was appointed a trustee of the will of the testator jointly with Charles Thompson in the place of Mary Thompson, deceased, and Frederick Craven, who retired from the trust.

Charles Thompson died on the 17th of March, 1905. He was married once only—viz. to Mary Ann Thompson. He had nine children, six sons and three daughters, all of whom were born before the death of the testator, and all of whom survived the testator and had attained the age of twenty-five years before the death of Mary Thompson, the appointrix, one of whom also had attained the age of twenty-five years before the death of the testator, and all of whom were still living.

One son, Alfred Thompson, assigned his share under the testator's will to the defendants, John Watkinson and Samuel Watkinson, together with George Watkinson, as tenants in common.

George Watkinson died on the 30th of August, 1905, having by his will appointed the defendants,

(*a*.) Reported by R. FRANKLIN STUBBING, Esq., Barrister-at-Law.

George Watkinson and Samuel Lord Watkinson, to be the executors thereof.

Another son, Arthur Henry Thompson, also assigned his share in the estate of the testator to George Watkinson and the defendants John Watkinson and Samuel Watkinson, as joint tenants.

Another son, Walter Thompson, was adjudicated bankrupt on the 23rd of February, 1897, and the defendant, A. H. Wildy, became the trustee in his bankruptcy.

This summons was taken out by J. C. Thompson, the surviving trustee of the will of the testator, for the determination of the question whether the appointments contained in the will of Mary Thompson to all and every the children or child of Charles Thompson, who, being a male, had attained or should attain the age of twenty-five years if born in her lifetime, or twenty-one years if born after her decease; or, being a female, had attained or should attain the age of twenty-five years, if born in her lifetime, or twenty-one years if born after her decease, or should, being a female, be previously married, and if more than one such child in equal shares were good appointments under the power given to her by the will of the testator, J. C. Thompson, deceased, in favour of any and which of the children of Charles Thompson, or whether such appointments were void under the rules against perpetuity.

Kenneth Wood, for the trustee of the will of the testator.

Younger, K.C., and *G. Henderson*, for two sons of Charles Thompson.—In the events which have happened, and which were definitely ascertained at the death of the testator, there was no possibility that the rule against perpetuity could have been infringed. At the death of the appointrix all the children of Charles Thompson had attained twenty-five, and the only persons to whom she appointed shares were the children of Charles Thompson living at her death who should attain twenty-five and to any children born after her death who should attain twenty-one. The question was what words must be read into the original will. It ought to be read with reference to the existing facts. In *Picken* v. *Matthews*, 10 Ch. D. 264, a gift which on the face of the will might be bad was held to be good having regard to the existing facts: see also *In re Barker, Caper* v. *Flick*, 92 L. T. 831. In the present case the class was closed in any event at the death of the appointrix, no one outside the class could come in afterwards. That period was within the legal limits, and therefore the appointment was good. The appointment must be read as if it ran: "I appoint in trust for all the children of Charles Thompson living at my death or for such of them born afterwards who shall attain twenty-one." That appointment, taken with reference to the facts, was good. The testator's will ought to be read, having regard to the facts, and to the exercise of the power of appointment, as if the following words were in it: "I give to my widow for life and upon her death to my brother Charles for life, and upon his death to his children living at my death who shall attain twenty-five years with remainder to the children born afterwards who shall attain twenty-one years." That class would have been a good class and such a gift in the testator's will would have been a perfectly good gift. The appointrix had appointed to these persons, and to no others, and therefore the rule against perpetuities had been entirely complied with. The exercise of a power of appointment of this kind might be good or bad according to the facts: see *Picken* v. *Matthews*. The facts that existed at the death of the appointrix must be read into the will creating the power, and if, on those facts, the will did not infringe the rule against perpetuities, the appointment was good, but if the will read in that manner did infringe the rule, the appointment was bad. As the children were all living at the death of the appointrix, they constituted a class that came within the rule. The principle laid down in *Von Brockdorff* v. *Malcolm*, 30 Ch. D. 172, was good, but it might be doubted whether the decision was good, because it was based upon the case of *Wilkinson* v. *Duncan*, 9 W. R. 915, 30 Beav. 111, where the gift was not to a class at all. That case could not be supported unless the facts that existed at the testator's death were looked at. [JOYCE, J., referred to Gray on Perpetuities, as approving that decision.] In *Badham* v. *Mee*, 1 Myl. & K. 32, Sir J. Leach, M.R., said that the Court of Common Pleas decided against the validity of the appointment upon the ground that by the execution of a power no estate could be created which would not have been valid if limited in the deed creating the power. The exercise of the power of appointment must be read into the will not in accordance with the words, but in accordance with the facts.

G. Lawrence, for the three daughters of Charles Thompson.

Felix Cassell, for the four Watkinsons, who were defendants.—The rule is laid down as stated by Mr. Younger in *In re Coulman, Munby* v. *Ross*, 30 Ch. D. 186, 34 W. R. Dig. 137. The validity of the appointment had to be determined by the state of things that existed when the appointment took effect, and not as they existed at the death of the testator who created the power.

Hughes, K.C., and *Dighton Pollock*, for those who took in default of appointment.—This appointment was not good, as it infringed the rules against perpetuities. The appointment in Mary Thompson's will would have to be read into the testator's will. If so read, it was in effect a gift to Mary Thompson for life, then to Charles Thompson for life, and then to the children of Charles Thompson born in his lifetime who should attain the age of twenty-five years. Unless subsequent events were taken into consideration that gift would be bad. The class was not closed until the death of the survivor of the two life tenants. There was no case in which it was laid down that the appointment could only be read into the testator's will together with the surrounding circumstances. *Picken* v. *Matthews* was not a case of the exercise of a power of appointment at all. In that case there was a gift of real and personal property to the children of a daughter who should attain the age of twenty-five years, and therefore the class would necessarily close and be ascertained at the date of the testator's death, and there could be no possibility of the gift being void for remoteness. Several points were argued in *Von Brockdorff* v. *Malcolm*. The decision for which it has been cited was dismissed in a very summary manner. It was not really argued, otherwise it would have been pointed out that *Wilkinson* v. *Duncan* did not support the proposition for which it was cited. In fact that case rather supported the view now contended for. There the gift was to each daughter and not to the daughters as a class, and therefore they could be easily ascertained. The gifts in the present case were the same as the gifts to the sons in *Wilkinson* v. *Duncan*, where the direction to pay the residue "between his sons equally as when they should respectively attain twenty-four years of age" was held void for remoteness. In order to ascertain whether the rule against perpetuities had been infringed the possible events must be looked at and not merely the actual events: *Pearks* v. *Moseley*, 29 W. R. 1, 5 App. Cas. 714. If the rule against

perpetuities was infringed by the testator's will, when the exercise of the appointment was read into it, that could not be rectified by looking at the surrounding circumstances. In the case of *In re Hallinan's Trusts*, [1904], 1 I. R. 452, there was no gift to a class at all but only a gift to one, and the proposition that there was a good exercise of the power was carefully limited to cases where the power was exercised in favour of a person named or described.

Younger, K.C., in reply.—The estates that are created by the power must be looked at and not the words creating the power. *In re Hallinan's Trusts.* The test of the validity of the estates raised is to place them in the deed creating the power in lieu of the power itself: Sugden on Powers (8th ed., p. 396), Farwell on Powers (2nd ed., p. 286). In one sense the validity is decided by referring to the event. The case of *Peard* v. *Kekewich*, 15 Beav. 166, bears out the same proposition.

Cur. adv. vult.

May 29.—JOYCE, J.—Upon consideration this appears to be a tolerably plain case and free from difficulty.

The rule against perpetuities requires that every estate or interest must vest, if at all, not later than twenty-one years after the determination of some life in being at the time of the creation of such estate or interest, and not only must the person to take be ascertained, but the amount of his interest must be ascertainable within the prescribed period. Or the rule may be stated thus: "A limitation of any estate or interest, to take effect in possession or enjoyment at a future time, and which is not, from the time of its creation, a vested estate or interest, will be void, *ab initio*, if, at the time when the limitation takes effect, there is a possibility that the estate or interest limited will not vest within the period of a life or lives then in being, or within a further period of twenty-one years thereafter."

In the case of a will disposing of the testator's own property or exercising a general power of appointment, the rule requires that the estates or interests limited should vest, if at all, not later than twenty-one years after limitation of a life in being at the death of the testator. As to estates or interests vesting immediately upon the testator's death, there is of course no question of remoteness. Where, as in the present case, the will under consideration is made in exercise of a special power of appointment, the question whether an estate or interest appointed by it be too remote depends upon its distance from the creation, not from the exercise of the power. In other words, the period within which estates and interests limited by the appointment made in exercise of a special power must vest does not begin from the death of the person exercising the power, but, if such power was created by a will, from the death of the original testator. In the case of a will made in exercise of a special power of appointment, as to any estates or interests given which vest immediately upon the testator's death, or must vest within twenty-one years afterwards if the testator, the donee of the power, was living at the time of its creation, there is no objection on the ground of remoteness, since what is given must vest immediately upon or within twenty-one years after the termination of a life (that of the donee of the power) which was in existence at the time of the creation of the power. In the case of a power to appoint by will to issue, however remote, if the donee of the power was alive at the time of its creation any appointment to objects of the power, specified by name or otherwise, but capable at the death of the donee of the power of being ascertained immediately, must be unobjectionable, notwithstanding that neither the appointees nor their parents nor their grandparents were alive at the time of the creation of the power. For the interests of the appointees vest at the appointor's death, and the appointees were living when the power was created. But if future estates or interests be given by the will of the donee of the power, the question may arise whether such estates or interests are, or are not, within the limits allowed by the rule, which requires them to vest not later than twenty-one years after the termination of some life in being at the time of the creation of the power.

The present case is that of an appointment by will in exercise of a special power created by the will of John C. Thompson, so that the date of the creation of the power was the death of this testator, which occurred in the year 1872. Mary Thompson, the donee of the power, was then living; consequently, as to any gift by her will exercising the power that vested immediately upon her death, no question of remoteness arises whether such gift was to persons by name or to persons capable of being definitely ascertained at once, provided that the amount of their shares was also ascertainable within the prescribed period. Again, an appointment by her will to the children that attain twenty-one or previously marry of any person (*e.g.* Charles Thompson) who was living at the death of John C. Thompson, the original testator, is obviously unobjectionable. What the testatrix did do was to appoint (after a preceding life estate which vested immediately) to a composite class comprising the children of Charles Thompson born in her lifetime that attained twenty-five, or being females previously married, and the children of Charles Thompson born after her decease that attained twenty-one, or being females previously married. Now the children of Charles Thompson born in the lifetime of the testatrix were of course ascertained at her death. As a matter of fact all such children had previously fulfilled the condition of attaining twenty-five. Consequently, each of them, upon the death of the testatrix, took an immediate vested interest in some share of the appointed property, the amount of which share would necessarily be determined not later than twenty-one years after the death of their father, Charles Thompson, who was living at the time of the creation of the power. For within that period all his children that lived to attain twenty-one, in particular those (if any) born after the death of the testatrix, Mary Thompson, must have been of age. In point of fact, however, there were no such children born after the death of the testatrix. If the appointment made after the preceding vested life interest had been simply to the children of Charles Thompson born after the decease of the testatrix who should attain twenty-one, or, being females, previously marry, it is plain that this would have been perfectly valid, for Charles Thompson was alive at the time of the creation of the power. Again, if the appointment after the preceding life estate had been simply to the children of Charles Thompson born in the testatrix's lifetime who attained or should attain twenty-five, then it appearing, as was the fact, that the class of these children was closed and the members of such class definitely ascertained in her lifetime, the case would have been merely one of an immediate vested gift taking effect upon the death of the donee of the power, who was living at the time of its creation, to persons definitely ascertained. Manifestly this would have been free from all objection on the ground of remoteness. The addition to the last mentioned class of such (if any) children of Charles Thompson as might be born after the decease of the testatrix and attain twenty-one or being females previously married, made no material difference with respect to the

validity of the gift, since all these other children, if any, would necessarily be ascertained, as also, therefore, the amount of the share of each member of the composite class, not later than the expiration of twenty-one years from the termination of the life of Charles Thompson, their father, who was living at the death of the original testator whose will created the power. The result is that immediately upon the appointment by the will of Mary Thompson coming into force, that is to say, at her decease, it was absolutely certain that, within the prescribed period of a life or lives in being at the creation of the power and twenty-one years, not only would the persons to take be ascertained, but their interests would be vested, and the amount or number of their aliquot shares be definitely fixed. In other words, the appointments contained in the will of Mary Thompson are good appointments under the power given to her by the will of the testator, John Carby Thompson.

In the course of the arguments before me some doubt was suggested as to the authority of the decision of Pearson, J., in *Von Brockdorff* v. *Malcolm*, 30 Ch. D. 172. I mean, of course, that part of the decision which had reference to the question of remoteness. Professor Gray, in his most excellent treatise on The Rule against Perpetuities (2nd ed.), sections 523*c* and 523*d*, treats the decision as correct. I do not entertain the slighest doubt that it is so. It has been followed in Ireland in *In re Hallinan's Trusts*, [1904] 1 I. R. 452, affirmed on appeal.

When Mr. Jarman, in vol. 1 of his book on Wills (5th ed), at p. 259, states that the test by which the validity of such a gift as that which I have had to consider must be tried is to read it as inserted in the deed or will creating the power in the place of the power, that does not mean that the precise language of the instrument exercising the power (in the present case the will of Mary Thompson) is to be read into the instrument creating it—viz. the will of J. C. Thompson (Gray, section 515 and seq.). The will of Mary Thompson was an ambulatory document, having no force or effect whatever until her death: see the judgment of Lord Davey in *Beddington* v. *Baumann*, 51 W. R., at p. 385, [1903] App. Cas., at p. 19. Inasmuch, therefore, as the appointment made by the will of Mary Thompson was so made that the persons who according to the true construction of such will were to take under it and the shares they were to take would necessarily be ascertained, and their interests vest not later than the expiration of twenty-one years from the death of Charles Thompson, who was alive at the death of the testator, by whose will the power was created, the appointment made by the will of Mary Thompson was perfectly valid: see the judgment of Kindersley, V.C., in *Harvey* v. *Stracey*, 1 Drew, at p. 137.

Solicitors, *Hunter & Haynes; Thompson & Co.; Williamson, Hill, & Co.*, for *Clarkson & Buckley*, Halifax.

K. B. Div.
Bray, J.

May 3, 25.

WESTMINSTER CORPORATION *v.* LONDON COUNTY COUNCIL. (*a.*)

Metropolis—Thames—Sewers—District sewer constructed by vestry with consent of the Sewer Commissioners draining houses directly into the Thames—Notice to discontinue drainage—Houses connected up with main drainage system — Expenses — Liability — Metropolis Management Act, 1855 (18 & 19 *Vict. c.* 120), *s.* 135—*Amending Act*, 1858 (21 & 22 *Vict. c.* 104), *s.* 1.

At the time of the passing of the Metropolis Management Act, 1855, a group of houses in London near the Thames were drained into the river by means of a drain constructed with the consent of the Metropolitan Commissioners of Sewers. In 1903 the Thames Conservancy gave notice requiring the plaintiffs, who were the successors of the vestry, to discontinue the passage of sewage into the Thames from this drain, and it was agreed by the plaintiffs and the defendants that the only practical mode of complying with the notice was to bring the sewage into the metropolitan main drainage sewer in the neighbouring street. The necessary work was then done by the plaintiffs, and the action was brought to decide whether they or the London County Council, as the successors to the Metropolitan Board of Works, should bear the expense.

Held, that as the London County Council were not under any legal obligation to provide means of preventing the sewage of houses from passing into the river, the declaration of their liability asked for by the plaintiffs for the expenses of constructing the new sewer must be refused.

Special case.

In the action the plaintiff claimed a declaration that the defendants were liable to commence and complete the necessary sewers and works for preventing, as far as possible, the sewage of the houses Nos. 102, 103, and 104, Grosvenor-road, and of All Saints' Church from passing into the Thames within the Metropolis, and also to recover £627 4s. as money paid by the plaintiffs for and at the request of the defendants.

The special case, so far as material to the judgment, was as follows:

In May, 1849, some time after Grosvenor-road, with the embankment on one side thereof abutting on the Thames, was constructed by the Commissioners of Woods and Forests, the Commissioners of Sewers consented to the construction of a drain from Nos. 1, 2, 3, Erin-place, afterwards known as Nos. 102, 103, and 104, Grosvenor-road, into the Thames on the application of a builder on behalf of the then owner of the houses.

The drain was made, and from that date down to the completion of the works now in question, the sewage from the houses discharged into the Thames.

It is to be taken that the said drain was, at the passing of the Metropolis Management Act, 1855, a drain for draining a group of houses by a combined operation laid before the 1st of January, 1856, with the sanction and approval of the Metropolitan Commissioners of Sewers.

About 1870, All Saint's Church, near 104, Grosvenor-road, was built, and at some time subsequently a drain from the church was connected with the drain from the houses, by means of which the sewage from the church discharged into the Thames.

It cannot be stated whether the drain from the church and its connection with the pipe leading from the manhole into the river was constructed with or without the knowledge or consent of the vestry of St. George, Hanover-square.

The Grosvenor-road houses and the church are within the parish of St. George, Hanover-square, and under the London Government Act of 1899 the powers and duties of the elective vestry of that parish were transferred to, and are now vested in, the Westminster City Council. The sewage from the houses and church passed into the river through a flap, which opened at low tide, but at high tide was closed by the pressure of the water. Before 1899 the vestry of St. George, Hanover-square, and after 1899 the Westminster City

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

Council, took steps to ensure the efficient working of the said flap. With that exception the Westminster City Council has done no acts of interference with or control over the drainage of the said houses. Having regard to the Thames Conservancy Act, 1894, it is admitted that the only practicable mode of disposing of sewage from the houses and church was to bring such sewage into the metropolitan main drainage, system at the Lupus-street sewer.

In July, 1895, the court decided that the London County Council had no power to order the vestry of St. George, Hanover-square, to construct a sewer to commence opposite No. 102, Grosvenor-road and terminate in Lupus-street at the low-level sewer belonging to the County Council.

In October, 1903, the Conservators of the Thames gave notice requiring the Westminster City Council to discontinue within three months the passage of sewage into the Thames from the sewer taking the drainage of the Grosvenor-road houses. In consequence of that notice the Westminster City Council ceased their practice of seeing to the effectual working of the aforesaid flap opening into the Thames.

In June, 1904, during proceedings by the owners of the houses against the Westminster City Council for ceasing to maintain the proper working of the flap, both parties concurred in stating that a sewer must be constructed for carrying off the drainage, and by consent the proceedings stood over to give the Westminster City Council an opportunity of arranging with the London County Council for the immediate construction of such a sewer, leaving the question of the cost of such sewer to be determined later between the said last-mentioned parties.

The Westminster City Council have since had constructed a sewer, which carries the sewage from the said houses and church into the Rutland-street sewer, and have paid £627 4s., the cost of these works. The question was whether the London County Council were under a legal liability to provide means of preventing the sewage of the houses and church from passing into the Thames within the metropolis, as if that was the case the sum paid is to be taken to have been paid for the defendants at the defendants' request.

The Westminster City Council contend that the duty and obligation of doing the said works is by statute imposed on the county council.

The London County Council contend that on the facts and in the circumstances above stated they were under no obligation to provide means of carrying the drainage either of the houses or of the church into one of the City of Westminster sewers communicating with the metropolitan main drainage system, or otherwise into that system, and that in any case it had a discretion in the matter.

Macmorran, K.C., and *Colam*, for the plaintiff.

English Harrison K.C., and *Daldy*, for the defendant.

Cur. adv. vult.

BRAY, J., read his judgment as follows: This is a special case stated in an action by the Mayor, &c., of the City of Westminster against the London County Council, and the question I have to decide is stated in paragraph 19 of the case—viz. whether the London County Council was under a legal liability to provide means of preventing the sewage of certain houses in Grosvenor-road and All Saints' Church from passing into the River Thames. The plaintiffs allege that this liability is created by section 135 of the Metropolis Management Act, 1855, or by section 1 of the Amendment Act of 1858. Previous to the passing of the Act of 1855 two bodies, the Commissioners of Sewers of the City of London and the Metropolitan Commissioners of Sewers, had constructed certain main sewers, the sewage from many of which passed directly into the Thames. The Metropolitan Board of Works was created by section 135 of the Act of 1855, and by the same section the main sewers before mentioned were vested in them. The section then proceeded as follows: "Such Board shall make such sewers and works as they may think necessary for preventing all or any part of the sewage within the metropolis from flowing or passing into the River Thames in or near the metropolis." At the time of the passing of the Act the sewage from the houses now known as 102, 103, and 104, Grosvenor-road, was passing directly into the Thames by a drain made with the consent of the Commissioners of Sewers, and the contention is that the Metropolitan Board of Works should have constructed a main or intercepting sewer to take this sewage, and as they did not do so, but carried their intercepting sewer along Lupus-street instead of along Grosvenor-road, that they, or, rather, their successors, the London County Council, can now be compelled to construct a main sewer to prevent this sewage from passing into the Thames. In my opinion section 135 did not compel the board to lay a main sewer to intercept this sewage. The section states "such sewers and works as they may may think necessary"—that is to say, it was for them to decide what sewers and works were necessary. They did in 1869 lay in Lupus-street a sewer sufficiently low to take this sewage by means of a sewer along what was afterwards known as Rutland-street, and they might in their discretion think such a sewer as the low-level Lupus-street sewer was all that was necessary. It was for the vestries and district boards under section 69 to make the necessary sewers for effectually draining their parishes or districts, and the Metropolitan Board of Works was not, in my opinion, bound to lay a main sewer so as to intercept the drain of every house that drained into the Thames. More reliance, however, was placed on section 1 of the Act of 1858: "The Metropolitan Board shall cause to be commenced as soon as may be after the passing of this Act, and to be carried on and completed with all convenient speed according to such plan as to them may seem proper, the necessary sewers and works for the improvement of the main drainage of the metropolis and for preventing as far as may be practicable the sewage of the metropolis from passing into the River Thames within the metropolis." It does not contain the words "as they may think necessary," but "according to such plan as to them may seem proper," and later "as far as may be practicable." It was not in my opinion intended by this section to take away from the board the discretion they formerly had. The object of the statute appears from the preamble—viz., that the works which the board had been authorized to carry out by the Act of 1855 should be speedily undertaken and completed, and I think the "necessary sewers and works" in section 10 only meant the same necessary sewers and works as had been mentioned in section 135 of the Act of 1855—viz., such as the board might think necessary. To give the Act any other construction would oblige the board to construct many sewers which would be properly district sewers, and not main sewers, and sufficient in number and extent to take the sewage of every house that at that time drained into the Thames. I am satisfied that was not intended, and in my opinion the words of the section do not compel me to adopt such a construction. There must, therefore, be judgment for the defendants in the action with costs.

Solicitors for the plaintiffs, *Allen & Son.*

Solicitor for the defendants, *Seager Berry.*

Privy Council.

(*From the Court of Error and from the Supreme Court of the Turks and Caicos Islands.*)

March 21.

FRITH *v.* FRITH. (*a.*)

Power of attorney—Power coupled with an interest—Revocation—Manager—Evidence—Additional consideration to that expressed in document—Specific performance.

Where a power of attorney was given by the owners of an estate to an agent to enter into possession and to manage the estate, to receive the rents and profits and to pay the debts of the owners, and possession was taken by the agent, and some time afterwards the power of attorney revoked and possession demanded,

Held, that the power of attorney was revocable, although the agent had, with the consent of one of the owners, given a personal guarantee to the mortgagee of the estate to pay the mortgage debt on the day of redemption, and (even if the authority were irrevocable) the owners were entitled to recover possession of the property.

These appeals arose out of an action of ejectment under circumstances which are set out at length in their lordships' judgment.

The question as to when a power of attorney is revocable when the donee of the power has an interest was considered, and in this particular case adjudicated upon.

Martelli, for the appellant.

Whinney, for the respondent.

The judgment of their lordships (Earl of HALSBURY, Lords DAVEY, ROBERTSON, ATKINSON, and Sir ARTHUR WILSON) was delivered by

Lord ATKINSON.—The action out of which these appeals have arisen was one of ejectment, brought to recover possession of an estate called "the J. J. Frith Estate" situate at Cockburn Harbour, South Caicos, in the Turks and Caicos Islands. The plaintiff (the present respondent) sued as attorney for Elizabeth Ann Frith, the widow and executrix of J. J. Frith, deceased, the former owner, under whose will she (the widow) was tenant for life of the estate, her two sons being tenants in common in remainder. The defendant (the present appellant) had been appointed attorney over the estate by two deeds, dated respectively the 12th of March, 1902, and the 18th of October, 1902, executed by the executrix and her said two sons, and authorizing him to enter into possession of and manage the estate, to receive the rents and profits thereof, and thereout, after providing for the expenses of management, pay the debts due by the owners of the estate. In the month of May, 1902, the appellant entered into possession as such attorney. In the month of September, 1903, notice was served upon him by the widow and the sons purporting to revoke his appointment. Shortly afterwards possession was demanded from him on behalf of the widow, but was refused by him on the ground that owing to a personal guarantee that he, with the widow's consent, had given to one W. B. Astwood, a mortgagee of the estate, to pay the mortgage debt on the day of redemption, his authority was coupled with an interest and was, therefore, irrevocable. The deeds of the 12th of March and the 18th of October, 1902, do not contain any reference to this guarantee or to the mortgage debt, and did not create any charge or lien in favour of Astwood or any other creditor of the owners of the estate, or form part of Astwood's security. And though by the payment of the latter's debt the special interest which was to keep alive the appellant's authority would have ceased to exist, his continuance in his post is not made to depend in any way on that event. It was alleged that the appellant had before the 12th of March, 1902, the date of the first deed, given security to another creditor, Messrs. Middleton & Co., of New York, but inasmuch as before it was attempted to revoke the appellant's authority, and necessarily before possession was demanded, the full amount due to this firm had been tendered to them, it was conceded in argument that nothing turned upon this transaction, and that as far as these appeals are concerned it might be dismissed from consideration.

At the trial, which took place before St. Aubyn, J., and a special jury of the island, there was no substantial conflict of evidence. The main facts of the case were in effect admitted. The appellant, however, tendered evidence to show that the deed of the 18th of October, 1902, did not disclose the entire consideration given for it, and that additional consideration for it had moved from the appellant, namely, the above-mentioned personal guarantee given by him to Astwood with the approval of the widow, without which it was clearly established that Astwood would not have advanced the money. The learned judge at first, apparently, thought this evidence was inadmissible on the ground that it would contradict the deed; but subsequently he admitted it. At the close of the defendant's case he expressed the opinion that the main question at issue—namely, whether the power of attorney were revocable or not—was purely a question of law for his own decision; but at the instance of the appellant's advocate he submitted to the jury eight somewhat involved and complicated questions. Of these three only—namely, Nos. 2, 3, and 8, seem to be of any importance. The answers to these appear when taken together to amount, in effect, to a finding that there was consideration for the deed of the 18th of October, 1902, other than, and additional to, that mentioned in it—namely, the agreement between the widow and the appellant that the latter should give to Astwood the above mentioned personal guarantee, as he subsequently did.

On these findings the appellant's advocate moved for judgment, but St. Aubyn, J., on the 3rd of December, 1903, delivered the judgment of the Supreme Court in favour of respondent, holding that the parol evidence tendered to prove the additional consideration was inadmissible on the ground that it contradicted the deed, and that the authority given to the appellant as attorney was revocable.

From this decision the appellant appealed to the Court of Error of the Islands. That tribunal held that the appellant had not taken the necessary steps to bring his appeal before them; that the appeal was in fact not properly before them at all; and they dismissed it with costs. From this decision the appellant obtained leave to appeal to his Majesty in Council in the usual way. The record of the proceedings does not show what were the particular rules of practice which the appellant was considered to have violated or failed to observe, and as the proceedings of the Court of Error appear to have been somewhat irregular, special leave was given to the appellant to appeal from the decision of the Supreme Court direct to his Majesty in Council, in addition to the leave to appeal obtained by him from the Court of Error itself.

The appellant's counsel on the hearing of these appeals contended in effect:

(1) That St. Aubyn, J., was wrong in holding that

(*a.*) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

the parol evidence of the additional consideration was inadmissible.

(2) That the authority given to the appellant by the two instruments of the 12th of March and the 18th of October, 1902, was, having regard to the findings of the jury in reference to the guarantee, an authority coupled with an interest and therefore irrevocable.

(3) That the attempt to revoke the authority and to dismiss and dispossess the appellant before the seven years for which he was appointed had expired was so inequitable that the respondent should be restrained by injunction from carrying it out, and that therefore the appellant had a good equitable defence to the ejectment.

These are, in effect, the questions for their lordships' decision.

In support of the first contention the case of *Clifford* v. *Turrell*, 1 Y. & C. 138, which was a suit for specific performance, was cited.

The plaintiff in that case was the lessee of a farm the stock and farming implements upon which had at the suit of the defendant been taken in execution. The plaintiff, with the consent of the sheriff, executed a deed by which he purported to assign to the defendant, for a money consideration exceeding the amount of the execution, the chattels seized, and, it was contended, his interest in the leasehold. Parol evidence was admitted to prove that additional consideration was in fact given for the deed by which the plaintiff was induced to execute it—namely, an agreement by the defendant that he would pay to the plaintiff an annuity of £40 per annum during his life and give to him a house worth £10 a year to live in. Specific performance of that parol agreement was decreed. The Vice-Chancellor (Sir L Shadwell) in delivering judgment in the case, lays down, in the opinion of their lordships correctly, the rule of law upon this subject. He said:

"Rules of law may exclude parol evidence where a written instrument stands in competition with it, but it has long been settled that it is not within any rule of this nature to adduce evidence of a consideration additional to what is stated in a written instrument." And then adds: "The rule is, that where there is one consideration stated in the deed, you may prove any other consideration which existed, not in contradiction to the instrument; and it is not in contradiction to the instrument to prove a larger consideration than that which is stated."

Their lordships think the present case comes within the rule, that the evidence proposed to be given did not contradict the deed, and that the appellant's first contention is well founded.

In reference to the second point, it cannot be disputed that the general rule of law is that employment of the general character of the appellant's in this case can be terminated at the will of the employer. The proper conduct of the affairs of life necessitates that this should be so. The exception to this rule within which the appellant must bring himself, if he is to succeed, is that where "an agreement is entered into for sufficient consideration, and either forms part of a security, or is given for the purpose of securing some benefit to the donee of the authority, such authority is irrevocable": Storey on Agency, p. 476.

It cannot be contended that the ordinary case of an agent or manager employed for pecuniary reward in the shape of a fixed salary comes within this exception, though his employment confers a benefit upon him. And their lordships are of opinion that the position of the appellant under the instruments appointing him attorney over this estate is in law that of an ordinary agent or manager employed at a salary, and nothing more, because the authority which was conferred upon him contains no reference to the special interest in the occupation of his post which his guarantee to Astwood might have given him, was not expressed or intended to be used for the purpose of subserving that interest, and has no connection with it. For these reasons their lordships think that the authority given to the appellant was revocable. Several cases have been cited by the appellant's counsel in support of his second contention. On an examination of them it will be found that the essential distinction between this case and those cited is this, that in each of the latter power and authority were given to a particular individual to do a particular thing, the doing of which conferred a benefit upon him, the authority ceasing when the benefit was reaped, while in this case, as already pointed out, nothing of that kind was ever provided for or contemplated. In *Carmichael's case*, [1896] 2 Ch. 643, the donor of the power, for valuable consideration, conferred upon the donee authority to do a particular thing in which the latter had an interest—namely, to apply for the shares of the company which the donee was promoting for the purpose of purchasing his own property from him, and the donor sought to revoke that authority before the benefit was reaped. In *Spooner* v. *Sandilands*, 1 Y. & C. 390, the donor charged his lands with certain debts due and to accrue due to the donees, and put the latter into the possession of those lands and into receipt of the rents and profits of them, for the express purpose of enabling the donees to discharge thereout these same debts; and it was sought to eject the donees before their debts were paid. In *Clerk* v. *Laurie*, 5 W. R. 629, 2 H. & N. 199, a wife pledged to a bank dividends to which she was entitled to secure advances made to her husband. It was held that while the advances remained unpaid she could not revoke the bank's authority to receive the dividends. In *Smart* v. *Sandars*, 5 C. B. 895, it was decided that the general authority of a factor in whose hands goods were placed for sale, to sell at the best price which could reasonably be obtained, could not be revoked after the factor had made advances on the security of the goods to the owner of them, and while these advances remained unpaid. It is not necessary for the purposes of these appeals that their lordships should determine whether or not the appellant has, on the authority of *Read* v. *Anderson*, 32 W. R. 950, L. R. 13 Q. B. D. 779, and *Turner* v. *Goldsmith*, 39 W. R. 547, [1891] 1 Q. B. 544, a right of action against the respondent for damages for breach of agreement. However that may be, it is clear, their lordships think, that even if the authority conferred upon the appellant had been irrevocable, he has not a good equitable defence to the action of ejectment, inasmuch as the contract made with him, being one entire thing incapable of being divided into independent parts, he would not, upon the authorities cited, be entitled to an injunction to restrain the respondent from suing in ejectment. That is, as the appellant's counsel admits, the test. A suit for such an injunction would, in this case, amount in effect to a suit for specific performance of a contract for hiring and service, a suit which cannot be maintained. In *Ogden* v. *Fossick*, 4 De G. F. & J. 426, the suit was instituted for specific performance of an agreement to grant a lease of a coal wharf. The agreement contained a provision that the plaintiff should, during the term, be appointed manager of the coal wharf at a specified salary. It was held by the Lords Justices that the two parts of the agreement were inseparably connected, and as a decree for specific performance of the contract for personal service could not be granted, the suit must be dismissed. In *Stocker* v. *Brockelbank*, 20 L. J. Ch.

401, the plaintiff, who was entitled to certain letters patent, by deed granted to the defendant for a money consideration an exclusive licence to use the patent, and by the same deed covenanted with the plaintiff that he (the plaintiff) should act as manager of the defendant's works for the same period. The plaintiff was dismissed. He thereupon filed a bill claiming to be a partner in the business, and praying that the defendant might be restrained from excluding him from the works. In delivering judgment the Lord Chancellor (Lord Truro) said:

"I therefore am clearly of opinion that . . . there was no partnership, that it was simply a contract of hiring and of service, the remuneration to be measured with reference to the amount of the profits of the business. If that be so, is there any instance . . . where it has been supposed that a contract of hiring and service could be made the subject of an application to this court if the employer claimed . . . to dismiss his servant, or his manager, or by whatever name the party to perform the service is to be denominated? I do not recollect any instance of any attempt on the part of a court of equity to compel the employer to retain the servant, agent, or manager, and not to forbear to leave him to his remedy at law for the breach of it."

Their lordships are accordingly of opinion that the appellant's third contention, like his second, cannot be sustained, and that the appellant is not entitled to withhold from the executrix the possession of the lands which he obtained as her and her sons' attorney or agent.

Their lordships will therefore humbly advise his Majesty that both these appeals should be dismissed. The appellant must pay the costs of them.

Solicitors, *Burgess, Cosens, & Co.; John Fawcett.*

Court of Appeal.

Original Motion.
(Collins, M.R., and Vaughan Williams, Romer, Cozens-Hardy, Moulton, and Farwell, L.JJ.) July 31.

In re AN ARBITRATION BETWEEN CROASDELL AND CAMMELL, LAIRD, & CO. (LIMITED). (a.)

Practice—Appeal—Interlocutory or final order—Motion to set aside award—Ord. 58, rr. 3, 15.

An award of an arbitrator was stated in the form of a special case. Before the special case came on for hearing, the Divisional Court, upon the application of one of the parties, set the award aside upon the ground of some technical misconduct on the part of the arbitrator. Upon appeal from the order of the Divisional Court,

Held, that the order was an interlocutory and not a final order, and the appeal ought therefore to be entered in the interlocutory list.

Application to transfer an appeal from the final to the interlocutory list.

A contract in writing between Croasdell and Cammell, Laird, & Co. contained a clause that all disputes arising under the contract should be referred to arbitration. Disputes having arisen under the contract, an arbitrator was appointed, and he made his award in the form of a special case, which was set down for hearing.

Before the special case came on to be heard, Cammell, Laird, & Co. moved to set the award aside upon the ground of some objection to the conduct of the arbitrator amounting to technical misconduct on his part.

The Divisional Court ordered "that the award of" the arbitrator "made by him in the form of a special case . . . be set aside with costs."

Croasdell served notice of appeal as from an interlocutory order, but the officer in charge of the list entered the appeal in the final list as being an appeal from a final order.

C. A. Russell, K.C. (*Shepherd Little* with him), for Croasdell.—The order of the Divisional Court is an interlocutory and not a final order. The latest test is that laid down by Lord Alverstone, L.C.J., in *Bozson* v. *Altrincham Urban Council*, 51 W. R. 337, [1903] 1 K. B. 547, in the Court of Appeal—namely, whether the judgment or order, as made, finally disposes of the rights of the parties. That was the test laid down by Jessel, M.R., in delivering the decision of the Court of Appeal in *In re Stockton Iron Furnace Co.*, 27 W. R. 433, 10 Ch. D. 335. In *Bozson* v. *Altrincham Urban Council* the court refused to follow the test laid down in *Salaman* v. *Warner*, 39 W. R. 547, [1891] 1 Q. B. 734—namely, that an order is not final unless it is one made on such an application or proceeding that, for whichever side the decision is given, it will, if it stands, finally determine the matter in litigation. In the present case the order does not determine the rights of the parties. The court has to ascertain what is the real matter in litigation, and see whether the rights of the parties as to it have been determined. The real matter in litigation here relates to the rights of the parties under the contract. There has been no determination as to those rights, and they are left undetermined by the order setting aside the award. In *In re Delagoa Bay Railway and Tancred*, 37 W. R. 578, this court held that an appeal from a refusal to set aside an award or remit it to the umpire for consideration is analogous to an application for a new trial, and ought to be set down in the interlocutory and not in the final list of appeals. That decision covers the present case, and as it has stood for seventeen years it ought not to be disturbed.

Standard Discount Co. v. *Otard de la Grange*, 26 W. R. 25, 3 C. P. D. 67; *Collins* v. *Paddington Vestry*, 28 W. R. 588, 5 Q. B. D. 368; *Sherbrook* v. *Tufnell*, 30 W. R. 740, 9 Q. B. D. 621; and *In re Reeves & Co.*, 50 W. R. 252, [1902] 1 Ch. 29, were also referred to.

A. J. Ashton, for Cammell, Laird, & Co.—The test is whether the particular litigation before the court has been brought to an end by the order appealed against. The *lis* here is the reference of the disputes to the particular arbitrator, and that has come to a final conclusion by the order of the Divisional Court. If the other party desires to have those disputes settled under the arbitration clause in the contract, he must begin his proceedings *de novo*. The rights of the parties in that particular *lis* have been finally disposed of, and therefore the order is a final order.

C. A. Russell, K.C., replied.

COLLINS, M.R.—In the view which we take of this matter it is not necessary to go through all the decisions which have been cited to us with the view of showing what is the proper general principle upon which the court ought to act. In any view we may take of that matter we must in the end decide the particular case before us, and I prefer in this instance merely to decide the particular case for the reasons which I will give later on.

The particular order from which the appeal is brought is one made upon an application to set aside an award of an arbitrator upon the ground of some

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

technical objection to his conduct, or upon the ground of some excess of jurisdiction. The arbitrator stated his award in the form of a special case. The result of the application to the Divisional Court was that the award was set aside. That order of the court did not involve any decision as to the rights of the parties in the arbitration proceedings, but simply decided that the award given was abortive. It did not deal or pretend to deal with any of the matters raised in the special case, which are left undecided by the order. The order left the rights of the parties just as they were before. The question now raised is whether that order is a final or an interlocutory order. It seems to me that, judged by any of the tests which have been suggested in the cases, it is an interlocutory order. The parties to the arbitration are, in my opinion, in substance in the same position for this purpose as the parties to a litigation. The law has asserted its jurisdiction over these consensual arrangements for the determination of disputes between the parties, and having thus introduced the machinery of the law, which gives legal effect outside and beyond the consent of the parties to those arrangements, it seems to me that the proceedings ought to be treated as proceedings in a litigation. Where there are disputes between the parties and provision is made for the determination of those disputes by arbitration, and there is introduced the machinery of the court which crystallizes the disputes and brings them to the determination of the arbitrator, who is acting under the jurisdiction sanctioned by the court, it seems to me that in those circumstances an order made by the court, not dealing with any of those disputes at all, but leaving them exactly where they were before and merely asserting an infirmity in the award, must be treated as an interlocutory order. The court retains its jurisdiction over the matter, and may send it to another arbitrator. That is enough to decide this case, and therefore an order must be made transferring the appeal to the interlocutory list. We refrain from laying down any general rule upon the subject, because the matter is within the jurisdiction of the Rule Committee, and it seems to us to be more fitting that the Rule Committee should do it by means of a new rule than that the court should lay it down in a case in which it is not necessary to do so. The costs of this application will be costs in the appeal.

VAUGHAN WILLIAMS, ROMER, COZENS-HARDY, MOULTON, and FARWELL, L.JJ., agreed.

Application granted.

Solicitor for Croasdell, *H. Nelson Paisley*, for *Paisley, Falcon, & Skerry*, Workington.

Solicitors for Cammell, Laird, & Co., *Ledgard & Smith*, for *T. Milburn*, Workington.

From Chan. Div. (Vaughan Williams, Romer, and Moulton, L.JJ.) — July 9.

In re BARRY'S TRUSTS.
BARRY *v.* SMART. (*a.*)

Divorce — Separation deed — Alimony — Deduction of income tax—Inland revenue—Income Tax Act, 1842 (5 & 6 *Vict. c.* 35), *ss.* 102, 103—*Income Tax Act*, 1853 (16 & 17 *Vict. c.* 34), *s.* 40.

Decision of Kekewich, J. (ante, *p.* 448, [1906] 1 *Ch.* 768), *affirmed.*

This was an appeal from a decision of Kekewich, J. The facts of the case will be found fully reported *ante*, p. 448, [1906] 1 Ch. 768.

Beddall, for the appellant.

P. O. Lawrence, K.C., and *E. Ford*, for the respondent, were not called upon.

Norman, for the trustees.

VAUGHAN WILLIAMS, L.J.—In my opinion the decision of Kekewich, J., in this case is absolutely right on every point and it would only be wasting time to go *seriatim* through the arguments which have been addressed to us on behalf of the appellant.

ROMER, L.J.—I am of the same opinion. There are no serious legal grounds for this appeal. The appellant herself, who is not a lawyer, may have thought that there were.

FLETCHER MOULTON, L.J.—I agree.

Appeal dismissed.

Solicitors, *Booth & Smee; Harcourt, Sons, & Rolt.*

(*a.*) Reported by LEONARD T. FORD, Esq., Barrister-at-Law.

High Court of Justice.

Chan. Div. Buckley, J. — June 20, 27.

NEWTON *v.* BIRMINGHAM SMALL ARMS CO. (LIMITED). (*a.*)

Company — Articles of association — Alteration of — Internal reserve fund—Auditors not to disclose information—Validity of article—Companies Act, 1879 (42 & 43 *Vict. c.* 76), *s.* 7—*Companies Act*, 1900 (63 & 64 *Vict. c.* 48), *ss.* 21, 22, 23.

A company had passed a special resolution to alter the articles of association of the company by inserting provisions therein for the creation of an internal reserve fund, in respect of which the auditors should be bound to withhold all information from the shareholders. A shareholder brought an action to restrain the company and its directors from acting on such resolution.

Held, that any regulations which precluded the auditors from availing themselves of all the information to which under the Act they were entitled, as material for the report which under the Act they were to make as to the true and correct state of the company's affairs, were inconsistent with the Act, and that the resolution was therefore invalid.

This was the trial of an action brought by Sir A. J. Newton, suing on behalf of himself and all the other shareholders of the company, against the company, claiming a declaration that a special resolution passed at an extraordinary general meeting of the company held on the 24th of January, 1906, and confirmed at an extraordinary general meeting held on the 21st of February, 1906, to alter the articles of association of the company by inserting provisions for the creation of an internal reserve fund was *ultra vires* and invalid, and an injunction to restrain the company and its directors from acting upon such resolution.

The company was incorporated in 1896 under the name of the Birmingham Small Arms and Metal Co. (Limited), with a capital of £600,000, divided into 79,370 ordinary shares of £5 each, and 40,630 preference shares of £5 each.

(*a.*) Reported by EDWARD J. M. CHAPLIN, Esq., Barrister-at-Law.

By a special resolution of the company duly passed and confirmed the name of the company was in 1897 altered to the Birmingham Small Arms Co. (Limited).

The special resolution which formed the subject-matter of the present action was, so far as material, in the following terms:

"That the articles of association of the company be and they are hereby altered as follows:

"(1) By the insertion after article 133 of the following article: 133A. In addition and without prejudice to the powers conferred by articles 132 and 133, the directors may in any year in which they shall recommend a dividend to be paid on the ordinary shares of the company of not less than 10 per cent. on the amount paid up thereon, set aside (without disclosing the fact) out of the earnings or profits in such year remaining after providing the amounts necessary to pay the dividends payable on preference shares, and the dividend which they recommend on the ordinary shares, such a sum as they may deem necessary or desirable in the interest of the company as an internal reserve fund, or as an addition to such internal reserve fund when formed, which internal reserve fund shall be held upon the terms and for the purposes following—that is to say:

"(*a*) The internal reserve fund shall be separate from the reserve fund under article 132, and need not be shown in or disclosed by the balance-sheet, and the directors need not give any information to the shareholders as to the amount, investment, or application thereof, or otherwise in relation thereto, either in their report or otherwise."

"(*b*) Such internal reserve fund may be invested upon such investments (other than the shares of the company) as the directors may in their absolute discretion think fit, without their being liable for any depreciation of or loss in consequence of such investments, whether the same be usual or authorized investments for trust funds or not.

"(*c*) Such internal reserve fund may be used and applied at the discretion of the directors for any purpose for which the ordinary reserve fund is available or for any purpose which the directors in their absolute discretion may consider will serve, protect, or advance the interests of the company, or preserve or promote the value of the undertaking, assets, or goodwill of the company."

"(*d*) The directors shall disclose the internal reserve fund and the amount thereof and all additions thereto and all other particulars in respect of the said fund to the auditors of the company appointed by the shareholders, whose duty shall be to see that the same is applied for the purposes of the company in accordance with the provisions hereinbefore contained, but not to disclose any information with regard to the same to the shareholders or otherwise."

The material articles were as follows: "132. The directors may, but shall not be obliged, before recommending or declaring any dividend or bonus out of or in respect of the earnings or profits of the company for any yearly or other period, cause to be reserved, or retained and set aside, out of such profits, such sum as they may think proper to form a reserve fund or reserve funds to meet contingencies or depreciation in the value of the property of the company, or for equalizing dividends, or for repairing, improving, and maintaining any of the property of the company, providing against losses, meeting claims on or liabilities of the company, or for such other purposes as the directors shall in their absolute discretion think conducive to the interests of the company."

"133. All moneys carried to the reserve fund and all other moneys of the company not immediately applicable or required for any payment to be made by the company, may be either employed in the business of the company or be invested by the directors upon such securities (other than the purchase of or loan upon shares of the company) as the directors may from time to time think proper, with power for them to make such investments in the name of the company or of the trustees for the company as they may think fit, and from time to time to deal with and vary such investments, and to dispose of all or any part thereof for the benefit of the company, and to divide the reserve fund into such special funds as they may think fit."

"134. The directors shall cause true accounts to be kept of the moneys received and expended by the company and all matters in respect of which such receipt and expenditure take place, and of the property, assets, credits and liabilities of the company."

"137. At the ordinary meeting in every year the directors shall lay before the company a balance-sheet containing a summary of the property and liabilities of the company, made up to a date to be therein mentioned, which shall be as near the day of meeting as can conveniently be fixed."

"139. The accounts of the company shall, once at least in every year, be examined and audited by an auditor or auditors. . . ."

"144. Every account of the directors, when audited, and approved by a general meeting, shall be conclusive, except as regards any error discovered therein within three months next after approval thereof; and whenever any such error is discovered within that period the account shall forthwith be corrected and thenceforth shall be conclusive."

The new article was to be inserted as article 133A after article 133.

Buckmaster, K.C., and *H. K. Newton*, for the plaintiff.—The resolution was *ultrà vires* and ought not to be acted on. It would enable the directors to conceal from the shareholders the true position of the company and to withhold all information as to the amount of the internal reserve fund and how the same was dealt with. It would also compel the auditors to disregard the statutory obligations imposed on them by section 23 of the Companies Act, 1900, which was practically an embodiment of the provisions of section 7 of the Companies Act, 1879, with reference to the audit of accounts of banking companies registered after 1879. Before the Act of 1900 there was no statutory requirement as to auditing. The Act of 1862 was silent as to accounts. The shareholders had the right to call on the managers of their property to keep such accounts that they might ascertain whether the management had been properly conducted. The directors could not refuse to lay a balance-sheet before the shareholders; they were accounting parties and had to show how they had used the property of the company. Directors of a company had been defined as "commercial trustees" or "managing partners": *In re Forest of Dean Coal Mining Co.*, 27 W. R. 594, 10 Ch. D. 450. The statutory rights of shareholders, such as the right to petition for winding up and the right to dissent and be paid out on a reconstruction, could not be excluded by the company's articles: *In re Peveril Gold Mines (Limited)*, 46 W. R. 198, [1898] 1 Ch. 122; *Payne* v. *The Cork Co. (Limited)*, 48 W. R. 325, [1900] 1 Ch. 308. Nor could the statutory right to have proper information under section 23 of the Act of 1900 be excluded. Section 21 of the Act required the shareholders at each annual meeting to appoint an auditor, and if that was not done a shareholder could apply to the Board of Trade to appoint an auditor, and by section 23 the auditor had to report and certify to the shareholders. The duties of

auditors were laid down in *In re London and General Bank*, 44 W. R. 80, [1895] 2 Ch. 673. It was not open to the company by its articles to compel an auditor to commit a misdemeanour by disobeying section 23 of the Act of 1900.

Sir R. B. Finlay, K.C., and *R. J. Parker*, for the company.—The propositions of law put forward were not disputed. There was no attempt made by the new article to prevent the auditor from carrying out his statutory duty. There was in it nothing inconsistent with section 23 of the Act of 1900, and the duties thereby imposed on the auditor. That section did not require a balance-sheet. It said that the auditors must sign a certificate at the foot of the balance-sheet, and must report on every balance-sheet laid before the company; but the article did not prevent the auditors from correctly certifying and reporting. The shareholder's right to have a balance-sheet depended on the articles, and a balance-sheet might be wholly dispensed with. It was a well-known practice to write down the value of assets so as to show a smaller margin for dividends. Rights which were not statutory might be controlled by the articles. The object of the new article was to prevent information going out which might injure the company and assist rival traders. It was only proposed to do with the assent of the shareholders what was done every day without such assent.

BUCKLEY, J.—In February last this company passed special resolutions the short substance of which is that the directors may, under defined circumstances, set aside (without disclosing the fact) out of the profits sums to form an "internal reserve fund"—a sort of secret service fund—and that this fund need not be shown in or disclosed by the balance-sheet and no information need be given to the shareholders as to its amount, investment, or application; that the directors may invest it as they think fit without being liable for loss in consequence of such investments; that they may apply it for any purposes which they consider will advance the interests of the company; and that, while the particulars as to this fund are to be disclosed to the auditors, it is to be the auditors' duty not to disclose any information with regard to it to the shareholders or otherwise. The question for decision is whether, having regard to sections 21 to 23 of the Companies Act, 1900, these special resolutions are *ultra vires*. The Companies Act, 1862, was silent as to accounts. Table A (which the company might or might not adopt, as it chose) contained provisions on the subject, but otherwise the Act left the matter untouched, relying, no doubt, upon the application of the ordinary principles applicable as between partners and proceeding upon the footing that the members of a company under the Act are partners in a special sort of partnership modified and governed by statutory provisions. The Companies Act, 1879, s. 7, contained, for the first time, provisions as to audit of accounts, and was confined to banking companies registered after 1879 as limited companies. The Companies Act, 1900, ss. 21 to 23, for the first time contained provisions as to the audit of the accounts of other companies under these Acts. The provisions of the Act of 1879 and those of the Act of 1900 are closely similar, though not the same; so similar, indeed, as that the reason for the difference is hard to see. The principal differences that I trace are that the Act of 1879 does, while the Act of 1900 does not, provide affirmatively for an annual audit, and that the Act of 1879 does, while the Act of 1900 does not, provide that if there is no auditor a meeting shall be forthwith called to elect an auditor. As regards the former of the differences, I think that the Act of 1900, though it does not do so expressly, yet does impliedly provide for an annual audit. Section 21, sub-section 1, requires the annual appointment of an auditor to hold office for one year, and the Act contemplates that he will audit during his tenure of office. There will thus result an annual audit. As regards the latter difference, I find that section 21, sub-section 2, provides for the appointment of an auditor by the Board of Trade on the application of any member in case an auditor has not been appointed at the annual meeting. Neither statute contains any provision in favour of the public in the matter of publication of the accounts. The two statutes really do not differ, I think, in substance in their result. The question is how far the Act of 1900 goes in requiring for the protection of the members that the accounts shall be open to audit and that the report on them shall be made to the members. The defendants do not dispute that, if and so far as the special resolutions are inconsistent with the Act, it is the Act which must prevail. The concluding sentence of section 23 requires that the auditor shall state whether the balance-sheet exhibits a true and correct view of the state of the company's affairs as shown by the books. Sir Robert Finlay argued that these words are satisfied if the auditors report that the balance-sheet does not exhibit a true view and that the statute does not, in these words, say that they shall report what is the true view. This is logically true as regards the language, but, in my judgment, the statute is saved from the reproach of having achieved no more than this impotent result by words earlier in that section, which provide that the auditors are to report to the shareholders on the accounts. A report upon the accounts involves a report of the result of the accounts, and this necessarily involves, as matter of substance if not of form, the statement of a balance-sheet or the equivalent of a balance-sheet. There are, I agree, in the Act of 1900 no affirmative words to the effect of what I am about to state, but I think the language of the Act is sufficient to show that by implication it requires that there shall be annually an audit of accounts resulting in a balance-sheet, to the accuracy of which the auditors shall speak. The special resolutions in the present case provide that the balance-sheet shall not disclose the internal reserve fund. It must therefore omit on the assets side of the balance-sheet the assets which make up the amount standing to the credit of that fund and the *contra* item—namely, the credit balance of the fund—on the liability side. The result will be to show the financial position of the company to be not as good as in fact it is. If the balance-sheet be so worded as to show that there is an undisclosed asset, the existence of which makes the financial position better than shown, such a balance-sheet will not, in my judgment, be necessarily inconsistent with the Act of Parliament. Assets are often, by reason of prudence, estimated, and stated to be estimated, at less than their probably real value. The purpose of the balance-sheet is primarily to show that the financial position of the company is at least as good as there stated, not to show that it is not or may not be better. The provision as to not disclosing the internal reserve fund in the balance-sheet is not, I think, necessarily fatal to the special resolutions. The Act, however, provides that the auditors shall report to the shareholders on the accounts examined by them. These auditors will examine, among others, the accounts of the internal reserve fund. A principal question in this case, I think, is whether it is a compliance with these words of the Act that the auditors shall report that they have examined the accounts as to the internal reserve fund, that they are satisfied

with them, and that the funds have been employed in manner authorized by the company's regulations, or whether there will be default in complying with the Act if they do not go on to say how the fund has been employed. In my judgment such a report would be a sufficient report within the Act if the auditor is *bonâ fide* satisfied that in making this report, and nothing further, he is truly reporting as to "the true and correct view of the state of the company's affairs." But the special resolutions do not stop there. They provide that it shall be the duty of the auditor not to disclose any information with regard to this fund to the shareholders or otherwise. It is, I think, inconsistent with the Act of Parliament that the auditor shall be bound, even when he thinks that the true state of the company's affairs is affected by facts relating to the internal reserve fund, to withhold all information with regard to the same from the shareholders. If, for instance, the directors had invested the internal reserve fund upon investments which might involve the company under certain circumstances in enormous loss, the Act, I think, requires that the auditor shall be at liberty and be bound to report that fact. In reporting upon the accounts submitted to them the auditors do not, of course, report as to the details of the accounts to which they find no cause to take exception. Their duty is to call attention to that which is wrong, not to condescend upon all the details of that which is right. It is, I think, competent to the statutory majority of the shareholders to say that as to particular items of their business it is to the interest of the corporation that there shall be secrecy, and that the auditors, who must for the purposes of their audit know all such details, shall not, unless their duty under the statute requires it, disclose such details to the members.

There is no suggestion in this case that these clauses are intended to be used for any other than a legitimate purpose. Those who are engaged in commerce are familiar with the fact that undue publicity as regards the details of their trade, or as to their financial arrangements, may often be injurious to traders, having regard to the rivalry of competitors in trade, to complications sometimes arising from strained relations between capital and labour, and the like. There are legitimate reasons for ensuring secrecy to a proper extent. It is not, I think, necessary, nor, having regard to the great utility of these Acts, is it desirable to expose persons who trade under these Acts to the necessities of a publicity from which their competitors are free unless such publicity is required to ensure commercial integrity. I am not disposed to look too closely for reasons why I should find clauses such as these to be inconsistent with the Act if I see that the true purpose of the Act is satisfied. I think, however, these special resolutions go too far. Any regulations which preclude the auditors from availing themselves of all the information to which under the Act they are entitled as material for the report which under the Act they are to make as to the true and correct state of the company's affairs, are, I think, inconsistent with the Act.

Injunction granted.

Solicitors for the plaintiff, *Boxall & Boxall.*

Solicitors for the company, *Sharpe, Parker, Pritchards, Barham, & Lawford*, for *Ryland, Martineau, & Co.*, Birmingham.

Chan. Div. }
Joyce, J. } May 15.

In re SEGELCKE.
ZIEGLER *v.* NICOL. (*a.*)

Will—Construction—Intention—Gift "in addition" to prior gift.

A testator by a codicil to his will gave a legacy of £1,000 to a class, and by a subsequent codicil gave £50 to each of the class "so that each receives £100." Each member of the class received more than £100 under the original gift.

Held, that the subsequent bequest was a clear gift to each member of the class which was not cut down by the words which followed.

Adjourned summons.

This was a summons taken out by nine godchildren of the testator to determine whether by the will and codicils and in the events which had happened each of the said godchildren were entitled to a sum of £50 bequeathed by the third codicil in addition to a share in a legacy of £1,000 bequeathed by the first codicil.

The testator made his will dated the 20th of May, 1887, and by the first codicil thereto, dated the 22nd of August, 1895, bequeathed "the sum of £1,000 to be divided equally among such of my godchildren as shall at the time of my decease be the recipients, through my cousin, Ferdinand H. Segelcke, of Cuxhaven, of Christmas presents from me."

By a third codicil, dated the 23rd of November, 1899, the testator bequeathed "£50 additional to each of my godchildren as named in my will, so that each receives £100 each."

The testator died on the 24th of April, 1901, and his said will and codicils were duly proved by his executors.

At the time of the testator's death there were nine godchildren coming within the description in the first codicil, so that the share of each in the gift bequeathed by that codicil amounted to over £100.

Younger, K.C., and *Heckscher*, for the plaintiffs.—The words of the third codicil might mean that each is to receive not less than £100. There is no case in which a gift has been cut down by a mere expression of intention. Each godchild ought to receive £50 in addition to the share in the £1,000 legacy: *Gordon* v. *Hoffmann*, 7 Sim. 29; *Mann* v. *Fuller*, 2 W. R. 510, 1 Kay 624; *In re Rowe*, 46 W. R. 357, [1898] 1 Ch. 153.

Hughes, K.C., and *Jones*, for the executors.—The godchildren are not entitled to take the gift of £50 under the third codicil. They have already received all the testator intended them to take. The controlling idea is to fix the amount each godchild is to take, not to give a fixed additional sum: *Milner* v. *Milner*, 1 Ves. sen. 105; *Jordan* v. *Fortescue*, 10 Beav. 259; *Farrer* v. *St. Catherine's College*, 21 W. R. 643, 16 Eq. 19; *Trevor* v. *Trevor*, 5 Russ. 24; *Morgan* v. *Middlemiss*, 14 W. R. 414, 35 Beav. 278; *Wilson* v. *Morley*, 25 W. R. 690, 5 Ch. D. 776; *Ives* v. *Dodson*, 9 Eq. 401, 18 W. R. Dig. 156.

JOYCE, J., in giving judgment, after reading the codicils, said: At the date of the testator's death there were nine such godchildren as were included in the legacy given by the first codicil, so that each has received more than £100. What I am asked to say is that the legacy given by the third codicil is absolutely nugatory or, in other words, I am to strike out that clause. As I read it, it appears to me to be

(*a.*) Reported by H. WOLCOTT WARNER, Esq., Barrister-at-Law.

a clear gift of £50 additional to each godchild. That is followed by some words which may refer to motive or may be a mere miscalculation of the amount each godchild is to receive; they may have been inserted for various reasons and may mean different things. A number of cases have been cited in which a figure named has been increased, but no case where a figure named in a gift has been cut down. I cannot conceal from myself that what I am going to decide is contrary to the *dictum* of Lord Hardwicke in *Milner* v. *Milner*, but there is one principle never now departed from in the construction of wills—namely, that a clear gift is not to be cut down by subsequent words of doubtful import. I am really asked to strike out the clause from the codicil or to deprive the words of any meaning, because of words following, which may merely be a miscalculation of the effect of the gift. I accordingly hold that the legacies of £50 are payable to the godchildren in addition to their share in the legacy of £1,000.

Solicitors for the plaintiffs, *Jenkins, Baker, & Co.*

Solicitors for the executors, *Nicol, Son, & Jones.*

Chan. Div.
Swinfen Eady, J. } May 17.

In re HEATHER. (*a*.)
POMFREY *v.* FRYER.

Will—Ademption—Legacy to adopted child—Advancement to adopted child—Bequest of residue to adopted child and stranger.

A testator bequeathed to his adopted daughter a sum of £3,000 and a share of residue. By a codicil he gave to her various sums previously advanced to her by him. Between the making of this codicil and his death the testator gave a further sum of money to his adopted daughter. On a summons to determine whether the legacy and bequest of residue were pro tanto *ademed,*

Held, that there was no ademption, and that the doctrine of ademption would not be applied in favour of a stranger as against a child.

Originating summons.

The object of this summons was to determine a question arising in connection with the will of a testator who died on the 13th of June, 1905. The will was dated the 28th of July, 1901. By it the testator bequeathed a legacy of £50 to Eliza Emma Barton, the wife of Charles Arthur Barton, and a legacy of £500 to Charles Arthur Barton, and also, *inter alia*, a legacy of £3,000 to Mary Ellen Fryer free of duty. He divided the residue of his estate between Charles Arthur Barton and Mary Ellen Fryer.

The testator made a first codicil to his will, upon which no question arose, and on the 29th of August, 1903, he made a second codicil. This second codicil recited that the testator had advanced certain sums of money to his adopted daughter, Mary Ellen Fryer, for investment by her, and gave her the sums which had been so advanced. Since making this codicil the testator gave to his adopted daughter further sums of money, including one of £1,000.

The summons was issued in order to decide the question whether the legacy to the adopted daughter of £3,000 was *pro tanto* ademed by the subsequent gift to her of £1,000. The full circumstances of the case are dealt with in the judgment.

Duke, for the executors of the will.

Eve, K.C., and *Mark Romer*, for the adopted daughter, Mary Ellen Fryer.—There is no ademption of the legacy, the testator was *in loco parentis* to Mrs. Fryer, and the advances were not made with any intention of ademing the legacy.

They cited *Meinertzhagen* v. *Walters*, 20 W. R. 918, 7 Ch. App. 670, and *Fowkes* v. *Pascoe*, 23 W. R. 538, 10 Ch. 343.

Micklem, K.C., and *J. M. Stone*, for Charles Arthur Barton.—The gifts of money must operate in ademption of the legacy to Mrs. Fryer. [They cited *Trimmer* v. *Bayne*, 7 Ves. 508; *Montefiore* v. *Guedalla*, 8 W. R. 53, 1 De G. F. & J. 93; *Ex parte Pye*, 18 Ves. 140, at p. 151; *Twining* v. *Powell*, 2 Coll. 262; *Powys* v. *Mansfield*, 6 Sim. 528, & 3 M. & C. 359.] The earlier cases show that a child is, in some respects, in a worse position than a stranger.

SWINFEN EADY, J., explained the object of the summons, summarized the will and codicils, and continued: Mrs. Fryer went to live with the testator, and she acted as his housekeeper. From the evidence it appears that the testator had an account with the London and County Bank. He also had some money on deposit with the London and Westminster Bank. At intervals he drew cheques on his banking account; these were cashed, and he retained the proceeds, and from time to time gave money to Mrs. Fryer for purposes of housekeeping. This went on until shortly before the death of the testator. During the ten or twelve months preceding his death the cheques were cashed by Mrs. Fryer, and she retained the proceeds and made the usual household disbursements. The testator also gave money in both large and small sums to Mrs. Fryer for her own use, and a list of these sums has been put in evidence. The sums paid in this way before the making of the second codicil amount to several thousands of pounds. They were given in varying amounts; sometimes in sums of £20 or less, and sometimes in sums as large as £1,000. The smaller sums were drawn from the account at the London and County Bank, and the larger from the money on deposit with the London and Westminster Bank. From time to time the testator wrote letters to the latter bank, asking that money forming part of the money on deposit might be transferred to the account of Mrs. Fryer. This went on until one of the testator's deposit accounts was exhausted. There was another deposit account remaining at the London and Westminster Bank at the testator's death.

According to the evidence of Mrs. Fryer, what took place was this. In addition to cheques drawn by the testator for the purposes of household expenses, the testator was in the habit of giving to Mrs. Fryer cheques and cash as presents for herself at irregular intervals. The testator said he made these gifts in order that they might be invested in Mrs. Fryer's own name for her own benefit. Mrs. Fryer was living with a very old man as his daughter, and she took care of him and looked after him as a daughter. The testator treated her as if she were his daughter, and the nature and amount of the gifts and the mode of making them do not cause any suspicion. She invested her own money with the assistance of a solicitor. The sums of money paid to her personally were gifts which she is not liable to account for. Even without the codicil she would not have had to account for them, but by the codicil he gives her the sums advanced and already paid to her. After making the second codicil the testator gave her

(*a*.) Reported by F. HARDINGE DALSTON, Esq., Barrister-at-Law

certain further moneys amounting to the balance of the money on deposit with the London and Westminster Bank. These moneys included a sum of £1,000 and it is said that, as the testator by his will gave to Mrs. Fryer a legacy of £3,000 and a moiety of his residue, and this sum of £1,000 was paid to her since the making of the second codicil, there was ademption of the £3,000 legacy to that extent. It is clear that the £1,000 was given to Mrs. Fryer for her own use.

Now, as to the question of ademption, if a parent gives to a child a legacy or share of residue, and then gives money to the child, the legacy or share is adeemed *pro tanto*. But it is not every gift from a parent to a child that is to be treated as an ademption. Though a sum is paid on the marriage of a daughter, it has to be asked whether that sum is a portion or not. This £1,000 cannot be treated as a portion. Previous to the payment of the £1,000 the testator had given to Mrs. Fryer large sums of money. After the making of the codicil a particular sum of £1,000 was given. It was not paid under any special circumstances or for any specific purpose. The facts of the particular case must be considered, and in this case I do not consider that the sum of £1,000 need be brought into account. The doctrine of ademption is considered in *Montefiore* v. *Guedalla*, 8 W. R. 53, 1 De G. F. & J. 93.

In that case the Lord Chancellor said (at p. 100): "While it was strangely supposed that there could not be ademption *pro tanto*, there might be some colour for giving weight to the argument arising from the alleged uncertainty of the amount of a residue. But after the decision in *Pym* v. *Lockyer*, 5 M. & C. 29, establishing that there may be ademption *pro tanto*, the cases relied upon to shew that there is a distinction on this subject between a bequest of a specific amount and the bequest of a residue, are left without any reasonable support."

Also in *Meinertzhagen* v. *Walters*, 20 W. R. 918, 7 Ch. 670, James, L.J., said at the beginning of his judgment, "The contention of the appellant is, that if a father leaves his residue between a child and a stranger, and then makes a large advance to the child and also a large advance to the stranger, there being nothing more but the will and those advances, the law of England is this, that the child is obliged to bring what he has received into the residue, and that the stranger is not to bring in what he has received, but is to have it enlarged by that which has been given to the child." James, L.J., strongly disapproved of that contention. In *Fowkes* v. *Pascoe*, 23 W. R. 538, 10 Ch. 343, James, L.J. (at p. 350), said: "The rule of law is that legacies given by a father, or a person *in loco parentis*, are or may be adeemed by gifts between the will and the death. The principle is that the will shows the distribution which the father thinks just and expedient for his children, and if, after having made such a scheme for distribution, he advances one of his children on marriage, or going out to establish himself in the world, or the like, it is to be presumed, as a *presumptio juris et de jure*, that the advancement is an anticipation of the testamentary provision, just as under the Statute of Distributions an advancement is to be brought into hotchpot. But this presumption applies only to fathers or persons who have put themselves *in loco parentis*.

No case has been cited where residue was given by a testator and the doctrine applied against a child, and I know of no case where the doctrine has been applied against a child in favour of a stranger. Such an application of it would work peculiar hardship. I therefore determine that in respect of none of the sums paid or given by the testator to Mrs. Fryer after the date of the second codicil was there ademption *pro tanto* of the £3,000 legacy or the share of residue, and that none of them need be brought into account.

Solicitors, *Henry Pumfrey & Son; Robbins, Billing, & Co.*, for *F. J. & C. Poole*, Widnes; *Stones, Morris, & Stone.*

K. B. Div.
(Lord Alverstone, L.C.J., and Darling and Bray, JJ.) April 5.

THE KING *v.* CABLE AND ANOTHER.
Ex parte O'SHEA. (*a.*)

Criminal law — Cruelty to animals — One act — Conviction for cruelty to several animals—Cruelty to Animals Act, 1849 (12 & 13 *Vict. c.* 92), *ss.* 2, 29.

A conviction under section 2 *of the Cruelty to Animals Act*, 1849, *for having cruelly ill-treated five cows by causing them to be over-stocked with milk, was appealed against on the ground that the conviction was bad on its face, in that it was a conviction for five separate and distinct offences.*

Held, that an act or omission affecting several animals might constitute one offence under the section, and that it was not necessary that there should be a separate summons and separate conviction in respect of each animal.

Rule *nisi* to justices of the borough of Guildford to show cause why a writ of *certiorari* should not issue to bring up a certain conviction in order that the same might be quashed. The rule was moved for and obtained on the ground that the conviction was bad on the face of it, in that it was a conviction for five separate and distinct offences.

The conviction was as follows: "In the borough of Guildford. Before the Court of Summary Jurisdiction sitting at Guildford. The thirtieth day of October, 1905. Con. O'Shea, of Newmarket, County Cork (hereinafter called the defendant), is this day convicted for that he on the tenth day of Octobers 1905, did cruelly ill-treat, abuse and torture five cow, by causing the same to be over-stocked with milk contrary to the form of the statute in such case made and provided. And it is adjudged that the defendant for his said offence do forfeit and pay to the clerk of this court the sum of forty shillings, and do also pay to him the sum of ten shillings and sixpence for costs forthwith."

Colam showed cause against the rule.—The conviction is good. A somewhat similar point was raised in *Reg* v. *Justices of Devonshire*, cited in 56 J. P. 455, *sub. nom. Reg.* v. *Totnes Justices*, and is an authority for the proposition that an information alleging cruelty to more than one animal is good. There have been many cases in which this course has been followed: *Murphy* v. *Manning*, 25 W. R. 540, 2 Ex. D. 307; *Lewis* v. *Fermor*, 35 W. R. 378, 18 Q. B. D. 532; *Ford* v. *Wiley*, 37 W. R. 709, 23 Q. B. D. 203, but in none was it suggested that the summons was bad on that account. It is also material on this point to note that section 29 of the Act of 1849, *inter alia*, provides "that words denoting the singular number are to be understood to apply also to a plurality of persons, animals, or things.

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

Scholefield, in support of the rule.—The proper test to apply to decide the question whether a conviction on this ground is good or bad is to ask whether it refers to one offence or to more than one. In *Milnes* v. *Bale*, 23 W. R. 660, L. R. 10 C. P. 591, Brett, J., at p. 594, laid down that rule, "Where the different acts were so far distinct and separate offences in kind that to prove a person guilty of any one of them evidence could not be given of the doing of any other of them." Applying that to the present case a separate offence was here committed in respect of each cow, and the statute imposes a separate penalty in respect of each. In *Ex parte Beal*, L. R. 3 Q. B. 387, the same view was expressed. In the *Totnes case* the question was whether an information which charged the defendants with having cruelly beaten, ill-treated, abused, and tortured two heifers, was bad, because, as it was contended, each of these four alleged acts of cruelty under section 2 constituted a separate offence. The court said it did not, but the point that the information was also bad because it referred to two heifers does not to appear to have been taken. The decision is not an authority, therefore, in the present case.

Lord ALVERSTONE, L.C.J.—In this case the defendant was charged with an offence under section 2 of the Act of 1849, and it is not immaterial to observe (although having regard to the Interpretation of Statutes Act, 1889, it may not be very important) that the words denoting the singular number are to be understood to include the plural; that does seem to show that it was thought necessary to give power in the Act of 1849 to deal with cases involving cruelty to a number of animals, as, for example, a flock of sheep. It would, in my opinion, be a very vexatious view of the law if it were held to be necessary that a summons should be taken out in regard to each animal alleged to have been ill-treated, and it might well put the prosecutor to some difficulty as to proof. But while I take this view, I desire to say that I have no doubt that separate summonses may be taken out in respect of each animal alleged to have been ill-treated.

It is contended that the conviction in this case is bad on the face of it because it refers to cruelty to five cows, which, it is said, necessarily involves five separate offences. In my opinion the case of *Reg.* v. *Totnes Justices*, which is also reported in the *Times* newspaper of the 9th of May, 1879, is an indirect authority of this court for the view that this conviction is good. On referring to the papers in that case which I have obtained from the Crown Office, I find that there a summons had been obtained against the defendants for cruelty to two heifers by overdriving them. The justices upheld the objection that the information was bad as it charged four separate offences. A rule *nisi* for a *mandamus* was obtained, and was subsequently made absolute. That was a case in which it appeared on the face of the information that cruelty to two heifers was alleged, and the court came to the conclusion that the case was one which the justices ought to have heard and determined. It is therefore a decision in a case in which objections to the form of the information were being considered by the court in which it was held that an information for an offence against two animals was good. It is further to be observed that it has been the practice for a long series of years to do what has been done in the present case. In *Murphy* v. *Manning* the summons was for cutting the combs of three cocks; in *Lewis* v. *Fermor* the cruelty was alleged in respect of five sows; and in *Ford* v. *Wiley* there were two informations, one charging cruelty to sixteen oxen on one date and the other cruelty to sixteen oxen on another date. It is true that in none of these cases the point now argued before us appears to have been taken, but it is curious that, if the point is a good one, it should not have been raised in any of these cases. I think, therefore, that by the implied authority of this court the decisions are against the contention that this conviction is bad because it refers to five cows. For these reasons I think this rule must be discharged.

DARLING, J.—I am of the same opinion. I think there is a good deal to be said in favour of Mr. Scholefield's argument that this conviction is bad in form, and if the question came before the court for the first time I should have had some difficulty in deciding against that view, but it appears to me that the matter is concluded by the case of *Reg.* v. *Totnes Justices* to which we have been referred.

BRAY, J.—I agree. I only desire to say that I should have come to the same conclusion if there had been no authority upon the point.

Rule discharged.

Solicitor for the prosecution, *S. G. Polhill.*

Solicitors for the defendant, *Baker & Co.*, for *W. M. Maud*, Guildford.

IN BANKRUPTCY.

K. B. Div. (Bigham, J.) — May 29

In re GARNER.
Ex parte PEDLEY. (*a.*)

Bankruptcy—Practice—Taxation of costs—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 73—*Bankruptcy Rules*, 1886-1890, *rr.* 112, 124, *Form* 141—*Scale of Costs*, 1886-1890, *General Regulations*, *r.* 2—*Solicitors' Remuneration Order*, 1882, *Schedule I.*

In taxing the costs of a solicitor who has acted for the trustee in business connected with sales of property of the bankrupt, under regulation 2 of the General Regulations as to costs in bankruptcy, the taxing-master need not consider whether there are any proceeds of sale out of which the costs can be paid, but should merely allow the proper amount of costs, and direct that such amount is to be paid in accordance with regulation 2 of the General Regulations.

Appeal against a taxation by the taxing-master of the High Court in bankruptcy.

The estate of the bankrupt consisted largely of plots of land. Each of the plots were separately mortgaged to a first mortgagee, and there was a second mortgage covering all the plots generally. The trustee employed a solicitor to sell three of the plots, and the money derived from the sale was employed in paying off the first mortgagees in full and in part payment of the second mortgage with the exception of a small sum of £1 9s. 11d., which was handed over to the trustee after the above-mentioned payments had been made. It was estimated that when all the plots were sold they would realize sufficient to pay off both the first and second mortgages and leave a considerable surplus for the estate.

The solicitor brought in his bill for taxation by the registrar of the county court at Crewe, who allowed

(*a.*) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

the costs of the sale at £16 10s., as being the proper percentage on the gross amount realized by the sale in accordance with the Solicitors' Remuneration Order, 1882. The Board of Trade required the taxation to be reviewed by the bankruptcy taxing-master of the High Court.

The taxing-master refused to allow the solicitor more than £1 9s. 11d., and based his decision upon rule 2 of the General Regulations as to costs in bankruptcy, which provides that where a solicitor is entitled to remuneration by a percentage "such percentage shall be payable only out of the proceeds of sale." In the present case all the "proceeds of sale" beyond £1 9s. 11d. had gone in payment off of the mortgagees, and as that was the only sum available for the payment of the solicitor the taxing-master taxed down the costs to that amount.

The solicitor appealed.

T. R. Hughes, K.C., and *Redman*, for the appellant.—The taxing-master has nothing to do with the question of whether there is a fund out of which the costs will be payable; all he has to do is to assess the amount of costs properly payable to the solicitor, and issue an *allocatur* for that amount. In the present case, when the plots are all sold there will be a fund out of which the solicitor can be paid, but as long as this *allocatur* stands good he will get no more than £1 9s. 11d. It is suggested that the taxing-master should issue an *allocatur* for the proper amount of costs without prejudice to the question of how they are to be paid.

Hansell, for the Board of Trade.—If the *allocatur* be issued for the full amount the solicitor will have to pay the full stamp duty of 1s. on every £2 allowed, and if he sends in his *allocatur* and claims payment on it from the trustee the Board of Trade will have to go behind it and refuse the trustee leave to draw a cheque on the bankruptcy estates account if there are no "proceeds of sale" out of which the amount can be paid.

BIGHAM, J.—I think that in this case it is the duty of the taxing-master to tax in accordance with the Solicitors' Remuneration Act, 1881, and for that purpose he must have regard to the Solicitors' Remuneration Order, 1882; but having so taxed he should note, on giving his certificate, that the amount is only to be paid in accordance with rule 2 of the General Regulations as to costs in bankruptcy, leaving the parties to ascertain whether there exist any proceeds of sale out of which the costs are payable.

The form of allocation should be as follows: "I hereby certify that I have taxed the bill of costs of Mr. C. D., and have allowed the same at the sum of pounds, shillings, and pence, and the amount is to be paid in accordance with regulation 2 of the General Regulations as to costs in bankruptcy."

Appeal allowed; leave to appeal given.

Solicitors for appellant, *Woosnam & Smith*, for *C. H. Pedley*, Crewe.

Solicitor for the respondent, *The Solicitor to the Board of Trade.*

[THE END.]

THE

WEEKLY REPORTER DIGEST

OF ALL THE

CASES DECIDED IN THE SUPREME COURT OF JUDICATURE;

WITH

APPEALS TO THE HOUSE OF LORDS AND PRIVY COUNCIL;

FROM THE 24TH OF OCTOBER, 1905, TO THE 12TH OF AUGUST, 1906.

VOL. LIV.

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1906.

A DIGEST

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VOL. LIV. OF THE WEEKLY REPORTER, 1905-1906;

AND IN

CERTAIN OTHER LEGAL REPORTS DURING THE SAME PERIOD,

TOGETHER ALSO WITH CERTAIN OTHER CASES REPORTED THEREIN DURING THE SAME PERIOD, BUT DECIDED PREVIOUSLY THERETO.

*** In the following Digest the letters H.L. after a case indicate the House of Lords; P.C., the Privy Council; C.A., the Court of Appeal; LUN., Lunacy; CH.D., the Chancery Division; K.B.D., the King's Bench Division; BKCY., the King's Bench Division sitting in Bankruptcy; P.D. & AD.D., the Probate, Divorce, and Admiralty Division; C.C.R., the Court for Crown Cases Reserved.

*** *This Digest will contain at the end thereof a Tabular Index of the Names of all Cases Reported up to the end of August,* 1906, *as well in this Volume* (54) *of the* WEEKLY REPORTER *as in certain other Contemporaneous Reports. In this Digest, figures following the name of a case denote the page in the* WEEKLY REPORTER *at which it will be found. Where the name of a case has no figures attached, the case is not reported in this Volume of the* WEEKLY REPORTER; *but the references to the case in other Reports are given in this Digest.*

ACT OF STATE:—

Annexation of native State—Confiscation of property of infant ruler—Distinction between his private and State property—Assumption of guardianship by Government—Jurisdiction of municipal courts.—Where the East India Co., as representing the Crown, has done acts of such a nature, and under such circumstances, as to lead to the conclusion that those acts were done in the exercise of supreme power, as acts of State, and to negative any intention to give thereby legal rights, whether contractual or otherwise, to an individual or individuals as against the company, the municipal courts have no jurisdiction to question the validity of those acts, or to entertain any claim in respect thereof by an individual against the Secretary of State for India, as the successor of the East India Co.

Secretary of State in Council of India v. *Kamachee Boye Sahaba*, (1859) 7 Moo. Ind. App. 476, 13 Moo. P. C. C. 22, followed.—SALAMAN *v.* SECRETARY OF STATE IN COUNCIL OF INDIA, *C.A.*; [1906] 1 K. B. 613; 75 L. J. K. B. 418; 94 L. T. 858.

ADEMPTION:—

Will—Legacy to adopted child—Advancement to adopted child—Bequest of residue to adopted child and stranger.—A testator bequeathed to his adopted daughter a sum of £3,000 and a share of residue. By a codicil he gave to her various sums previously advanced to her by him. Between the making of this codicil and his death the testator gave a further sum of money to his adopted daughter. On a summons to determine whether the legacy and bequest of residue were *pro tanto* adeemed,

Held, that there was no ademption, and that the doctrine of ademption would not be applied in favour of a stranger as against a child.—HEATHER, RE, POMFREY *v.* FRYER, *Ch.D. Swinfen Eady, J.*, 625; [1906] 2 Ch. 230; 75 L J. Ch. 568.

See also Will, 18.

ADMINISTRATION:—

1. *Insolvent estate—Transfer of proceedings in Chancery to Bankruptcy—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 125.—The intention of the Legislature in section 125 of the Bankruptcy Act, 1883, is that estates of deceased insolvents shall be administered in Bankruptcy in the same way, so far as possible, as those of living bankrupts. Consequently proceedings for adminstration of a deceased insolvent's estate commenced in Chancery, were ordered to be transferred to Bankruptcy in the absence of any special reasons for retention. Such reasons are difficult questions of law, or the fact that the Chancery proceedings are far advanced.—KENWARD, RE, HAMMOND *v.* EADE, *Ch.D. Kekewich, J.*; 94 L. T. 277.

2. *Marshalling assets—Debts, funeral and testamentary expenses—Insufficiency of personal estate—Pecuniary legatees—Specific devises—Land Transfer Act*, 1897 (60 & 61 *Vict. c.* 65), *s.* 2, *sub-section* 3.—Where a will contains a direction charging debts upon the real estate, and the personal estate is exhausted in paying the debts, the Land Transfer Act does not alter the old rule under which the pecuniary legatees were entitled to have the assets marshalled as against the specific devises.

In re Roberts, Roberts v. *Roberts*, 51 W. R. 89, [1902] 2 Ch. 834, followed.—KEMPSTER, RE, KEMPSTER v. KEMPSTER, *Ch.D. Kekewich, J.*, 385; [1906] 1 Ch. 446; 75 L. J. Ch. 286; 94 L. T. 248.

See also Bankruptcy, 8, Executor, 1, 2; Lunatic, 1; Practice, 1; Probate, 1-3.

ADULTERATION:—

1. *Inspector of nuisances, power to take proceedings—Local authority—Analyst—Justices—Jurisdiction—Sale of Food and Drugs Acts*, 1875 (38 & 39 *Vict. c.* 63), *ss.* 6, 10, 11, 12, 13, 14, 20, 26; 1899 (62 & 63 *Vict. c.* 51), *ss.* 3, 25, 28—*Local Government Act*, 1888 (51 *Vict. c.* 41), *s.* 39.—Magistrates have jurisdiction to hear and determine an information preferred under section 6 of the Sale of Food and Drugs Act, 1875, by an inspector of nuisances duly appointed by a town council, on behalf of the said council, although the said council be not one of the authorities referred to in section 10 of the said Act, and therefore not authorized to appoint an analyst for the Acts, and consequently not a local authority as defined by section 25 of the Act of 1899. Such a condition of things only affects the question as to the allocation of the fine inflicted by the magistrates, as dealt with in section 25 of the Act of 1875.—WORTHINGTON *v.* KYRNE, *K.B.D.*, 185; 93 L. T. 546.

2. *Margarine—"Parcel"—Margarine Act*, 1887 (50 & 51 *Vict. c.* 29), *s.* 6.—Six rounded pieces of margarine placed in the form of a triangle so that three form the base, two being placed upon the three and one upon the two, all touching, sufficiently form one "parcel" within section 6 of the Margarine Act, 1887.—PARKINSON *v.* MCNAIR, *K.B.D.*; 93 L. T. 553.

3. *Analysis—Condition precedent—Analysis impossible through no fault of applicant—Sale of Food and Drugs Acts*, 1875 (38 & 39 *Vict. c.* 63), *ss.* 9, 14, 21, 22; *and* 1899 (62 & 63 *Vict. c.* 51), *s.* 21.—Section 21 of the Sale of Food and Drugs Act, 1899, provides: "The justices or court referred to in section 22 of the Sale of Food and Drugs Act, 1875, shall on the request of either party under that section cause an article of food or drug to be sent to the Commissioners of Inland Revenue for analysis, and may, if they think fit, do so without any such request.

If through no fault of the party sought to be burdened, the analysis by the Commissioners of Inland Revenue, contemplated by the above section, is a matter of impossibility, the court may convict for an offence under section 9 of the Act of 1875, notwithstanding that the analysis has not been made. The Commissioners of Inland Revenue reported that an examination of the bottle of milk submitted for analysis showed that the cork was loose and portions of fat and dried milk were adhering to the outside of the bottle and the paper wrapper, and that under these circumstances a satisfactory examination of the milk was not possible.

Held, that the court having come to the conclusion, upon proper evidence, that the milk was adulterated, the defendant was properly convicted.—SUCKLING *v.* PARKER, *K.B.D.*, 438; [1906] 1 K. B. 527; 75 L. J. K. B. 302.

4. *Milk—Defence—Written warranty—Application of warranty to future deliveries—Sale of Food and Drugs Act*, 1875 (38 & 39 *Vict. c.* 63), *s.* 25.—An information was preferred by the appellant against the respondent, charging him with selling to the appellant, on the 28th of December, 1905, milk which was not of the nature, substance, and quality demanded by the appellant. On the date in question the respondent sold to the appellant a pint of new milk which contained 16 per cent. of added water. The milk in question had been supplied to the respondent by one Mott, under a contract made in August, 1905. On the 5th of August, after the making of the contract, but before the delivery of any milk thereunder, Mott had given to the respondent a letter in the following terms: "I guarantee that the milk supplied by me to Mr. Stevens is perfectly pure and with all its cream as the cow gives it. (Signed) FRANCIS MOTT." Both the respondent and Mott intended this to be a continuing warranty. The milk which was sold to the appellant had not been purchased with any warranty, except in so far as the above letter constituted a warranty. The justices were of opinion that the letter was intended by both parties to cover the delivery of milk of which one pint was sold to the appellant, and they discharged the respondent. The question for the opinion of the court was whether the justices came to a correct determination in point of law.

The Court (Lord Alverstone, L.C.J., and Darling, J., Ridley, J., dissenting) allowed the appeal.—WATTS *v.* STEVENS, *K.B.D.*; [1906] 2 K. B. 323.

5. *Sample—Division to three parts—Sale of Food and Drugs Act*, 1875 (38 & 39 *Vict. c.* 63).—When an article is purchased for analysis under the Sale of Food and Drugs Act, 1875, each of the three parts into which it is divided pursuant to section 14 of the Act must be sufficient for the purpose of analysis.—LOWERY v. HALLARD, *K.B.D.*, 520; [1906] 1 K B. 398; 75 L. J. K. B. 249; 93 L. T. 844.

ANNUITY:—

Will—Tenant for life and remainderman—Residuary personalty—Covenant to pay life annuities—Capital and income—Apportionment.—A testator directed that his residuary estate should be held on trust for a life tenant and a remainderman. He had covenanted to pay certain annuities.

Held, that each instalment of the annuity should be apportioned between capital and income, according to the value of the life estate and the reversion as ascertained at the time of the testator's death.

Yates v. *Yates*, 28 Beav. 637, followed.—DAWSON, RE, ARATHOON v. DAWSON, *Ch.D. Swinfen Eady, J.*, 556; [1906] 2 Ch. 211; 75 L. J. Ch. 604; 94 L. T. 817.

APPEAL:—

1. *Appeal to Court of Appeal—Time—Order of Divisional Court upon case stated by magistrate in civil proceedings—Final order—Ord.* 58, *r.* 15.—A final order of a Divisional Court made upon a case stated by a magistrate in civil proceedings is an order made in a "matter not being an action" within the meaning of ord. 58, r. 15, and an appeal to the Court of Appeal must be brought within fourteen days.—AUSTIN FRIARS STEAM SHIPPING CO. *v.* STRACK, *C.A.*; 94 L. T. 875.

2. *Interlocutory or final order—Motion to set aside award—Ord.* 58, *rr.* 3, 15.—An award of an arbitrator was stated in the form of a special case. Before the special case came on for hearing, the Divisional Court, upon the application of one of the parties, set the award aside upon the ground of some technical misconduct on the part of the arbitrator. Upon appeal from the order of the Divisional Court,

Held, that the order was an interlocutory and not a final order, and the appeal ought, therefore, to be entered in the interlocutory list.—CROASDELL AND CAMMELL, LAIRD, & CO., RE, *C.A.*, 620.

See also Australia, Law of, 1; Practice, 2.

APPOINTMENT:—

1. *Power of—Excessive exercise of power—Invalidity.*—A testator gave to his son a power to appoint certain real estate in certain events to his (the donee's) sons for life, with remainder to their issue in tail. By a testamentary instrument the donee, after referring to the power given to him by the testator, appointed one part of the estate "to my eldest son E. R. A. and his issue."

Held, that the court was not at liberty to speculate as to the meaning of the terms of the appointment, but must interpret it according to the actual language used; and that there was nothing in that language to entitle the court to put a different construction on the appointment than that the donee intended that E. R. A. should take an estate tail.

Decision of Buckley, J. (93 L. T. Rep. 742), reversed.—ADAMS, RE, ADAMS *v.* ADAMS, *C.A.*; 94 L. T. 720.

2. *Power of appointment—Special power—Exercise by will—Remoteness.*—A testator gave a life interest in his estate to his wife, and after her death he gave the estate to such of the children of his brother C. T. as his wife should appoint, and in default of appointment to the children of his brother and sister in equal shares after life estates to his brother and sister. The wife of the testator by her will appointed the estate to C. T. for life, and after his death to the children of C. T. who had attained or should attain twenty-five if born in her lifetime, or twenty-one if born after her death, or, being a female, had attained twenty-five if born in her lifetime, or twenty-one if born after her death, or should be previously married, and if more than one in equal shares. C. T. survived both the testator and his wife. All the children of C. T. were born in the lifetime of the testator's wife, and had attained twenty-five prior to her death, and one of them had attained twenty-five prior to the death of the testator.

Held, that the appointments were not void for remoteness, as the persons who would take under the will, and the shares they would take, would necessarily be ascertained and their shares vested, not later than twenty-one years from the death of C. T., who was alive at the death of the testator, the person by whose will the power was created.—THOMPSON, RE, THOMPSON *v.* THOMPSON, *Ch.D. Joyce, J.*, 613; [1906] 2 Ch. 199; 75 L. J. Ch. 599.

3. *Will — Remoteness — Doctrine of election.* — Persons taking a settled fund as in default of appointment in consequence of the appointment purported to be made by the will of the appointor being void for remoteness, and also having bequeathed to them by the same will other property belonging to the testatrix, are not put to their election between the settled fund and the property of the testatrix bequeathed to them, but are entitled to retain both without making compensation.

A testatrix having a power of appointment by will over certain settled property, and also being possessed of property of her own, devised and bequeathed her real and residuary personal estate, and all real and personal estate over which she had power of appointment by will, to trustees upon trust for sale, and to hold £10,000, part of the proceeds of sale, upon certain trusts, and the the residue of the proceeds of sale upon other trusts. Some of the trusts were, as regards the settled property, void for remoteness.

Held, that the persons taking in default of appointment, who were also beneficiaries of the testatrix's own property, were not put to their election between the two properties.

Held, also, that the £10,000 must be considered as taken proportionately out of the settled property and the property belonging to the testatrix, according to their respective values.

In re Oliver's Settlement, 53 W. R. 215 [1905] 1 Ch. 191, and *In re Beale's Settlement*, 53 W. R. 216, [1905] 1 Ch. 256, followed.

Tompkyns v. *Blane*, 28 Beav. 422, and *In re Bradshaw*, [1902] 1 Ch. 436, not followed.—WRIGHT, RE, WHITWORTH *v.* WRIGHT, *Ch.D. Buckley, J.*, 515; 75 L. J. Ch. 500; 94 L. T. 696.

See also Perpetuity, 1; Power, 1.

APPORTIONMENT. — See Annuity, 1; Lands Clauses Act, 2; Metropolis, 8; Rating, 6.

ARBITRATION:—

1. *Costs—Light railway—Lands Clauses Act*, 1845 (8 & 9 *Vict. c.* 18), *s.* 34—*Arbitration Act*, 1889 (52 & 53 *Vict. c.* 49), *s.* 24, *Schedule I.* (1)—*Light Railways Act*, 1896 (59 & 60 *Vict. c.* 48), *ss.* 12 (1), 13 (1) (3).—The costs of the reference and award in an arbitration under the Light Railways Act, 1896, are in the discretion of the arbitrator, as the Arbitration Act, 1889, applies to such proceedings and not the Land Clauses Act, 1845, even although the order authorizing the railway incorporates the Act of 1845.—BAXTER *v.* MIDLAND RAILWAY, *K.B.D.*; 93 L. T. 538.

2. *Jurisdiction — Private Acts — Corporation and traders—Argument—Waiver — Practice — Manchester Ship Canal Act*, 1885 (48 & 49 *Vict. c. clxxxviii.*), *ss.* 88, 202—*Manchester Ship Canal Act*, 1896 (59 & 60 *Vict. c. clxxxii.*), *s.* 43.—Under the Manchester Ship Canal Acts, 1885 and 1896, the Corporation of Warrington must resort to arbitration as provided by the Acts for the adjustment of differences between the corporation and the canal company, but the traders therein referred to may take proceeding in the courts in the usual way.—CROSFIELD & SONS *v.* MANCHESTER SHIP CANAL CO., *H.L.*, 172; [1905] A. C. 421; 74 L. J. Ch. 637; 93 L. T. 141.

See also Appeal, 2; Tramway, 2.

ASSIGNMENT:—

1. *Debt—Absolute assignment by writing—Request to debtor to pay third person—Equitable assignment—Judicature Act*, 1873, *s.* 25, *sub-section* 6.—The respondents were indebted to K. for the price of goods sold. K. sent to the appellants a letter, to be forwarded by them to the respondents, signed by himself, and addressed to the respondents, as follows: "Kindly sign the attached letter and forward same to" the appellants. The "attached letter" was addressed to the appellants, and was as follows: "Herewith we beg to confirm that we shall remit . . . the amount of invoices—£369 and £3,263 . . . received from K. & Co. when due direct to you for account of K. & Co." The letter was returned to the appellants signed by a person who had no authority to sign on behalf of the respondents.

Held, that the documents constituted a good equitable assignment of the debt apart from section 25, sub-section 6, of the Judicature Act, 1873.

Judgment of the Court of Appeal reversed.—BRANDT & CO. *v.* DUNLOP RUBBER CO., *H.L.*; [1905] A. C. 454; 74 L. J. K. B. 898; 93 L. T. 495.

2. *Debt—Covenant by assignee to repay assignor—Intention to make debtor bankrupt—Maintenance—Judicature Act*, 1873 (36 *&* 37 *Vict. c.* 66), *s.* 25, *sub-section* 6.—The plaintiff and the defendant were co-directors of a company. The plaintiff, being dissatisfied with the conduct of the defendant as a director, obtained from various creditors of the defendant an assignment of the debts owing from him to them, with the object of procuring an adjudication of bankruptcy against the defendant and of so getting him removed from the board of directors. The plaintiff covenanted with the creditors to pay over to them so much of the debts as he might be able to recover after payment of all costs necessarily incurred by him. This covenant was the only consideration for the assignment. The plaintiff having brought an action on the assignment, the defendant set up the defence that the conditions of the assignment and the purpose for which it was procured rendered it unenforceable, as evidencing a transaction which savoured of maintenance.

Held, that the plaintiff was entitled to judgment.

Comfort v. *Betts*, 39 W. R. 595, [1891] 1 Q. B. 737, followed.—FITZROY *v.* CAVE, *C.A.*, 17; [1905] 2 K. B. 364; 74 L. J. K. B. 829; 93 L. T. 499.

3. "*Effects, contracts, and engagements*"—*Claim for damages for breach of contract—Rights of assignee.* A trader had a claim against a company for unliquidated damages for breach of contract. Upon his becoming bankrupt his trustee in bankruptcy by deed assigned the goodwill of the bankrupt's business, and also "all the book and other debts, securities, credits, effects, contracts, and engagements belonging or appertaining to the said business."

Held (reversing the decision of A. T. Lawrence, J.), that these words were sufficient to pass to the assignee the bankrupt's claim for damages for breach of contract.—WEINBURG *v.* OGDENS (LIMITED), *C.A.*; 93 L. T. 729.

ATTACHMENT:—

1. *Disobedience to order—Service of order—Presence in court when order made—Service after date fixed for doing act—Prohibitive order—R. S. C. ord.* 41, *r.* 5; *ord.* 44, *r.* 2.—Where an order is made requiring a defendant to pay a sum of money into court on or before a certain date, although the defendant is present in court when the order was made, in order to found a motion for attachment upon it, it must be served on the defendant personally, except where, in the opinion of the court, the service has been evaded.

Dictum of Cotton, L.J., in *Hyde* v. *Hyde*, 13 P. Div. 171, overruled.

In the case of a prohibitive order, however, proof that notice of the order has reached the defendant is sufficient.—TUCK, RE, MURCH *v.* LOOSEMORE, *C.A.*; [1906] 1 Ch. 692; 75 L. J. Ch 497; 94 L. T. 597.

2. *Executor—Debt due from him to estate—Order for payment into court—Non-compliance—Possession as trustee or in a fiduciary capacity—Debtors Act*, 1869 (32 *&* 33 *Vict. c.* 62), *s.* 4, *sub-section* 3.—T. B. by his will appointed J. B. one of his executors, and he duly proved the will. At the time of T. B.'s death J. B. was indebted to him on four promissory notes for £500 each.

By a judgment of the 18th of July, 1905, in an action in the Chancery Division, J. B. was declared accountable for that sum "as assets in his hands" belonging to the testator T. B., with interest, and was ordered to pay the same into court. He did not comply with the order of the court, and had, after the commencement of the proceedings, sold all his assets, including his farming stock, and surrendered a policy of life insurance, handing over the proceeds to other creditors, and shortly after service of the order of the 18th of July, 1905, filed his petition in bankruptcy, on which a receiving order was made on the 26th of August, 1905, two days after the period for compliance with the order of the court expired.

Held, that J. B. was a person acting in a fiduciary capacity and ordered by a court of equity to pay a sum in his possession within section 4, sub-section 3, of the Debtors Act, 1869; and that on the merits the court ought to direct a writ of attachment to issue against him.

Decision of Kekewich, J., affirmed.

Dictum of Malins, V.C., in *In re Diamond Fuel Co., Metcalfe's case*, 13 Ch. Div. 820, overruled.

In re Woodward, Woodward v. *Woodward*, 81 L. T. R. 353, explained.—BOURNE, RE, DAVEY *v.* BOURNE, *C.A.*; [1906] 1 Ch. 697; 75 L. J. Ch. 474; 94 L. T. 750.

3. *Four-day order—Order on two persons—Service on one—Construction—"After service of this order."*—Two defendants were ordered to lodge a sum in court "within four days after service of this order." The order was served on one defendant only, the other not being able to be found.

Held, that the words "after service" meant after service upon the person against whom the order was to be enforced, and that a writ of attachment might be issued against the defendant who had been served.—ELLIS, RE, HARDCASTLE *v.* ELLIS, *Ch.D. Buckley, J.*, 526.

See also Contempt of Court, 1; Practice, 14.

AUSTRALIA, LAW of:—

1. *Appeal—Special leave to appeal from High Court of Australia.*—Where petitioners for special leave have elected to appeal to the High Court of Australia, from which it is known that there is no further appeal without special leave, their lordships will not, except in a very special case, entertain their petition.—VICTORIAN RAILWAY COMMISSIONERS *v.* BROWN, *P.C.*; [1906] A. C. 381.

2. *Excise duties—Power to impose—Commonwealth of Australia Constitution Act*, 1900 (63 *&* 64 *Vict. c.* 12), *ss.* 51, 86, 88, 90, 99.—The Parliament of the

Commonwealth of Australia has power under the Constitution Act, 1900, to impose duties of excise before uniform duties of customs in the several States have been imposed.

Where a uniform rule as to duties of excise was laid down by the Commonwealth Parliament applicable to all States alike, but it operated unequally in the several States in consequence of the inequality of duties imposed by the States themselves,

Held, that the duties were not imposed in a manner which discriminated between States or gave one State a preference over another, in violation of the provisions of the constitution.

Judgment of the court below affirmed.—COLONIAL SUGAR REFINING CO. *v.* IRVING, *P.C.*; [1906] A. C. 360; 75 L. J. P. C. 54; 94 L. T. 387.

3. *Statutes—Construction—Australian Lunacy Act,* 1898—*Powers of committee of lunatic.*—In the construction of statutes it is not to be assumed that all persons not specifically included in a protecting clause are for that reason alone excluded from the protection of the statute.

Therefore, as the committee of a lunatic has power to put the person found lunatic in proper care and custody, persons acting under the instructions of the committee, in good faith, and with due care, and without unnecessary violence, are not liable to an action, although they are not specifically protected by the Australian Lunacy Act, 1898.

Judgment of the court below affirmed.—MCLAUGHLIN *v.* WESTGARTH, *P.C.*; 94 L. T. 831.

BAILIFF:—

Cause of action—County court—Alleged act, neglect, or default of high bailiff—Non-service of judgment summons—Committal—Public Authorities Protection Act, 1893 (56 & 57 *Vict. c.* 61), *s.* 1 (a).—So long as a committal order stands, an action will not lie at the suit of a judgment debtor against the high bailiff of the county court for not having served him. the debtor, with the judgment summons upon which the order is made.

Any such action against the high bailiff, by virtue of the Public Authorities Protection Act, 1893, must be brought within six months of the "act, neglect, or default" complained of, and therefore it must be brought within six months of the time when the bailiff made the return of the service of the judgment summons and the county court judge acted upon it.

The date of the arrest on the committal order is not the date of the "act, neglect, or default."—TURLEY *v.* DAW, *K.B.D.*; 94 L. T. 216.

See also Distress, 3, 4.

BANKRUPTCY:—

1. *Act of bankruptcy—Notice to creditors that debtor could not meet his engagements—Bankruptcy Act,* 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-section* 1 (h).—A declaration by a debtor that he is unable to pay in full, made to his Stock Exchange creditors, and permission given to them to close their accounts,

Held, not sufficient notice within the meaning of of section 4, sub-section 1 (*h*), of the Bankruptcy Act, 1883, that the debtor had suspended or was about to suspend payment of his debts.

Decision of the Court of Appeal in *In re Reis, Ex parte Clough,* 54 W. R. 122, [1904] 2 K. B. 769, affirmed.—CLOUGH *v.* SAMUEL, *H.L.*, 114; [1905] A. C. 442; 74 L. J. K. B. 918; 93 L. T. 491.

2. *Annulment—Payment in full—Release by creditors—Bankruptcy Act,* 1883 (46 & 47 *Vict. c.* 52), *s.* 35 (1).—In order to obtain the annulment of an adjudication in bankruptcy by proving to the satisfaction of the court that all debts have been paid in full under section 35 (1) of the Bankruptcy Act, 1883, the payment in full must be a payment of money, and a debt which has been released by a creditor voluntarily, or for small consideration, is not paid in full within the meaning of the section.—KEET, RE, OFFICIAL RECEIVER, EX PARTE, *C.A.*, 20; [1905] 2 K. B. 666; 74 L. J. K. B. 694; 93 L. T. 259.

3. *Bill of sale—Apparent possession—Bankruptcy Act,* 1883 (46 & 47 *Vict. c.* 52), *s.* 44—*Bills of Sale Act,* 1878 (41 & 42 *Vict. c.* 31), *s.* 8.—The bankrupt being indebted to a friend, and having no property but her furniture, transferred the furniture in satisfaction of the loan, and carried out the transaction by documents which were found in fact to constitute an absolute bill of sale. Subsequently the sheriff seized the goods in execution, and was actually in possession when the bankrupt filed her own petition. The trustee in bankruptcy claimed the furniture, and sought to set aside the bill of sale as void for want of registration.

Held, following *Ex parte Saffery, In re Bremner,* 29 W. R. 749, 16 Ch. D. 669, that a bill of sale could not be avoided because at the date when the bankrupt filed her petition the goods were not in her possession or apparent possession, but in the possession of the sheriff.—BALES, RE, STEEL, EX PARTE, *Bkcy.*, 202.

4. *Contract for works—Power to engineer to order direct payment to those supplying contractor with machinery—Exercise of such power after receiving order against the contractor.*—The bankrupt had entered into a contract to do certain work for a public authority. The contract contained a clause empowering the engineer to order direct payment by the public authority to those supplying machinery to the contractor in case he should have reasonable cause to believe that the contractor was unduly delaying payment to them. At the date of the receiving order some of the firms who had supplied machinery were unpaid, and the engineer subsequently ordered direct payment to be made to them out of the money which remained due from the public authority to the bankrupt at the date of the receiving order.

Held, that the engineer was entitled to make such order, and that the trustee could not recover such money from the public authority, as the effect of the filing by the bankrupt of his petition was that payment to the machinery firms was unduly delayed.

Held, also, that the authority given by the contractor to the engineer under the clause in question was irrevocable by the contractor and consequently irrevocable by the trustee in his bankruptcy.—WILKINSON, RE, FOWLER, EX PARTE, *Bkcy.*, 157; [1905] 2 K. B. 713; 74 L. J. K. B. 969.

5. *Costs—Taxation—Bankruptcy Act,* 1883 (46 & 47 *Vict. c.* 52), *s.* 73—*Bankruptcy Rules,* 1886-1890, *rr.* 112, 124, *Form* 141—*Scale of Costs,* 1886-1890, *General Regulations, r.* 2—*Solicitors' Remuneration Order,* 1882, *Schedule I.*—In taxing the costs of a solicitor who has acted for the trustee in business connected with sales of property of the bankrupt, under regulation 2 of the General Regulations as to costs in bankruptcy, the taxing-master need not consider whether there are any proceeds of sale out of which the costs can be paid, but should merely allow the proper amount of costs, and direct that such amount is to be paid in accordance with regulation 2 of the General Regulations.—GARNER, RE, PEDLEY, EX PARTE, *Bkcy.*, 627; [1906] 2 K. B. 213; 75 L. J. K. B. 584.

6. *Deed of assignment — Petitioning creditor — Estoppel by assent to the deed—Petition founded on act of bankruptcy other than the deed.*—A creditor who has assented to a deed of assignment, but who is not bound by it, although he may be prevented from alleging that the assignment for the benefit of the creditors was an act of bankruptcy, is not prevented from presenting a petition founded on an independent act of bankruptcy.—MILLS. RE, MILLS, EX PARTE, *C.A.*, 322; [1906] 1 K. B. 389; 75 L. J. K. B. 247; 94 L. T. 41.

7. *Deed of assignment for the benefit of creditors—Bankruptcy proceedings instituted within the next three months—Effect of payment made to trustee of assignment deed—Protected transaction—Right of the trustee in the bankruptcy to enforce payment of the debt—Relation back of trustee's title—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 43, 49 (2).—The defendant being indebted to a builder for work done, and the builder having made an assignment of his property in favour of all his creditors, the defendant paid the amount of her debt to the trustee of the assignment deed, having been notified by the trustee of the execution of the deed and required to pay the debt to him. Within three months of the execution of the assignment deed a bankruptcy petition was presented against the builder founded on the act of bankruptcy occasioned by the execution of the deed, and he was adjudicated a bankrupt. The assignment trustee having failed to pay over to the trustee in bankruptcy the money received from the defendant, the trustee in bankruptcy sued the defendant.

Held, that, as the defendant had notice of the act of bankruptcy when the debt was paid to the assignment trustee, the payment was not a protected transaction, and the trustee in the bankruptcy was entitled to recover the amount from the defendant for the benefit of the bankrupt's creditors. —DAVIS *v.* PETRIE, *K.B.D.*, 30; [1905] 2 K. B. 528; 74 L. J. K. B. 785; 93 L. T. 511.

8. *Disclaimer—Administration of estate of deceased insolvent—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 55, 125, *sub-sections* 5, 6.—The provisions of section 55 of the Bankruptcy Act, 1883 (disclaimer of onerous property), are applicable to administrations in bankruptcy under section 125 of the same Act, of the estates of persons dying insolvent.

Dictum of Cave, J., in *Ex parte The Official Receiver, In re Gould*, 35 W. R. 569, 19 Q. B. D. 92, followed. —MELLISON, RE, DAY, EX PARTE, *Bkcy.*, 444; [1906] 2 K. B. 68; 75 L. J. K. B. 595; 94 L. T. 679.

9. *Disclaimer of onerous property—Time for disclaimer—First appointment of trustee—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 21, 55 (1)—*Bankruptcy Act*, 1890 (53 & 54 *Vict. c.* 71), *s.* 13.—The "twelve months after the first appointment of a trustee," within which, under section 55 (1) of the Bankruptcy Act, as amended by section 13 of the Bankruptcy Act, 1890, onerous property may be disclaimed by the trustee of a bankrupt, begin to run from the date of the certificate of the appointment of the trustee under section 21 of the Bankruptcy Act, 1883, and not from the date of the order of adjudication.—COHEN, RE, *C.A.*, 83; [1905] 2 K. B. 704; 74 L. J. K. B. 864; 93 L. T. 659.

10. *Jurisdiction of county court—Matter not arising out of the bankruptcy—Amount in dispute exceeding £200—Jurisdiction to refer dispute to registrar to report amount due—Bankruptcy Act*, 1883 (47 & 48 *Vict. c.* 52), *s.* 102 (1).—A county court judge has not jurisdiction (except by consent) under section 102 (1) of the Bankruptcy Act, 1883, to refer a claim exceeding £200 not arising out of the bankruptcy to his registrar, to ascertain by taking an account the amount really due.—HEALEY, RE, *Bkcy.*; 93 L. T. 704.

11. *Letters of lien on goods bought with advance—Bills of Sale Act*, 1878 (41 & 42 *Vict. c.* 31), *s.* 4—*Bills of Sale Act*, 1890 (53 & 54 *Vict. c.* 53)—*Bills of Sale Act*, 1891 (54 & 55 *Vict. c.* 35)—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 44.—Where bankers advanced money to traders for the purpose of paying for goods, and the traders gave the bankers letters of lien thereon, it was held, on the bankruptcy of the traders, that the letters were "documents used in the ordinary course of business as proof of the possession or control of goods," and so, being within the exceptions of section 4 of the Bills of Sale Act, 1878, need not be registered under the Bills of Sale Acts. It was also held that the Bills of Sale Acts, 1890 and 1891, had no bearing on the case. It was further held that goods covered by the letters of lien and sent by the traders to certain manufacturers before sale by the traders, and which were claimed by the bankers before the bankruptcy, were not "at the commencement of the bankruptcy in the possession, order, or disposition of the bankrupts" as "the reputed owners thereof" within section 44 of the Bankruptcy Act, 1883.—HAMILTON, YOUNG, & Co., RE, *C.A.*, 260; [1905] 2 K. B. 772; 74 L. J. K. B. 905; 93 L. T. 591.

12. *Notice—Final judgment for debt "and costs to be taxed"—Validity—Notice to pay judgment debt "in accordance with the terms of the judgment"—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-section* 1 (*g*)—*Ord.* 42, *r.* 18.—Where a creditor, having recovered judgment against a debtor for a debt "and costs to be taxed," served on the debtor, before the costs were taxed, a bankruptcy notice requiring him to pay the judgment debt, and subsequently, when the costs had been taxed, presented a bankruptcy petition alleging that the debtor was indebted in the amount due on the final judgment, being the judgment debt and the taxed costs, it was held that the bankruptcy notice was valid, as it required the debtor to pay the judgment debt "in accordance with the terms of the judgment," within the meaning of section 4, sub-section 1 (*g*), of the Bankruptcy Act, 1883, having regard to the provisions of ord. 42, r. 18, which entitles a creditor at his election to issue execution for the judgment debt separately from the costs.

In re H. B., [1904] 1 K. B. 94, distinguished.

Decision of Mr. Registrar Linklater affirmed.—G. J., RE, G. J., EX PARTE, *C.A.*; [1905] 2 K. B. 678; 74 L. J. K. B. 932; 93 L. T. 193.

13. *Partnership — Assignment of book debts — Executed by one partner—Other partner's name added without consent—Equitable assignment—Partnership Act*, 1890 (53 & 54 *Vict. c.* 39), *s.* 6.—One partner executed a deed assigning the book debts to a creditor of the firm. The signature of the other partner had been added to the deed without his consent, and he had no knowledge of the assignment. The deed was accepted in good faith by the creditor, who gave notice of the assignment to the debtors. Subsequently the partners became bankrupt.

Held, that whether or not the assignment was a valid deed, it was by virtue of the Partnership Act, 1890, s. 6, effective as an equitable assignment of the book debts.—BRIGGS & Co., RE, WRIGHT, EX PARTE, *K.B.D.*; [1906] 2 K. B. 209; 75 L. J. K. B. 591.

14. *Payment to creditor after petition—Protected transaction—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 49.—A payment made by a debtor before receiving order to one of his creditors in good faith and for valuable consideration, and taken by the creditor without notice of any available act of bankrupty, is a protected transaction within section 49 of the Bankruptcy Act, 1883, even though made after the presentation of a petition against the debtor.

In re Badham, Ex parte Palmer, 10 Morr. 252, distinguished.—DUNKLEY, RE, WALLER, EX PARTE *Bkcy.*, 171; [1905] 2 K. B 683; 74 L. J. K. B. 963; 93 L. T. 248.

15. *Petition—Deed of assignment—Acquiescence—Undue pressure—Sufficient cause for refusal of receiving order—Bankruptcy Act*, 1883 (46 & 47 *Vict. c* 52), *s.* 7, *sub-section* 3.—A petitioning creditor in bankruptcy, who recognizes that a trustee under a deed of arrangement has a good title, and who sells goods to the trustee and is paid by him therefor, is estopped from saying that the deed is a fraud upon creditors and an act of bankruptcy. A clause in a deed of arrangement authorizing the trustee by the direction of the committee of inspection or of the majority of the creditors to pay any creditor in full who does not execute or assent to the deed should not be inserted therein.—BRINDLEY, RE, TAYLOR & Co, EX PARTE, *C.A.*, 301; [1906] 1 K. B. 377; 75 L. J K. B. 211; 94 L. T. 116.

16. *Pledge of share certificates with bankrupt—Disappearance of pledgor—Power of sale by trustee in bankruptcy—Directions as to advertisement.*—Where certain share certificates had been pledged with a firm which afterwards became bankrupt, and the pledgor had disappeared without repaying the loan, the trustee in bankruptcy was given permission to sell the shares after advertising for the pledgor as directed by the court.—HARRISON & INGRAM, RE, WHINNEY, EX PARTE, *Bkcy.*, 203.

17. *Power of appointment — Appointment by bankrupt's will—Property divisible among creditors —Creditors subsequent to receiving order—Assets.*—H. G. had, under a settlement, a general testamentary power of appointment over a fund. By his will, made in 1892, he executed the power in favour of E. L., whom he appointed executor. A receiving order was made against H. G. in 1900, and he was adjudicated a bankrupt on the 1st of October, 1900. E. L. proved against the estate for £1,131. H. G. died in 1984 without having obtained his discharge. Between the date of the receiving order and the time of his death he had become indebted to various creditors.

Held, that the appointed fund was not property divisible amongst the creditors in the bankruptcy, either under section 44 of the Bankruptcy Act, 1833, or by virtue of any equitable doctrine as to property appointed in exercise of a general testamentary power; that the trustee in the bankruptcy was not entitled to receive the fund; that the duty of dividing it devolved upon the executor; and that the only creditors who had a right to share in the fund were the creditors who had become so after the bankruptcy.

Jenney v. *Andrews*, 6 Madd. 264, followed.—GUEDALLA, RE, LEE *v.* GUEDALLA, *Ch.D. Warrington, J.*, 77; [1905] 2 Ch. 331; 75 L. J. Ch. 52; 94 L. T. 94.

18. *Security for costs—Applicant resident abroad—Discretion.*—The jurisdiction to order an applicant resident abroad to give security for costs ought only to be exercised in extreme cases, and, in the absence of any evidence of inability to pay, an order ought to be refused.—PILLING, RE, CHAPMAN, EX PARTE, *Bkcy.*; 94 L. T. 682.

19. *Transfer of bankrupt's business to limited company—"Fraudulent conveyance" — Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-section* 1 (b). —A trader being in difficulties transferred his assets to a company in the *bonâ fide* hope of thereby benefiting his creditors. His assets were estimated at £2,000, and his debts at £1,000. The consideration for the transfer was an undertaking by the company to pay his debts and the allotment of ninety-four shares and debentures of the nominal value of £1,000. The debentures could not be enforced until interest was two months overdue—*i.e.*, eight months from their issue, or until execution was put in against the company.

Held, that this transfer did not necessarily tend to defeat or delay creditors, was not a fraudulent conveyance within section 4, sub-section 1 (*b*), of the Bankruptcy Act, 1883, and should not be set aside as void against the trustee in bankruptcy.—HARRIS, RE, THE TRUSTEE, EX PARTE, *Bkcy.*, 460.

See also Company, 4; Mortgage, 1; Probate, 1.

BILL OF EXCHANGE:—

Indorsement to bank for purpose of discount—Property in bill—Bill receivable whether a book debt—Debts omitted from books—Whether book debts.—The property in a bill of exchange, indorsed to a bank for the purpose of being discounted, does not pass to the bank before it has been actually discounted and the amount credited to the account of the customer.

Giles v. *Perkins*, 9 East 12, followed; *Ex parte Schofield, In re Firth*, 27 W. R. 925, 12 Ch. D. 337, distinguished.

Until this has been done it remains a "bill receivable" in the hands of the customer, and therefore a "book debt" of the customer.

In re Stevens, Stevens v. *Keilly*, (1888) W. N. 110, and correction at p. 116, followed.

"Book debts" may include debts omitted from the books, but which should have been entered in the ordinary course of trade.—DAWSON *v.* ISLE, *Ch.D. Warrington, J.*, 452; [1906] 1 Ch. 633; 75 L. J. Ch. 338.

See also Partnership, 1.

BILL OF SALE:—

1. *Registration—Execution creditor—Interpleader —Bills of Sale Act*, 1878 (41 & 42 *Vict. c.* 31), *s.* 8.—Where a person sets up as against a judgment creditor a title for goods which have been throughout in the possession of the judgment debtor, the claimant must show either a registered title or something done with the goods which renders registration unnecessary.

A. sold his furniture to B., a company, retaining the possession of it for a weekly monetary consideration; the transaction was not registered under the Bills of Sale Acts. Subsequently B. sold this furniture to C., the mother of A., for £200, the furniture still remaining in the possession of A. A. then removed to another town, taking the said furniture with him. Upon seizure in execution of a judgment debt, C. claimed the furniture;

Held, that the furniture having remained throughout in the possession of A., C.'s claim was not protected, as she could not show a title by any registered bill of sale, or anything that rendered registration unnecessary.—HOPKINS *v.* GUDGEON, *K.B.D.*, 419; [1906] 1 K. B. 690; 75 L. J. K. B. 452; 94 L. T. 578.

2. *Validity—Estoppel.*—A bill of sale given by the defendant to the plaintiffs was held invalid

because the consideration was not "truly set forth" as required by section 8 of the Bills of Sale Act, 1882.

Both the plaintiffs and the defendant had held out the bill to be valid against creditors of the defendant.

Held, that as between the plaintiffs and the defendant the bill was valid; the defendant having elected to obtain an advantage by asserting the bill to be valid could not, to gain a further advantage, be heard to say that it was invalid, even, *semble*, assuming that its invalidity was known to both the parties.—COMITTI *v.* MAHER, *Ch.D. Kekewich, J.*; 94 L. T. 158.

See also Bankruptcy, 3, 11; Ship, 17.

BURIAL-GROUND.

1. *Burial within one-hundred yards of dwelling-house —Dwelling-house erected after acquisition of land for cemetery—Ground not "already" used—New cemeteries—Burial Act*, 1855 (18 & 19 *Vict. c.* 128), *s.* 9. —In 1905, a burial board purchased a piece of land for a cemetery. Subsequently to the purchase, an adjoining landowner built a house within one hundred yards of the cemetery. Upon motion by the landowner to restrain the board from allowing burials to take place within one hundred yards of his house, in contravention of section 9 of the Burials Act, 1855, which prohibits ground "not already used" as a cemetery from being used for burials within one hundred yards "from any dwelling-house" without the consent of the owner:

Held, that "already" meant at the time of the passing of the Act in 1885; and that the Act protected houses even though built subsequently to the acquisition of any cemetery laid out since 1855, and that the injunction must be granted.—GODDEN *v.* HYTHE BURIAL BOARD, *C.A.*; 75 L. J., Ch. 595.

2. *Consecrated and unconsecrated parts of a cemetery —Sanction of Secretary of State—Rights of incumbent — "Services rendered" —Burials by Nonconformist minister—Burial Acts*, 1852 (15 & 16 *Vict. c.* 85), *s.* 32; 1853 (16 & 17 *Vict. c.* 134), *s.* 7; 1900 (63 & 64 *Vict. c.* 15), *s.* 3.—A part of a cemetery which has been duly consecrated for the purposes of burials in accordance with the rites of the Church of England is consecrated ground, although the sanction of the Secretary of State, under section 7 of the Act of 1853, has not been obtained. The possible effect of the absence of such sanction may be that the fees could not be enforceable at law.

The incumbent of a parish is not entitled to any fee under section 3, sub-section 4, of the Burial Act, 1900, unless he has rendered services in respect of the burial.—WILLIAMS *v.* BRITON FERRY BURIAL BOARD, *K.B.D.*, 187; [1905]; 2 K. B. 565; 74 L. J. K. B. 840; 92 L. J. 696.

3. *Erection of monument—Right of incumbent to fees in respect of—Burial Act*, 1900 (63 & 64 *Vict. c.* 15), *s.* 3, *sub-section* 4 (1).—By the Burials Act, 1900, s. 3, sub-section 4, it is enated that "no fee shall be payable to any incumbent in respect of any right of exclusive burial, or the erection of a monument, or any other matter whatsoever, in any burial-ground maintained by a burial authority except for services rendered him," but a proviso to the section preserved the rights of incumbents in "burial-grounds . . . laid out and used before the passing of this Act."

Held, that the above proviso did not apply to additional land which had been purchased by the local authority for the purpose of being added to the existing burial-ground, and which had been, previous to the passing of the Act, laid out as a burial-ground. but in which no burials had in fact taken place till subsequent to the passing of the Act, and that the incumbent was not therefore entitled to the fees claimed by him in respect of the erection of monuments on the additional land.—YOUNG *v.* KINGSTON-ON-THAMES, SURBITON, AND NEW MALDEN JOINT BURIALS COMMITTEE, *K.B.D.*, 507; [1906] 1 K. B. 338; 75 L. J. K. B. 225; 94 L. T. 196.

4. *New burial-ground—Addition to existing burial-ground—Disused burial-ground—"Set apart for the purposes of interment"—Ground set apart without statutory authority—Burial Act*, 1853 (16 & 17 *Vict. c.* 134), *s.* 1—*Metropolitan Open Spaces Act*, 1881 (44 & 45 *Vict. c.* 34), *s.* 1—*Disused Burial-grounds Act*, 1884 (47 & 48 *Vict. c.* 72), *s.* 3—*Open Spaces Act*, 1887 (50 & 51 *Vict. c.* 32), *s.* 4.—For the purposes of the provisions of the Burial Act, 1853, which prohibit the opening of any new burial-ground within the limits there specified without the approval of a Secretary of State, an addition to an existing burial-ground stands on the same footing as the opening of an entirely new burial-ground.

A piece of land which has once been set apart for the purposes of interment, and in which interments have taken place, but which is no longer used for interments, is, by virtue of section 4 of the Open Spaces, 1887, a disused burial-ground within the meaning of the Disused Burial-grounds Act, 1884, and therefore incapable of being used for building purposes, although by reason of a failure to obtain the approval of a Secretary of State the original setting apart was not lawful.—BOSWORTH AND GRAVESEND CORPORATION, RE, *C.A.*, 39; [1905] 2 K. B. 426; 74 L. J. K. B. 810; 93 L. T. 226.

See also Metropolis, 9.

CANADA, LAW of:—

1. *Civil Code of Quebec, art.* 1056—"*Indemnity or satisfaction*"—*Right of action by widow of deceased —Subscription to insurance and provident society.*—In a case where a person dies in consequence of injuries received by the commission of an offence or *quasi*-offence, the release or discharge by the deceased of his possible right of action is not of itself "satisfaction" within the meaning of art. 1056 of the Civil Code of Quebec, unless the deceased has thereby obtained from the offender a real and tangible indemnity or satisfaction for the offence or *quasi*-offence in question.

Therefore where a servant of a railway company was killed by the negligence of the company or its servants,

Held, that the fact that he was at the time of his death a member of an insurance and provident society, one of the bye-laws of which provided that "in consideration of the subscription of the company to the society no member thereof, or his representatives, shall have any claim against the company for compensation on account of injury or death from accident," was no bar to an action by his widow, under art. 1056 of the Civil Code, for the damages which she had sustained by his death.

Judgment of the court below reversed.

Reg. v. *Grenier*, 30 Sup. Ct. Rep. 42, disapproved. —MILLER *v.* GRAND TRUNK RAILWAY CO., *P.C.*; [1906] A. C. 187; 75 L. J. P. C. 45; 94 L. T. 231.

2. *Crown lands—Right of Dominion Parliament to legislate with respect to—Canadian Railway Act* (44 *Vict. c.* 1), *sect.* 18 (a)—*Consolidated Railway Act of Canada* (42 *Vict. c.* 9).—The Dominion Parliament of Canada is competent to legislate with respect to provincial Crown lands, and a section in an Act of the Dominion Parliament empowering a railway company to take possession of the foreshore for the purpose of constructing their railway, "in so far

as the same shall be vested in the Crown and shall not be required by the Crown," held not to be limited to Dominion Crown property.

The express provisions of a railway Act must prevail over the general provisions of the Consolidated Railway Act of Canada.

Judgment of the court below affirmed.—ATTORNEY-GENERAL FOR BRITISH COLUMBIA *v.* CANADIAN PACIFIC RAILWAY, *P.C.*; [1906] A. C. 204; 75 L. J. P. C. 38; 94 L. T. 295.

3. *Lower Canada—Civil Code, art.* 1018—*Contract—Construction*—By art. 1018 of the Civil Code of Lower Canada, "all the clauses of a contract are interpreted the one by the other, giving to each the meaning derived from the entire Act."

By a contract entered into between the appellants and the respondents, the appellants agreed to establish and work lines of railway for the conveyance of passengers in the city by means of cars propelled by electricity, and the respondents conferred upon the appellants privileges with regard to the use of electric power in the streets. The contract provided that the appellants should pay to the respondents annually certain percentages "upon the total amount of its gross earnings arising from the whole operation of its said railway." A schedule specified certain routes upon which the cars were to run within the city of Montreal.

The appellants afterwards extended their system beyond the limits of the city.

Held, that the percentages were only payable upon the gross earnings arising from the whole operation of the line within the limits of the city.

Judgment of the court below reversed.—MONTREAL STREET RAILWAY v. MONTREAL CITY, *P.C.*; [1906] A. C. 100; 75 L. J. P. C. 9; 93 L. T. 678.

4. *Ontario—Action for passing off—Injunction—Competency of appeal.*—By the Revised Statutes of Ontario, c. 48, s. 1, no appeal shall lie to the King in Council unless the matter in controversy exceeds the sum or value of 4,000 dollars. The appellant brought an action against the respondent for an injunction to restrain him from infringing certain trade-marks of the appellant, and from passing off his goods as the goods of the appellant, and for damages. The Court of Appeal for Ontario gave judgment for the appellant.

Held, that, no sum or value being in controversy, the appeal was not competent. — GILLETT v. LUMSDEN, *P.C.*; [1905] A. C. 601; 74 L. J. P. C. 155; 93 L. T. 314.

5. *Ontario—Practice—Payment of interest — Ontario Judicature Act, R.S.O.*, 1897, *c.* 51, *s.* 113.—Under the Ontario Judicature Act, 1897, in all cases where in the opinion of the court the payment of a just debt has been improperly withheld, and it seems to be fair and equitable that the party in default should make compensation by payment of interest, it is incumbent upon the court to allow interest for such time and at such rate as the court may think right.

Judgment of the court below affirmed.—TORONTO RAILWAY *v.* TORONTO CORPORATION, *P.C.*; [1906] A. C. 117; 75 L. J. P. C. 36; 93 L. T. 646.

6. *Ontario—Practice—Power of court to allow interest not claimed—Discretion of court.*—The court has power, on further directions, to order the payment of interest on a sum found to be due from a defendant, although the decree declaring the liability contains no direction for the payment of interest, and the statement of claim does not ask for it.

It is a matter for the discretion of the cour under the circumstances of the particular case.

Judgment of the court below varied.—BURLAND *v.* EARLE, *P.C.*; [1905] A. C. 590; 74 L. J. P. C. 156; 93 L. T. 313.

7. *Ontario—Provincial Statute* (36 *Vict. c.* 102), *s.* 5—*Water commissioners—Powers of expropriation—Water required for purpose of waterworks—Procedure under statute—Damages—Injunction.*—Water commissioners, incorporated to supply a town with water, were empowered by statute to enter upon lands and to divert and appropriate water for the purposes of their waterworks, making compensation to the owners.

Held (affirming the judgment of the court below), that they were acting within their powers in appropriating land and water rights, not for the purpose of storing water to be supplied to the town, but for generating power to raise the water supplied to the required height.

But in a case in which they had appropriated land and water rights without following the procedure as to compensation laid down by the statute,

Held (reversing the judgment of the court below), that an owner who had sustained injury by such appropriation could maintain an action, and was entitled to an injunction to restrain the commissioners from continuing or repeating the acts complained of, and not only to damages for the trespass.—SAUNBY *v.* CITY OF LONDON WATER COMMISSIONERS, *P.C.*; [1906] A. C. 110; 75 L. J. P. C. 25; 93 L. T. 648.

8. *Ontario—Railway—Mortgage—Power of sale—Statute* 46 *Vict. c.* 24, *ss.* 14, 15, 16—*Dominion Railway Act*, 1888 (51 *Vict. c.* 29).—A railway which is subject to the legislation of the Dominion of Canada can be sold in a suit by the trustees for bondholders to enforce a mortgage on the company's railway, lands, and franchises.

Judgment of the court below affirmed.—CENTRAL ONTARIO RAILWAY CO. *v.* TRUSTS AND GUARANTEE CO., *P.C.*; [1905] A. C. 576; 74 L. J. P. C. 116; 93 L. T. 317.

9. *Quebec—City of Montreal Act* (52 *Vict. c.* 79)—*Right to recover assessment for local improvements—Prescription.*—By section 120 of the Charter or Act of the City of Montreal (52 Vict. c. 79) a period of prescription of three years is imposed for the recovery of any tax, assessment, or rate made under the Act, to be counted from the time when such tax, assessment, or rate becomes due. An assessment was made under the Act for certain public improvements, and proceedings were taken to set it aside on the ground of certain alleged irregularities.

The Court upheld the validity of the assessment.

Held, that the pending proceedings did not prevent the period of prescription from running, and that the amount of the assessment could not be recovered after the lapse of three years from the time when it first became due.

Judgment of the court below affirmed. — MONTREAL CITY *v.* CANTIN, *P.C.*; [1906] A. C. 241; 75 L. J. P. C. 41; 94 L. T. 357.

10. *Quebec—Privilege of lessor in liquidation proceedings—Civil Code, art.* 2005.—The respondents let property in Montreal by lease to B. & Co. for the purposes of their business. In 1899 B. & Co. made a judicial abandonment of their property for the benefit of their creditors. At that time they owed more than two years' rent to the respondents. By art. 2005 of the Civil Code, as it stood at the

date of the lease, the lessors were entitled to rank as privileged creditors for the whole rent due. Between the date of the lease and the liquidation the article had been amended, and the lessors' privilege was restricted to two years' rent.

Held (reversing the judgment of the court below), that the case was governed by the law as it stood at the date of the liquidation, and the respondents could only claim privilege in respect of two years' rent, and ranked as ordinary creditors for the balance.—ROSS *v.* BEAUDRY, *P.C.*; [1905] A. C. 570; 74 L. J. P. C. 106; 93 L. T. 315.

CHAPEL:—

Public building or domestic oratory—Consecration.—A chapel which originally was part of the fabric of a mansion-house, but which became a separate building owing to a mansion-house being pulled down and rebuilt on a different site, had divine service and baptisms of the children of the owners of the mansion-house performed in it by the vicar of the parish.

In an action by the vicar for a declaration that he and his successors was and were entitled to the possession and control of the chapel and to perform divine service and celebrate the sacraments in the chapel according to the rites of the Church of England,

Held, that the chapel was not a consecrated public building, and had never been more than a domestic oratory.—NEVILL *v.* STUDDY, *Ch.D. Buckley, J.*; 94 L. T. 391.

See also Inland Revenue, 14.

CHARITY:—

1. *Will—Gift for ringing of church bells—Gift for headstones in churchyard—Gift to "public charities and institutions."*—A testatrix by her will made (*inter alia*) the following bequests: The sum of £1 to be paid to the bellringers a parish church to ring a peal annually "in commemoration of the happy restoration of the monarchy to England"; the income of the sum of £700 to be applied in the erection and maintenance of headstones on the graves of certain poor persons buried in the churchyard; and a gift of residue "to and amongst such public charities and institutions" as her trustees should think fit.

Held, that each of these gifts constituted a good and effectual charitable bequest.—PARDOE, RE, MCLAUGHLIN *v.* ATTORNEY-GENERAL, *Ch.D. Kekewich, J.*, 561; [1906] 2 Ch. 184; 75 L. J. Ch. 455; 94 L. T. 567.

2. *Will—Gift to be applied under direction of executors* — Cy-près. — A testatrix directed her executors to apply a sum to their satisfaction and under their direction towards the enlargement and equipment of a hospital. The enlargements were carried out in the lifetime of the testatrix.

Held, that there was not an immediate gift to the hospital, but that the executors ought to expend so much of the said sum as they thought proper in equipment, and in the event of a balance remaining in their hands, should apply to the court for directions.—UNITE, RE, EDWARDS *v.* SMITH, *Ch.D. Kekewich, J.*, 358; 75 L. J. Ch. 163.

3. *Will—Public institutions—Charitable institutions and other general purposes of locality.*—A testator in the events which happened gave part of his residuary estate upon trust for charitable, educational, or other institutions of the town of Kendal, and also for such other general purposes for the benefit of the town of Kendal or its inhabitants as his trustees should think fit. Certain institutions at Kendal, a hospital, grammar school, and free library were suggested by the testator, without binding his trustees to adopt the suggestion, as suitable institutions.

Held, that the gift was a valid charitable trust.

Dolan v. *Macdermott*, 17 W. R. 3, L. R. 5 Eq. 60, 3 Ch. App. 676, and *Mayor, &c., of Wrexham* v. *Tamplin*, 21 W. R. 768, followed.—ALLEN, RE, HARGREAVES *v.* TAYLOR, *Ch.D. Swinfen Eady, J.*, 91; [1905] 2 Ch. 400; 74 L. J. Ch. 593; 93 L. T. 597.

4. *Society having charitable objects — "Endowment"—Voluntary subscriptions—Special object—General objects—Investment in land—Registration under Land Transfer Acts*, 1875 *and* 1897—*Consent of Charity Commissioners—Charitable Trusts Act*, 1853 (16 *&* 17 *Vict. c.* 137), *ss.* 62, 66.—A society incorporated under the Companies Acts, 1862 to 1890, and formed for charitable purposes under section 23 of the Companies Act, 1867, invited and received voluntary subscriptions specially given for new headquarters. On applying to register a lease of land acquired by the society for the new headquarters, it was objected by the registrar that no disposition thereof could be made without the consent of the Charity Commissioners as it was an "endowment," and that a restriction to that effect should be entered on the register.

Held, that there was nothing in the circumstances to show that the subscriptions of donors, which were specially allocated to the purposes of the society's new headquarters, were to be treated as capital and not as applicable to current expenses and to be treated as income of the year; that therefore the same did not constitute an "endowment," but came within the exemption contained in section 62 of the Charitable Trusts Act, 1853, and were excepted from the jurisdiction of the Charity Commissioners.

In re Clergy Orphan Corporation, [1894] 3 Ch. 145, considered and applied.

Decision of Kekewich, J. (93 L. T. Rep. 230), affirmed.—CHURCH ARMY, RE, *C.A.*; 75 L. J. Ch. 467; 94 L. T. 559.

CHEQUE.—See Contract, 1, 6.

CLUB:—

Sporting—Rules—Power to alter—Object of club—Particular sport—Abolition by resolution—Validity of resolution.—A club was formed in 1868, one of the objects of which was to provide grounds and facilities for the sport of pigeon-shooting. From time to provision was made and facilities afforded for polo playing and other sports. One of the rules provided that any of the rules might be altered or added to at any general meeting of the club with the assent of a majority of two-thirds of the members. At the annual general meeting of the club, held on the 20th of May, 1905, a resolution was passed by the requisite majority that pigeon-shooting should be discontinued as from the 31st of December, 1905.

Held, that this resolution was valid.—THELLUSSON *v.* VALENTIA, *Ch.D. Joyce, J.*, 369; [1906] 1 Ch. 480; 75 L. J. Ch. 368; 94 L. T. 468.

COMPANY:—

1. *Action against company—Voluntary winding up—Stay of proceedings—Companies Act*, 1862 (25 *&* 26 *Vict. c.* 89), *ss.* 85, 87, 138—*Companies Act*, 1900 (63 *&* 64 *Vict. c.* 48), *s.* 25.—The plaintiff brought this action against the defendant company, which was being wound up voluntarily, to recover a sum of money as remuneration for services rendered to the company.

The liquidator, upon an application by the plain-

tiff for judgment under order 14, denied all liability of the company, and obtained unconditional leave to defend. The liquidator then applied for an order staying all proceedings in the action, upon the ground that the company was being wound up.

Held (dismissing the appeal), that, all liability being denied, the court ought not in the exercise of its discretion to stay proceedings in the action.—CURRIE *v.* CONSOLIDATED KENT COLLIERIES, *C.A.*; [1906] 1 K. B. 134; 75 L. J. K. B. 199; 94 L. T. 148.

2. *Alteration of bye-laws—Assurance company—Policy participating in profits—Prospectus.*—An assurance company was constituted by a deed of settlement, which provided that the profits were to be divided in manner directed by the bye-laws, and that any bye-law might be altered by a bye-law. Bye-laws were made which provided that the profits coming from the participating branch should be divided among the policy-holders in that department.

The respondent effected a policy on his own life in the participating branch on the faith of a statement in a prospectus of the company that the entire profits of that branch were divided among the policy-holders without any deduction for a reserve fund. The proposal form which he signed contained an undertaking to "conform to and abide by" the rules and regulations of the company in all respects, and a policy issued to him contained a covenant by the company to pay the sum assured, and all such other sums as might be added to such amount, "according to their practice for the time being." It was proposed to make a change in the regulations of the company, and to empower the directors to appropriate 5 per cent. of all profits, including those of the participating branch, to form a reserve fund.

Held, that the prospectus did not amount to more than a statement of the system in operation at the time when it was issued, and was no part of the contract between the company and the respondent, so as to debar the company from making the proposed alteration in the allocation of the profits.

Judgment of the Court of Appeal reversed.—BRITISH EQUITABLE ASSURANCE CO. *v.* BAILY, *H.L.*; [1906] A. C. 35; 75 L. J. Ch. 73; 94 L. T. 1.

3. *Articles of association—Alteration of—Internal reserve fund—Auditors not to disclose information—Validity of article—Companies Act*, 1879 (42 & 43 *Vict. c.* 76), *s.* 7—*Companies Act*, 1900 (63 & 64 *Vict. c.* 48), *ss.* 21, 22, 23.—A company had passed a special resolution to alter the articles of association of the company by inserting provisions therein for the creation of an internal reserve fund, in respect of which the auditors should be bound to withhold all information from the shareholders. A shareholder brought an action to restrain the company and its directors from acting on such resolution,

Held, that any regulations which precluded the auditors from availing themselves of all the information to which under the Act they were entitled, as material for the report which under the Act they were to make as to the true and correct state of the company's affairs, were inconsistent with the Act, and that the resolution was therefore invalid.—NEWTON *v.* BIRMINGHAM SMALL ARMS CO., *Ch.D. Buckley, J.*, 621; 75 L. J. Ch. 627.

4. *Bankruptcy—Right to participate in surplus assets of liquidating company as representing bankrupt—Shares partly paid up—Proof in bankruptcy not payment—Company—Liquidation—Distribution of surplus assets.*—A shareholder liable as a contributory to a company must discharge his obligation before he can participate in a distribution of surplus assets of the company. Thus, where the holder of partly paid-up shares in a company becomes bankrupt, and the company proves in the bankruptcy for the amount of unpaid calls on the bankrupt's shares, the trustee cannot, although the company has received a dividend on their proof, participate in a distribution of surplus assets of the company until the holders of the fully paid-up shares therein have received the amount paid by them in excess of that paid by the holder of the partly paid-up shares.—WEST COAST GOLD FIELDS (LIMITED), RE, *C.A.*, 116; [1906] 1 Ch. 1; 75 L. J. Ch. 23; 93 L. T. 609.

5. *Conflict of laws—English company—Business carried on in foreign state—Debts incurred abroad—Company wound up—Shareholder personally liable for debts under law of foreign state—Attempt to enforce payment in English court.*—An English company, incorporated under the Joint Stock Companies Acts as a limited company, was formed for the purpose of acquiring and working mines in (among other countries) the United States of America. By the articles of association the directors were empowered to do all things necessary to comply with the requirements of the law of any country where the company might carry on business. The company acquired and worked mines in the State of California, and for that purpose the company had to be registered and was duly registered there, and it incurred debts there in the purchase of machinery from the plaintiff in that state. By the law of the State of California each stockholder of a corporation is made individually liable for debts contracted for by the corporation according to the proportion which his holding bears to the whole of the subscribed capital of the company. The company having become insolvent, the plaintiffs sued the defendant, a shareholder of the company, in this country, for his proportion of the price of the machinery.

Held, that the defendant was not liable, as the facts did not show that he authorized the company to enter into contracts in California so as to pledge his personal credit for the price of the goods supplied, and the general power given by the memorandum and articles of association to the directors to carry on business in foreign countries was subject to the fundamental condition of a limited liability on the part of the shareholders, the company being registered in England as a limited joint stock company.

Decision of Kennedy, J. (1 K. B. 304, 53 W. R. Dig. 26), affirmed.—RISDON IRON AND LOCOMOTIVE WORKS *v.* FURNESS, *C.A.*, 324; [1906] 1 K. B. 49; 75 L. J. K. B. 83; 93 L. T. 687.

6. *Debentures—Issue—Deposit of blank debentures to secure loan.*—A company borrowed money on the security of debenture bonds. The bonds were signed and sealed and left blank as to the date and name and were deposited with a bank. The loan was paid off and the debentures returned.

Held, that the transaction with the bank amounted to an issue, and that the company were not in a position to re-issue the debentures.—PERTH ELECTRIC TRAMWAYS, RE, *Ch.D. Swinfen Eady, J.*, 535; [1906] 2 Ch. 216; 75 L. J. Ch. 534; 94 L. T. 815.

7. *Debentures—Issue as security for loan—Payment off of loan—Debentures returned to company with blank transfers—Registered owner—Subsequent transfer to purchaser for value—Priorities.*—A company duly issued a series of debentures, each of which

was to rank *pari passu* with the others. Certain of these debentures were issued as collateral security for loans made to the company. On repayment of the loans these debentures were returned to the company with blank transfers, but they were not transferred to the company, and the original holders continued on the register as the owner of such debentures. Subsequently these debentures were transferred to holders for value by completing the blank transfers.

Held, that the transferees were not entitled to rank *pari passu* with those debenture-holde s to whom debentures had been at once issued for their full nominal value. The effect of what was done was to pay off an incumbrance which, even if it could be kept alive, could not be set up by the company, the original mortgagor, against subsequent incumbrancers, and the transferees were in no better position than the ocmpany.

Decision of Kekewich, J. (53 W. R. 247, [1905] 1 Ch. 283), affirmed.—TASKER & SONS, RE, HOARE *v.* TASKER & SONS, *C.A.*, 65; [1905] 2 Ch. 587; 74 L. J. Ch. 857; 93 L. T. 195.

8. *Debentures — Registration — Extending time — Winding up—Protection of creditors—Companies Act,* 1900 (63 *&* 64 *Vict. c.* 48), *ss.* 14, 15.—A company in 1901 issued debentures which were not registered within twenty-one days as required by section 14 of the Companies Act, 1900. On the 24th of July, 1903, an order was made under section 15 of the Act extending the time for registration until the 14th of August. This order contained the proviso that "this order is to be without prejudice to the rights of parties acquired prior to the time when such debentures shall be actually registered." The debentures were registered before the 14th of August, 1903.

Held, that the creditors of the company whose debts had been incurred prior to the date of registration take *pari passu* with the debenture-holders the share of the assets which the debenture-holders would have taken if their debentures had been duly registered in accordance with section 14 of the Act.

In re Anglo-Oriental Carpet Manufacturing Co., 51 W. R. 634, [1903] 1 Ch. 914, followed.—EHRMANN BROTHERS (LIMITED), RE, *Ch.D. Joyce, J.*, 555; 75 L. J. Ch. 575.

9. *Debenture-holders' action—Appointment of receiver and manager — Preservation of property — Loans by debenture-holders to receiver—First charge given to lenders—Expenses of management and of receiver—Priority.*—An action was brought by the plaintiffs on behalf of themselves and all other the debenture-holders of the defendant company to enforce the charge created by their debentures.

In February, 1901, a receiver and manager was appointed in the usual form; and in March, 1901, judgment was given directing accounts and inquiries.

On the 3rd of July, 1901, an order was made that the receiver be at liberty to borrow £500 for the purposes of preserving the property of the defendant company comprised in the debentures, the moneys so borrowed to be a first charge on such property.

Subsequently further orders were made for the borrowing of sums of £200, £200, and £100 for like purposes; and there was an order for the sale of certain chattels. These orders were obtained at the instance of the plaintiffs, and all the sums which the receiver was authorized to borrow under the above-mentioned orders were advanced by the plaintiffs themselves. Formal charges were executed to the plaintiffs by the receiver on the occasion of the advances, and they were expressed to be first charges upon the property comprised in or charged by the security created by the debentures. Neither charge contained any express reservation of the receiver's right to be indemnified out of the assets in respect of his costs and expenses properly incurred, but it was in each of them declared that the receiver should not be personally liable to repay the advances out of his own moneys.

The receivership had been prolonged from time to time with a view to a scheme of reconstruction, and considerable expense was necessarily incurred in keeping the mines and machinery in working condition. Eventually the company's lease was forfeited, and the only assets which the receiver was finally able to realize were certain fixtures and plant which were sold.

The money in the hands of the receiver was not sufficient to satisfy his own charges and to meet the above advances.

Held, that the form of the charges given by the receiver was not sufficient to deprive him of his *primâ facie* right to be indemnified out of the assets in respect of his costs and expenses properly incurred, and therefore they must be paid in priority to the money advanced by the plaintiffs.

Decision of Joyce, J., affirmed.

Strapp v. *Bull*, [1895] 2 Ch. 1, followed.—GLASDIR COPPER MINES (LIMITED), RE; ENGLISH ELECTRO-METALLURGICAL CO. (LIMITED) *v.* GLASDIR COPPER MINES, *C.A.*; [1906] 1 Ch. 365; 75 L. J. Ch. 109; 94 L. T. 8.

10. *Directors—Fraudulent prospectus—Action by shareholder—Death of director—contribution*—Actio personalis—*Directors' Liability Act*, 1890 (53 *&* 54 *Vict. c.* 64), *s.* 3.—A director of a company who has become liable to make payments under the Directors' Liability Act, 1890, is entitled to recover contribution from the estates of directors who have died since the issue of a prospectus containing untrue statements. — SHEPHEARD v. BRAY, *Ch.D. Warrington, J.*, 556; [1906] 2 Ch. 235; 75 L. J. Ch. 633.

11. *Directors—Management—General meeting of shareholders—Resolution—Refusal of directors to carry out—Discretion—Construction of articles.* — A company was formed to acquire the rights to manufacture and to license the manufacture of certain patent filters. A large majority of the shareholders of the company had subsequently entered into an agreement with another company for a sale to them of the whole of their assets, and requisitioned a meeting of shareholders at which a resolution approving the sale was carried by a majority, but the directors in the *bonâ fide* exercise of their discretion, determined not to carry the agreement into effect. An action was brought by the company and one of the shareholders for an order that the directors might be ordered forthwith to affix the seal of the company to the agreement and to carry the resolution passed at the meeting into effect, and might be restrained by injunction from dealing with the assets in any manner inconsistent with the terms of the agreement The articles of association of the company provided that the management of the business and the control of the company should be vested in the directors. Upon a motion asking for the relief claimed in the action pending the trial,

Held, that upon the construction of the articles this was not a resolution which the directors were bound to carry out, and the motion must be refused, as it was not competent for the majority of the

shareholders at an ordinary general meeting to alter the mandate originally given to the directors by the articles of association.

Decision of Warrington, J., affirmed.—AUTOMATIC SELF-CLEANSING FILTER SYNDICATE v. CUNNINGHAME, *C.A.*; [1906] 2 Ch. 34; 75 L. J. Ch. 437; 94 L. T. 651.

12. *Directors—Power of board to postpone meeting—Notice for ordinary meeting—Election of directors—Power to transact business of an extraordinary meeting.*—In the absence of a special clause in the articles of association of a company under the Companies Acts, 1862 to 1900, enabling them to do so, the directors have no power to postpone an ordinary general meeting of the shareholders of the company, as distinguished from an adjournment of the meeting by the chairman with the consent of the meeting.

The fact that articles of association provide that ordinary general meetings are to be held in certain months does not prevent directors from calling extraordinary meetings of the shareholders at other times at which the business of ordinary meetings may be transacted, and if the meeting is called as an ordinary meeting at some other time of the year, it may nevertheless be treated as the ordinary meeting for the purpose of the election of directors and other ordinary business.—SMITH v. PARINGA MINES (LIMITED), *Ch.D. Kekewich, J.*; [1906] 2 Ch. 193; 94 L. T. 571.

13. *Directors — Qualification — Shares held "as liquidator of H. C."—Income tax on directors' fees—Meeting convened by acting directors—Valid resolutions—Ratification of* ultrà vires *acts—Notice of business*—Where the qualification of a director was the holding of shares "in his own right," shares held as liquidator of the H. Co.,"

Held, not to be a good qualification.

Sutton v. *English and Colonial Produce Co.*, 50 W. R. 571, [1902] 2 Ch. 502.

Unless allowed by the articles, directors may not be paid income tax on their fees.

A general meeting was convened by three *de facto* directors irregularly appointed.

Held, that the resolutions passed thereat were valid.

Browne v. *La Trindad*, 36 W. R. 289, 37 Ch. D. 1; *Southern Counties Deposit Bank* v. *Rider*, 73 L. T. 374, 44 W. R. Dig. 32; and *British Asbestos Co.* v. *Boyd*, 51 W. R. 667, [1903] 2 Ch. D. 439.

Articles fixing the qualification and remuneration of directors must be altered by the company before ratifying acts done in contravention of them.

Imperial Hydropathic Hotel Co, Blackpool v. *Hampson*, 31 W. R. 330, 23 Ch. D. 1.

The notice convening a general meeting stated that directors were to be appointed. The report sent with the notice stated that the meeting would be asked to ratify the election of R. as a director.

Held, that this was sufficient notice of this particular business.

Irvine v. *Union Bank of Australia*, 25 W. R 682, 2 A. C. 366.—BOSCHOEK PROPRIETARY CO. v. FUKE, *Ch.D. Swinfen Eady, J.*, 359; [1906] 1 Ch. 148; 75 L. J. Ch. 261; 94 L. T. 398.

14. *General meeting—Poll—Proxy—Voting papers—Powers of chairman—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 51.—By the articles of association of a company it was provided that votes might be given "either personally or by proxy," and that on a poll being demanded it should be taken "in such manner and at such time and place as the chairman of the meeting directs." At a general meeting of the company, on a poll being demanded, the chairman of the meeting directed that it should be taken by means of voting papers sent to each member, which should be signed by the member voting and returned to the company's offices by a certain date.

Held, that the use of such voting papers was irregular and invalid, and an injunction was granted restraining the company from acting upon the result of any poll so taken.—MCMILLAN v. LE ROI MINING CO., *Ch.D. Joyce, J.*, 281; [1906] 1 Ch. 331; 75 L. J. Ch. 174; 94 L. T. 160.

15. *Judgment creditor—Garnishee order* nisi—*Debentures—Floating security—Appointment of receiver and manager—Right to garnished debt as between receiver and garnishor.*—A judgment creditor of a company obtained a garnishee order *nisi* attaching a debt due to the company and served the order *nisi* upon the debtor of the company. After service of the garnishee order *nisi*, but before it had been made absolute, an order was made in a debenture-holders' action against the company appointing a receiver and manager. On the day following the appointment of the receiver and manager the garnishee order *nisi* was made absolute.

Held, that, regard being had to the conditions indorsed upon the debentures, as well as to the general nature of a debenture security, the receiver was entitled to the garnished debt as against the judgment creditor.

The *dictum* of James, L.J., in *Ex parte Joselyne*, 26 W. R. 645, 8 Ch. D., at p. 330, to the effect that service of a garnishee order *nisi* transfers the property in the debt absolutely to the garnishor, disapproved.—NORTON v. YATES, *K.B.D.*, 183; [1906] 1 K. B. 112; 75 L. J. K. B. 252.

16. *Memorandum of association—Objects—Construction—Subsidiary or substantive*—Ultrà vires.—One of the objects of a company, as stated in the first paragraph of clause 3 of the memorandum of association, was to acquire the undertaking of an older company and certain gold mines in Mysore. The object in the second paragraph was to acquire gold mines "in Mysore and elsewhere." The language of both these paragraphs, allowing for a change of name of the company in the first paragraph, was identical with, and the language of the remaining twenty-three paragraphs was to all intents the same as, that of the objects of the defendant company in *Stephens* v. *Mysore Reefs (Kangundy) Mining Co. (Limited)*, 50 W. R. 509, [1902] 1 Ch. 745. One object was to promote new companies for the company's benefit. The company resolved to enter into an agreement to acquire certain gold mines in India just outside Mysore, and to pay for them partly in cash and partly in their own shares or in shares of a new company to be promoted by them for the purpose.

Held, that the objects in paragraph 2 were not subsidiary to those in paragraph 1, and that consequently the agreement was authorized by paragraph 2, and was not *ultrà vires*.

Stephens v. *Mysore Reefs (Kangundy) Mining Co. (Limited)*, distinguished, and *dictum* of Swinfen Eady, J., as to construction of objects clause in a memorandum of association dissented from.—PEDLAR v. ROAD BLOCK GOLD MINES, *Ch.D. Warrington, J.*, 44; [1905] 2 Ch. 427; 74 L. J. Ch. 753; 93 L. T. 665.

17. *Prospectus—Non-disclosure—Misleading statements—Sub-purchaser—Companies Act*, 1900 (63 & 64 *Vict. c.* 48), *s.* 10, *sub-section* 1 (*f*).—A company is not a sub-purchaser within the meaning of section 10, sub-section 1 (*f*), of the Companies Act, 1900, unless it has to pay purchase-money to

someone other than its own vendor, and the sub-section does not require a company to state in its prospectus the amount of any consideration paid, or to be paid, by anyone other than the company.—BROOKES *v.* HANSEN, *Ch.D. Joyce, J.*, 502; [1906] 2 Ch. 122; 75 L. J. Ch. 450; 94 L. T. 728.

18. *Prospectus—Omission to state contract—Proof of damage—Waiver clause—Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 38.—In an action against directors by a shareholder who has taken shares on the faith of a prospectus claiming damages under section 38 of the Companies Act, 1867, it is necessary for the plaintiff to prove that he has sustained damage by reason of the non-disclosure of a material contract required to be disclosed by that section, and also that had he been aware of it he would not have taken the shares. Where there is no actual fraud, but a mistake honestly made by the directors, a waiver clause as to any fuller compliance with section 38 of the Companies Act, 1867, is a sufficient answer to the action.

Decision of the Court of Appeal ([1904] 2 Ch. 681) reversed.—CALTHORPE *v.* TRECHMANN, *H.L.*, 365; [1906] A. C. 24; 75 L. J. Ch. 90; 94 L. T. 68.

19. *Prospectus—Omission of material contract—Subscription on faith of prospectus—Proof of damage—Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 38.—In order that a shareholder may succeed in an action against directors of the company to recover damages on the ground that he had been induced to subscribe for the shares on the faith of a prospectus which did not, as required by section 38 of the Companies Act, 1867, disclose particulars of a contract entered into by the company, he must prove, not merely that the omitted contract was a material one, but also that he has been damaged by the omission.

The mere fact that a material contract has not been disclosed in the prospectus raises no presumption of law that the plaintiff was induced by the omission to take his shares, or would not have taken them if the contract had been disclosed.

Per Vaughan Williams and Stirling, L.JJ.—In order to succeed the plaintiff in such an action must prove that he would not have applied for the shares if the contract had been disclosed.

Per Romer, L.J.—In order to succeed in such an action the plaintiff must prove that if the omitted contract had been disclosed he might not have applied for the shares.

Decision of Joyce, J., reversed.

Observations of Collins, M.R., in *Broome* v. *Speak*, [1903] 1 Ch. 620, considered.—NASH *v.* CALTHORPE, *C.A.*; [1905] 2 Ch. 237; 74 L. J. Ch. 493; 93 L. T. 585.

20. *Receiver and manager—Debenture-holders' action—Express authority to borrow—Borrowing beyond amount authorized—Right to indemnity out of assets—Rights of creditors of the receiver and manager.*—W. was appointed receiver and manager of the undertaking and property of a company in an ordinary debenture-holders' action, and by an order of the court he was authorized to borrow on mortgage of the assets of the company a sum not exceeding £3,000 and interest. W. carried on the business and borrowed the £3,000 for the purpose from his bankers, B. & Co. In addition, and without any further authority from the court for the same purpose, he borrowed £1,500 more from his bankers, and also incurred debts and liabilities to other creditors. The company was in course of liquidation under an order of the court. W. became bankrupt, and a new manager was appointed. The creditors of W., in right of his indemnity, claimed to be paid out of the assets of the company in priority of the claims of the debenture-holders.

Held, that the order authorizing the limited borrowing was intended to limit the general authority of W. to borrow as such manager, and that, having incurred liabilities exceeding that limit without having obtained the previous authority of the court, he was not entitled to be indemnified against them unless he could show that, having regard to all the circumstances under which they were incurred, he was justified in incurring them without first obtaining leave; that what circumstances would justify the conduct of a manager in so increasing such liabilities without leave could not be defined in general terms, except that it would not be enough to show that the expenses or liabilities were incurred *bonâ fide* and in the ordinary course of business; and consequently the claims of the creditors were referred to the registrar to be examined, having regard to the above declaration.—BRITISH POWER, TRACTION, AND LIGHTING CO., RE, *Ch.D. Warrington, J.*, 387; [1906] 1 Ch. 497; 75 L. J. Ch. 248; 94 L. T. 479.

21. *Reconstruction—Amalgamation—Memorandum of association—Reconstruction under power in memorandum—Sale of assets for shares in new company—partly-paid shares—Distribution of consideration—Offer of shares to all shareholders.*—One of the objects of a company was to sell and dispose of its property for such consideration as it thought fit, and in particular for shares fully or partly paid up, and to divide the consideration amongst the members of the company. This power was to be exercisable either in view of a winding-up of the company or not. Another object was to distribute any of the assets of the company among the members of the company.

The company agreed to sell its assets and undertaking to another company. By the agreement the vendor company was to be wound up; part of the consideration was to consist of partly-paid shares to be allotted to the vendor company or its nominees. The vendor company were within two calendar months to find people to take up these shares, and if any of them were not taken up they were to be at the disposal of the purchasing company, and the vendor company was not to be liable to take them itself. Resolutions were passed and confirmed at meetings of the vendor company to wind up that company voluntarily, and that the liquidator should offer the new shares to the members at the rate of one such share for each share held by the members.

By the amalgamation scheme it was provided that the liquidator should sell shares which were not accepted by the shareholders and distribute the net proceeds of sale among such members. A shareholder in the vendor company objected to these proposals.

Held, that the proposed scheme of reconstruction was within the powers conferred by the memorandum, and ought to be allowed to proceed.—FULLER *v.* WHITE FEATHER REWARD (LIMITED), *Ch.D. Warrington, J.*; [1906] 1 Ch. 823; 75 L. J. Ch. 393.

22. *Reconstruction—Memorandum of association—Sale of property of company to new company for partly paid-up shares—Winding up—Option to shareholders of old company to take up new shares—Time limit for exercising option—Realization by liquidator of shares not taken up—Division of proceeds among dissentient shareholders—Scheme held* ultra vires.—The defendant company, being in financial difficulties and desiring to raise more capital, proposed to enter into an agreement with a new

company for the sale of its property and undertaking to that company in consideration of partly-paid shares therein, and the shareholders of the old company were to have the option of taking those shares in exchange for their existing shares. Shares not accepted within a certain time were to be sold by the liquidator, and the proceeds, after paying expenses, divided rateably among the shareholders, who would, had they claimed, have been entitled to those shares. By its memorandum of association the company was empowered to sell its undertaking for shares in any other company, whether wholly or partly paid up, and to distribute the shares in specie. A shareholder in the old company brought an action to obtain a declaration that the agreement was *ultrà vires* and void, and also for an injunction to restrain the company from carrying into effect any agreement in the terms of the draft agreement.

Held, that the draft agreement was *ultrà vires*, as not being a sale justified by the provisions of the memorandum, and as being in substance an attempt to force the shareholders to provide more capital under penalty of forfeiting their shares.

Manners v. *St. David's Gold and Copper Mines (Limited)*, [1904] 2 Ch. 593, 53 W. R. Dig. 28, followed.—BISGOOD *v.* NILE VALLEY Co., *Ch.D. Kekewich, J.*, 397; [1906] 1 Ch. 747; 75 L. J. Ch. 379; 94 L. T. 304.

23. *Reduction of capital—Paying off capital in excess of company's wants—Procedure—Form of minute—Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *ss.* 9, 15—*Companies Act*, 1877 (40 & 41 *Vict. c.* 26), *ss.* 3, 4.—On a petition presented by the Lees Brook Spinning Co. for confirmation by the court of a special resolution for reduction of its capital by repaying to its members £1 10s. per share, the shares to be reduced to £2 each and £1 per share to be deemed to be paid up, a question arose as to the proper form of minute, having regard to the decision of Buckley, J., in *In re Calgary and Edmonton Land Co.*, [1906] 1 Ch. 141.

Held, that an order confirming the reduction could be made, although the £1 10s. per share had not been returned, and that the proper minute to approve for registration was one which, after stating the reduced capital, contained the words "at the time of the registration of this minute the sum of £1 and no more is proposed to be deemed to have been paid up on each share."

In re Calgary and Edmonton Land Co. not followed. —LEES BROOK SPINNING CO., RE, *Ch.D. Swinfen Eady, J.*, 563; 75 L. J. Ch. 565.

24. *Reduction of capital—Return of capital in excess of company's wants—Procedure—Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 13—*Companies Act*, 1877 (40 & 41 *Vict. c.* 26), *s.* 3.—When a company petitions the court to confirm a reduction of the company's capital, to be effected by paying off capital which is in excess of the wants of the company, the court will not, even though satisfied that such payment should be made, forthwith make a final order confirming the reduction.

In such a case the proper method of proceeding is (1) to allow the petition to stand over till evidence has been produced that the capital to be paid off has actually been returned to the shareholders; and (2) then to post-date the order confirming the reduction and approving of a minute showing, with respect to the capital as altered by the order, the particulars required by section 15 of the Companies Act, 1867.

Remarks on the proper form of minute in a case where capital is paid off, but is subject to be recalled.—CALGARY AND EDMONTON LAND CO., RE, *Ch.D. Buckley, J.*; [1906] 1 Ch. 141; 75 L. J. Ch. 138; 94 L. T. 132.

25. *Sale of land to company—Alleged want of authority on the part of the purchaser's agents—Action to set aside sale*—Ultrà vires.—Where a company is empowered to acquire and hold real estate for the purposes of its business, the company, acting *bonâ fide*, must be the sole judge of what is required for the purposes of its business. But where a vendor sold property to a company upon the faith of a document given to him by the officials of the company, which purported to be a copy of a resolution of the directors duly and regularly passed, the company cannot afterwards be heard to say that the proper formalities had not been complied with, and that the alleged resolution was invalid, there being nothing to put the vendor on inquiry.

Judgment of the court below affirmed. — MONTREAL AND ST. LAWRENCE LIGHT AND POWER CO. *v.* ROBERT, *P.C.*; [1906] A. C. 196; 75 L. J. P. C. 33; 94 L. T. 229.

26. *Shares — Equitable title — Notice — Right to registration—Negligence—R. S. C.*, 1883, *ord.* 46, *r.* 3.—A debtor, after assigning all his property by deed to trustees for his creditors, fraudulently sold certain shares through a broker and received the purchase-money from him. The companies concerned, having previously received notice of the assignment, refused to issue certificates to the purchasers, and the selling broker, under the rules of the Stock Exchange, provided other shares in substitution.

Held, that the failure of the trustees to serve, under ord. 46, r. 3, notice in lieu of distringas on the companies did not amount to negligence so as to postpone their equitable title, having regard to the fact that the trustees had given notice of the deed of assignment; and that the selling broker had no lien on the shares for the purchase-money, except possibly on the debtor's interest in them, which was subject to the deed of assignment.—PEAT *v.* CLAYTON, *Ch.D. Joyce, J.*, 416; [1906] 1 Ch. 659; 75 L. J. Ch. 344; 94 L. T. 465.

27. *Shares—Minimum subscription—Payment in cash—Allotment—Companies Act*, 1900 (63 & 64 *Vict. c.* 48), *s.* 4 (1).—Payment in cash of the sum payable on application for the minimum subscription to the shares of a limited company must be paid to and received by the company before allotment. Payment by cheque is permissible, but the cheque must be cleared before allotment. — MEARS *v.* WESTERN CANADA PULP AND PAPER CO., *C.A.*, 176; [1905] 2 Ch. 353; 74 L. J. Ch. 581; 93 L. T. 150.

28. *Shares—Negotiable instrument—Share warrant to bearer—English company—Usage of Stock Exchange —Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *ss.* 27-29.—A share warrant to bearer issued by an English company registered under the Companies Act, 1867, certifying that "the bearer is entitled to one share of £ which is fully paid up numbered " in the company is a negotiable instrument, and if such warrant is stolen and afterwards gets into the hands of a *bonâ fide* holder for value without notice of the fraud, such holder can enforce against the company payment of coupons for dividends due in respect of such share warrant.

Rumball v. *Metropolitan Bank*, 2 Q. B. D. 194, followed.—WEBB, HALE, & CO. *v.* ALEXANDRIA WATER CO., *K.B.D.*; 93 L. T. 339.

29. *Shares—Transfer—Blank transfer — Implied contract by transferor.*—There is an implied obligation on the part of a transferor of shares to do nothing

to prevent his transferee getting the benefit of the transfer. W., a shareholder in a company, handed the certificate of the shares and a blank transfer to H. to enable him to raise a loan. H. endeavoured to raise the loan from the plaintiff. The plaintiff declined to advance the money personally, but he found a bank who were willing to advance it to him on his personal security. H. thereupon authorized the plaintiff to raise a loan on the security of the shares, and undertook to indemnify him against loss. In pursuance of this authority the plaintiff handed the share certificate and transfer to the bank, and received from them the amount of the loan, which he paid to H. The bank filled in the name of the plaintiff as transferee, and lodged the certificate and transfer for registration with the company. The company informed W., who notified them that the transfer was irregular. By reason of such notification the company declined to proceed with the transfer, and it was not completed till the shares had fallen very considerably in value. H. became bankrupt and never repaid the plaintiff any portion of the loan, all of which had eventually to be repaid by the plaintiff to the bank.

Held, that the plaintiff was entitled to damages as against W. for breach of the implied obligation on W.'s part to do nothing to prevent or delay the registration of the shares, the measure of such damages being the difference between the amount the plaintiff might reasonably have obtained by realizing the shares at the time of the breach and their actual value of the date when he obtained registration.—HOOPER v. HERTS, *C.A.*, 350; [1906] 1 Ch. 549; 75 L. J. Ch. 253; 94 L. T. 321.

30. *Shares—Transfer—Indemnity—Forged transfer of stock—Innocent transferee—Loss incurred by company—Registration of transfer—Liability as between company and transferee.*—A request to a person to carry out some statutory or ministerial duty, apparently legal, implies an undertaking to hold him free from loss occasioned by his thus complying with his supposed duty.

The respondents presented what purported to be a transfer of the Sheffield Corporation Stock to the appellants, requesting them to register it in the name of their nominee. This was done, all parties acting innocently and without negligence. Subsequently the supposed transfer was found to be a forgery, and the corporation had to make good (there were new purchasers on the register) the loss to the real owners of the stock.

Held, that the respondents were liable to indemnify the corporation, as there was an implied contract to that effect.

The opinion of Lindley, J., in *Simm* v. *Anglo-American Telegraph Co.*, 28 W. R. 290, 5 Q. B. D. 188, at p. 195, dissented from.

Decision of the Court of Appeal (52 W. R. 54, [1903] 2 K. B. 580) reversed.—SHEFFIELD CORPORATION v. BARCLAY, *H.L.*, 49; [1906] A. C. 392; 74 L. J. K. B. 747; 93 L. T. 83.

31. *Shares—Transfer—Non-production of share certificate on transfer—Inquiry as to non-production—Duty and liability of company—Loan to officer of company—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 22.—A company dealing with shares in the company for its own benefit is affected with notice of a third party's interest where the agents, who managed the transaction on its behalf, are aware of the third party's interest. In such case the third party can recover from the company the proceeds of a sale of the shares effected in disregard of that interest of which it had notice. — RAINFORD *v.* KEITH, *C.A.*, 189; [1905] 2 Ch. 147; 74 L. J. Ch. 531; 92 L. T. 786.

32. *Trustee — Dissolution — Vesting order — Outstanding legal estate—Leaseholds—Trustee Act*, 1893 (56 & 57 *Vict. c.* 53), *ss.* 25, 26.—Where a company which up to its dissolution was trustee of property has ceased to exist, the court has power under section 25 of the Trustee Act, 1893, upon the application of the beneficiary, to appoint a new trustee or trustees of the property, and to make an order under section 26 of the Act vesting the property in the new trustee or trustees.

In re General Accident Assurance Corporation, 52 W. R. 332, [1904] 1 Ch. 147, followed.

In re Taylor's Agreement Trusts, 52 W. R. 602, [1904] 2 Ch. 737, distinguished.—BOMORE ROAD (No. 9), RE, *Ch.D. Warrington, J.*, 312; [1906] 1 Ch. 359; 75 L. J. Ch. 157; 94 L. T. 403.

33. *Winding up—Assets covered by debentures—Business of company carried on by debenture-holders—Petition to wind up—Just and equitable—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 79.—The business of a company was being carried on by the debenture-holders. A receiver had not been appointed. All the assets were charged by the debentures. The balance-sheet showed a surplus available for unsecured creditors. A judgment creditor presented a petition to have the company wound up by the court compulsorily.

Held, that, assuming that the assets were insufficient to satisfy the claims of the debenture-holders, the court was entitled to exercise the discretion vested in it under section 79 of the Companies Act, 1862, and wind up a company so conducted. The court, however, was not satisfied on the evidence that the order would be barren, and ordered the company to be wound up.—MELSON & Co., RE, *Ch.D. Buckley, J.*, 468; [1906] 1 Ch. 841; 75 L. J. Ch. 509; 94 L. T. 641.

34. *Winding up—Not entitled to commence business—Contracts preliminary to carrying on business—Companies Act*, 1900 (63 & 64 *Vict. c.* 48). *s.* 6 (3).—All contracts entered into by a company formed since 1900 are, under section 6 (3) of the Companies Act, 1900, provisional, and not binding until the company becomes entitled to commence business; and there is no distinction, for the purposes of the section, between preliminary contracts entered into for the purpose of future business and others. Therefore a person who has bought goods and paid expenses on behalf of a company formed in 1905, which went into liquidation without having become entitled to commence business, has no claim as a creditor upon the company.—OTTO ELECTRICAL MANUFACTURING Co., RE, *Ch.D. Buckley, J.*, 601.

35. *Winding up—Petition standing over—Undertaking "not to wind up voluntarily."*—Where a petition to wind up a company is ordered to stand over by consent on the terms of what is known as "St. Thomas' Dock Order," the undertaking by the company should not be that it will not consent to an order on another petition and will not wind up voluntarily, but should follow the wording of the judgment of Jessel, M.R., in *In re St. Thomas' Dock Co.*, 34 L. T. Rep. 228, 2 Ch. Div. 116, and be an undertaking that the company will not consent to a winding-up order on the petition of another person, or to a voluntary winding up.

Semble, that a corporation cannot validly undertake not to wind up voluntarily.—ST. NEOTS WATER Co., RE, *Ch.D. Buckley, J.*; 93 L. T. 788.

36. *Winding up—Statutory affidavit—Petitioner*

abroad—Power of attorney—Affidavit of attorney—Companies (Winding-up) Rules, 1903.—It is not a fatal objection to a petition to wind up a company that the affidavit verifying it has been made by some one other than the petitioner, rule 29 of the Companies (Winding-up) Rules, 1903, being merely directory in this respect; and the court can accept any affidavit sufficient according to the ordinary practice as sufficient for the purpose. Therefore where the petitioner was resident in the Transvaal Colony, and the affidavit was made by a person resident in this country who knew the facts of the case better than the petitioner, and who was acting under a power of attorney for the petitioner, the affidavit was accepted.

In re Chartered Stores and Trading Co., 49 W. R. 75, [1900] 2 Ch. 870, not followed.—AFRICAN FARMS (LIMITED), RE, *Ch.D. Warrington, J.*, 490; [1906] 1 Ch. 640; 75 L. J. Ch. 378.

See also Damages, 2; Gas, 1, 2; Insurance, 1.

COMPROMISE:—

Practice—Co-plaintiffs—Striking out one of co-plaintiffs—Stay of proceedings—Discretion of court.—A co-plaintiff who has compromised with the defendants has no absolute right to have his name struck out. In a proper case his name will be struck out and added as a defendant upon security being given for the costs of the defendants. On an application by two defendants to strike out the name of one of three co-plaintiffs on the ground that she had entered into a compromise with them, the order was refused by the court.

Attorney-General v. *Cooper*, 3 My. & Cr. 258, and *Brown* v. *Sawer*, 3 Beav. 598, followed.—MATHEWS, RE, OATES *v.* MOONEY, *Ch.D. Swinfen Eady, J.*, 75; [1905] 2 Ch. 460; 74 L. J. Ch. 656; 93 L. T. 158.

CONTEMPT OF COURT:—

Attachment—Newspaper—Publication tending to prejudicial trial—Publication prior to commital to quarter sessions or assize court—Publication after committal to quarter sessions.—The King's Bench Division of the High Court has a summary jurisdiction to attach for a contempt of court in respect of the publication of matter calculated to prejudice the fair trial in an inferior court, not only when, prior to committal, it is uncertain whether in the event of a committal the case will be sent to quarter sessions or the assize court, but also when the publication complained of is after committal to the quarter sessions.

Rex v. *Parke*, 52 W. R. 215, [1903] 2 K. B. 432, followed and extended.—REX *v.* DAVIES, *K.B.D.*, 107; [1906] 1 K. B. 32; 75 L. J. K. B. 104; 93 L. T. 772.

See also Practice, 14.

CONTRACT:—

1. *Breach—Accord and satisfaction—Cheque—Evidence.*—The defendant company entered into a scheme with their customers whereby they undertook to distribute annually for four years from April, 1902, among such of their customers as came into the scheme, their entire net profits on goods sold in the United Kingdom; and, in addition, for such years to distribute to those customers a bonus of £200,000 per annum, or £50,000 each quarter, the share of each customer to be in proportion to his purchases from the company in each year and quarter respectively.

After one payment of the quarterly bonus had been made, the defendant company on the 27th of September, 1902, sold their business and went into voluntary liquidation. The second quarter having elapsed, the liquidator of the company sent to the plaintiffs a cheque payable to order with a covering letter which described the cheque as being "your share of the second and final bonus distribution of Ogdens (Limited) for the quarter ending the 20th of September last, at which date the company ceased to carry on business." On the face of the cheque were printed the words, "The receipt at the back hereof must be signed, which signature will be taken as an indorsement of the cheque." On the back of the cheque were printed the words, "Received from Mr. Joseph Hood, liquidator of Ogdens (Limited), this cheque for £ , being my share of the second and final bonus distribution of the company."

This cheque was received, signed, and cashed by the plaintiffs.

In an action by the plaintiffs to recover damages from the company for breaches of their contract under the bonus scheme, a preliminary point of law was set down for argument, whether the acceptance of the cheque by the plaintiffs operated in law as a waiver and discharge of any further claim against the company under its bonus scheme.

Held, affirming the decision of A. T. Lawrence, J. (reported 93 L. T. Rep. 553), that there was no evidence to justify a finding of accord and satisfaction of the claim for damages.—NATHAN *v.* OGDENS, *C.A.*; 94 L. T. 126.

2. *Breach — Penalty — Liquidated damages — "Actual cost" of construction of line—Interest.*—The criterion of whether a sum stipulated for on the breach of a contract is "liquidated damages" with which the court will not interfere, or a "penalty" which covers the damage, if proved, but does not assess it, is to be found in whether the sum so stipulated for can or cannot be regarded as a genuine pre-estimate of the creditor's probable or possible interest in the due performance of the principal obligation. Therefore where a contract with a Colonial Government for the construction of a railway, to be paid for in instalments as the work proceeded, empowered the Government to retain 10 per cent. of the instalments as they fell due, to be forfeited to the Government "as and for liquidated damages" in case of the non-completion of the line.

Held (affirming the judgment of the court below), that the sums so retained were of the nature of a penalty, not liquidated damages.

The contract provided that in the event of the line not being completed the contractor should be paid "the actual cost" of the incomplete line.

Held (affirming the judgment of the court below), that he was not entitled to interest on the amount.—PUBLIC WORKS COMMISSIONER *v.* HILLS, *P.C.*; [1906] A. C. 368; 94 L. T. 833.

3. *Damages — Forfeiture of sum deposited — Liquidated damages or penalty.*—In deciding whether a sum made payable by way of compensation for breach of a contract is to be treated as liquidated damages or as a penalty, the court must take all the circumstances into consideration, in order to ascertain the intention of the parties. The fact that the sum in question is to be paid on the breach of any one of a variety of stipulations of different degrees of importance does not necessarily oblige the court to treat it as a penalty, although it raises a presumption that that was the intention of the parties; nor does the fact that the sum in question had been deposited at the making of the contract compel the court to treat it as liquidated damages, although it forms a material element to be taken into consideration in ascertaining the intention of the parties.—PYE *v.* BRITISH

AUTOMOBILE COMMERCIAL SYNDICATE (LIMITED), *K.B.D.*; [1906] 1 K. B. 425; 75 L. J. K. B. 270.

4. *Hiring for a year—Right to continue—Three months' notice.*—By an agreement the plaintiffs agreed to let and one E. agreed to hire two carriage horses by the year from a certain date at £105 per annum, payment to be made quarterly. It was also provided: "After the expiration of the first year the hiring can be terminated by either party giving one quarter's written notice from a quarter day."

Held, that the hiring was for one year certain, with a right to keep the horses after the end of the year, and then to terminate the contract by a quarter's notice.—TILLING *v.* JAMES, *K.B.D.*; 94 L. T. 823.

5. *Illegality—Probate action—Costs to be paid out of the estate—Legality of contract.*—A plaintiff in a probate action entered into an agreement with the two defendants (one of whom was an infant) that whichever of the two wills in dispute was established the costs of both parties to the suit as between solicitor and client should be paid out of the estate, whether the court so ordered or not. At the trial the defendant succeeded, but the court refused to sanction the agreement on behalf of the infant defendant and ordered the plaintiff to pay the costs of both parties to the suit. The plaintiff thereupon brought an action upon the agreement against the adult defendant to recover the costs which the plaintiff had been ordered to pay in the probate action.

Held, that the above agreement was not void as being against the policy of the law in that it intended to affect the administration of justice, and that it was enforceable as against the defendant, who was *sui juris*.—PRINCE *v.* HAWORTH, *K.B.D.*, 249; [1905] 2 K. B. 768; 75 L. J. K. B. 92; 92 L. T. 773.

6. *Performance impossible—Cheque given as part payment—Express provision if caterer incurred no expense.*—The appellant agreed with respondent to supply refreshments at a fixed tariff on board a pleasure steamer on the occasion of a naval review to be held on the 28th of June, £300 to be paid on account on the Monday before the review. In accepting the contract the respondents wrote, on the 23rd of June, "It is, of course, understood that in the event of the cancellation of the review before any expense is incurred by the caterer there shall be no liability on our side," and a cheque for £300 was duly sent in part payment of the contract. The appellant spent nothing on refreshments, and there was no dispute as to any initial outlay by the caterer. The next day the review was cancelled, and the respondents stopped payment of the cheque.

Held, that the respondents were not liable and could not be sued on the cheque.—ELLIOTT *v.* CRUTCHLEY, *H.L.*, 349; [1906] A. C. 7; 75 L. J. K. B. 147; 94 L. T. 5.

See also Damages, 1.

CONVERSION:—

Property passing—Measure of damages.—H. was a shipowner, and L. loaded a quantity of barley on his ship and received bills of lading. The ship was unable to load the whole of the barley, and L. agreed to indemnify the holder of the bills of lading. One bill of lading came into the hands of B., who handed it to M., and M. advanced £5,057 16s. 4d. upon it. M. received less than the quantity of barley covered by his bill of lading, as the holders of the other bills took delivery first from the agents of H., and he called upon B. to make good the deficiency, which he did by making certain payments and delivering some barley. M. sold the barley, and rendered B. an account showing a balance remaining due on the transaction from B. of £12 1s. 9d. Afterwards B. failed, owing M. some £1,651.

Held, that, as between M. and H., M. had the full property in the barley covered by his bill of lading, and that H. had been guilty of a conversion, but that M. could only recover £12 1s. 9d. as damages.—MONTGOMERY *v.* HUTCHINS, *K.B.D.*; 94 L. T. 207.

CONVICT:—

Estate tail—Administrator—Power to disentail—Alienation—Forfeiture Act, 1870 (33 & 34 *Vict. c.* 23), *ss.* 8. 10, 12—*Fines and Recoveries Act*, 1833 (3 & 4 *Will.* 4, *c.* 74), *ss.* 15, 40.—Section 10 of the Forfeiture Act, 1870, vests all the convict's property in the administrator upon his appointment for all the estate and interest of the convict therein, and section 12 gives the administrator absolute power to sell, convey, and transfer such property.

W. died on the 17th of July, 1888, having by his will, which was duly proved on the 31st of December, 1888, devised a freehold rent-charge of £300 for an estate tail to T.

On the 15th of March, 1905, T. was convicted of a felony, and G. was duly appointed administrator for the purposes of the Forfeiture Act, 1870, of the property of T

By a deed dated the 5th of July, 1905, and duly enrolled, G. purported to bar the estate tail and to grant the rent-charge, of which he was then tenant in tail, to the use of himself.

In November, 1905, G. contracted to sell the fee simple in the property to W.

Held (affirming the decision of Kekewich, J.), that what was vested in the convict was an estate in fee determinable by the entry of issue, and the administrator had no power to convey the fee.

Held, also, that if the convict executed a deed simply granting the property to a grantee and his heirs, to hold to the grantee and his heirs to the use of himself, his heirs and assigns, this would not be an "alienation" within section 8 of the Forfeiture Act of 1870, and on this deed being enrolled the fee simple would vest in the administrator under section 10, and he could make a good title.—GASKELL AND WALTERS' CONTRACT, RE, *C.A.*; [1906] 2 Ch. 1; 75 L. J. Ch. 503; 94 L. T. 658.

COPYRIGHT:—

1. *Letters—Publication after death of author—Restraint of publication—Copyright Act*, 1842 (5 & 6 *Vict. c.* 45), *s.* 3.—Under section 3 of the Copyright Act, 1842, the copyright in a book published after the death of the author belongs to the proprietor of the author's manuscript from which such book shall be first published.

Held, that the proprietor of the author's manuscript means the proprietor of the piece of paper that is written upon.

S. E. & Co. purchased from S. the exclusive right to publish certain letters written by C. Lamb; S. was a descendant of the person to whom the letter were sent. S. E. & Co. published these letters in a book, and also gave an exclusive licence to M. & Co. to publish them. Subsequently J. M. D. & Co. purchased the actual letters from S. and published them also.

Held, that S. E. & Co. had acquired the copyright in the letters, as they were the assignees of

S., who had the right to publish them under section 3 of the Copyright Act, 1842; that S. E. & Co. were the proprietors of the author's manuscript, from which their book was first published, and that J. M. D. & Co. accordingly had no right to publish the letters.—MACMILLAN *v.* DENT, *Ch.D. Kekewich, J.*, 262; [1906] 1 Ch. 101; 75 L. J. Ch. 99; 94 L. T. 84.

2. *Photograph—Infringement—Photograph "made for or on behalf of any other person for a good or a valuable consideration"—Fine Arts Copyright Act*, 1862 (25 & 26 *Vict. c.* 68), *s.* 1.—Where a person, without being under an obligation to make any payment, gives permission to a photographer to enter his house in order to take photographs thereof upon the chance of obtaining orders, there is a good consideration within the meaning of the Fine Arts Copyright Act, 1862, s. 1, so that the photographer cannot made use of the photographs so obtained without the consent of the person who permitted the photographs to be taken.—STACKEMANN *v.* PATON, *Ch.D. Farwell, J.*, 466; [1906] 1 Ch. 774; 75 L. J. Ch. 590.

CORONER:—

Inquest in prison—Duty of coroner in holding—Death of prisoner caused by wound inflicted before admission to prison—Previous investigation by magistrates on charge of assault—Duty of coroner to hold full inquiry after previous investigation—Coroners Act, 1887 (50 & 51 *Vict. c.* 71), *ss.* 3, 4, 6.—When an inquest is held by a coroner in a prison upon the body of a person who has died within the prison, it is the duty and obligation of the coroner to make as full and complete an inquiry touching the death of the deceased as in the case of an ordinary inquest outside the prison; and his duty of making inquiry does not necessarily terminate when the jury have found that no one in the prison is to blame for such death.

If the inquest be upon a prisoner who has died within the prison from the effects of a wound inflicted upon him before his admission to the prison, and if the circumstances under which the wound was inflicted upon the deceased have been previously idvestigated by magistrates on a charge and cross-charge of assault, and the magistrates have found that the prisoner was the aggressor and was alone to blame and have sentenced him to imprisonment in respect of such assault, the fact of such previous investigation by the magistrates, and their finding that the prisoner was alone to blame for the injury inflicted upon himself, does not exonerate the coroner from the obligation of holding as full an inquiry into the circumstances under which the wound which caused the death of the deceased was inflicted as if no such investigation by the magistrates had taken place.—REX *v.* GRAHAM, *K.B.D.*; 93 L. T. 371.

CORPORATION:—

1. *Highway—Alteration and making up by local authority—Orders for payment of money—Wasteful, extravagant, and unnecessary expenditure—Public road adapted for motor-car racing—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 149—*Municipal Corporations Act*, 1882 (45 & 46 *Vict. c.* 50), *s.* 141. —The court ordered a *certiorari* to issue to bring up and quash a resolution of a municipal corporation for the payment by the treasurer of two several sums of £2,500 and £550 to the Public Works Committee, which sums had been expended on paving a road in the borough with tarmac, on the grounds that the expenditure was wasteful, extravagant, and unnecessary, and therefore illegal, the money not having been *bonâ fide* expended for the repair of the road, but solely for the purpose of enabling the motor-car trials of the Automobile Club to be held there.—REX *v.* BRIGHTON CORPORATION, *K.B.D.*, 539.

2. *Municipal corporation—Borrowing powers—Ultrà vires—Interest on overdraft at bankers—Liability of borough treasurer—Municipal Corporations Act*, 1882 (45 & 46 *Vict. c.* 50), *ss.* 18-21, 25-28, 139-144—*Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 6, 189, 198, 209, 210, 233-237, 245-247, 265—*Public Authorities Protection Act*, 1893 (56 & 57 *Vict. c.* 61), *s.* 1.—A municipal corporation had overdrafts on various accounts at the bank beyond their statutory powers of borrowing. The defendant, who was the borough treasurer, and also the manager of the said bank, by the authority of the corporation, credited himself and debited the corporation with interest on such overdrafts at 4½ per cent., with quarterly rests.

Held, that the defendant was not entitled to credit himself or to debit any of the borough funds with interest on any of the overdrafts appearing in the accounts theretofore put in by him as treasurer since his appointment.

Held, also, that the borough were not necessary parties to the action.

Held, further, that though the Municipal Corporations Act, 1882, has provided a remedy by *certiorari*, or an appeal against the rate, there is nothing in the Act to deprive the Attorney-General, at the relation of a party interested, of the power of obtaining by injunction an order to restrain the payment of money being made under an order of the borough council, for which order there was no legal warrant.

Tynemouth Corporation v. *Attorney-General*, [1899] A. C. 293, 47 W. R. Dig. 43, followed.—ATTORNEY-GENERAL *v.* DE WINTON, *Ch.D. Farwell, J.*, 499; [1906] 2 Ch. 106; 75 L. J. Ch. 612.

3. *Municipal corporation—Statutory powers—Tramway business—Common carrier—Incidental powers—Ultrà vires—General Tramway Act*, 1870 (33 & 34 *Vict. c.* 78)—*Railway Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 20), *s.* 86—*Manchester Southern Tramways Act*, 1903 (3 *Ed.* 7, *c. cxciii.*)—*Manchester Corporation Tramways Act*, 1889 (62 & 63 *Vict. c. cclv.*).—The defendants were incorporated by Royal Charter and subject to the Municipal Corporations Act, 1882. The Manchester Corporation Act, 1899, enabled the Manchester Corporation to run carriages and take tolls on all the network of tramways mentioned therein, and to use such tramways for the purpose of carrying passengers and of conveying and delivering animals, goods, minerals, and parcels.

Held, it was not *ultrà vires* for the corporation to deliver by cart or otherwise at the consignee's house or to any other place authorized by him, including the station of a railway company, such goods as they have brought on their tram lines, such delivery being fairly incidental to their authorized business. There was nothing in the Acts relating to the Manchester Corporation which authorized them to act as carriers generally without reference to their tramways. The defendants were not entitled to expend money for the purpose of establishing or maintaining or carrying on the business of carriers, except as part of or in connection with their tramway undertaking, and in respect of articles carried along all or part of the tramways.—ATTORNEY-GENERAL *v.* MANCHESTER CORPORATION, *Ch.D. Farwell, J.*, 307; [1906] 1 Ch. 643; 75 L. J. Ch. 330.

COSTS.—See Bankruptcy, 5, 8; Practice, 1, 3-7; Ship, 25; Solicitor, 2-7.

COUNTY COURT:—

1. *Costs—Counsel's fees—Application for certificate not made at trial—"Good cause"—Mere omission to ask for certificate—Right to make application under "liberty to apply"—County Court Rules*, 1903, *ord.* 53, *r.* 7.—Ord. 53, r. 7, of the County Court Rules, 1903, provides that the application for the allowance by the judge of certain items of costs therein specified, including amongst others counsel's fees in certain cases, shall be made "at or immediately after the trial or hearing; and if not so made shall not afterwards be entertained, unless the judge for good cause otherwise orders."

Held, that the mere neglect or omission to ask for the allowance of these costs at or immediately after the trial is not "good cause" within the meaning of the rule; and if the successful party merely through forgetfulness omits to ask for such costs at the time, the judge has no jurisdiction afterwards to entertain an application for the allowance of such costs.

Held, further, that there is no power to make a subsequent application for the allowance of such costs under a general liberty to apply given to the parties at the time of the trial.—MORLEY *v.* BEVINGTON, *K.B.D.*; 93 L. T. 768.

2. *Execution—Claim to goods—Deposit of amount of value—Withdrawal of bailiff—Order for sale—Retaking possession.*—Held, that if the amount deposited by the claimant with the bailiff was not the value of the goods his withdrawal from possession was wrongful, and the county court judge had power in that case to order him to retake possession, and that the case must go back to the county court judge to determine whether an order for sale ought to be made.—MILLER *v.* SOLOMON, *K.B.D.*; [1906] 2 K. B. 91.

3. *Judge—Deputy—Appointment of two deputies—County Courts Act*, 1888 (51 *&* 52 *Vict. c.* 43), *ss.* 18-21.—A county court judge is not appointed to a circuit, but to different courts with a district, and has power therefore under sections 18 to 21 of the County Courts Act, 1888, to appoint a separate deputy to each court district within his jurisdiction.

Decision of the Divisional Court (*ante*, p. 410, [1906] 1 K. B. 22) affirmed, Moulton, L.J., *dubitante*.—REX v. LLOYD, *C.A.*, 464; [1906] 1 K. B. 552; 75 L. J. K. B. 406; 94 L. T. 498.

4. *Notice of special defence—Statute—County Court Rules*, 1903, *ord.* 10, *r.* 18.—By ord. 10, r. 18, of the County Court Rules, where a defendant relies on a statutory defence he shall in his statement set forth the year, chapter, and section of the statute in the short title, and the particular matter on which he relies, "or otherwise sufficiently indicate the nature of the defence on which he relies."

In an action the defendant pleaded that the action was "null and void, and the defendant relies on the Gaming Act, 1845 (8 & 9 Vict. c. 109, s. 18)."

As a matter of fact he should have pleaded the Gaming Act, 1892.

Held, that there had been a sufficient indication of the defence within the rule.—RENTON v. KING, *K.B.D.*; 93 L. T. 10.

5. *Practice—Right to reply.*—If the defendant calls evidence to support his defence, the defendant has the right to reply in the county court, following the practice observed in the High Court.—CLACK *v.* CLACK, *K.B.D.*, 375; [1906] 1 K. B. 483; 75 L. J. K. B. 274; 94 L. T. 516.

See also Bailiff, 1; Bankruptcy, 10; Distress, 2; Limitations, Statute of, 1; Practice, 3, 22.

COVENANT:

Construction—Covenant not to "directly or indirectly carry on or be engaged or concerned or interested in" a trade in any part of Great Britain.—A covenant not to be "concerned or interested in" a certain trade within specified limits held not to be broken by a sale of a business on credit to a third party who afterwards began to carry on the trade within the prescribed limits.

Judgment of the Court of Appeal affirmed.—CORY & SON *v.* HARRISON, *H.L.*; [1906] A. C. 274; 93 L. T. 818.

See also Landlord and Tenant, 2-10.

CRIMINAL LAW:—

1. *Attempt—Offences Against the Person Act*, 1861 (24 *&* 25 *Vict. c.* 100), *ss.* 14, 18.—The Offences Against the Person Act, 1861, s. 14: "Whosoever shall shoot at any person or shall by drawing a trigger or in any other manner attempt to discharge any kind of loaded arms at any person with intent in any of the cases aforesaid to commit murder shall, whether any bodily injury be effected or not, be guilty of felony." Section 18: "Whosoever shall maliciously shoot at any person, or by drawing a trigger or in any other manner attempt to discharge any kind of loaded arms at any person with intent in any of the cases aforesaid to do some grievous bodily harm to any person, shall be guilty of felony." To commit an offence under these sections it is not sufficient to intend to shoot or to make preparations to shoot, but there must be "an attempt," an act in a series of acts which, if not interrupted, would lead to the commission of the crime.

A. was seen to put his hand in his pocket and draw out a loaded revolver; B. caught his arm after the revolver was clear from his pocket, a struggle ensued, and finally B. wrenched the revolver from B. During the struggle A. said repeatedly to B., "You've got to die."

Held, that A. was rightly convicted of the offence of attempting to discharge loaded arms.—REX *v.* LINNEKER, *C.C.R.*, 494; [1906] 2 K. B. 99; 75 L. J. K. B. 385; 94 L. T. 856.

2. *Conspiracy—Agreement by prisoner with another to do an unlawful act for which the other could not be prosecuted—Offences Against the Person Act*, 1861 (24 *&* 25 *Vict. c.* 100), *s.* 56.—The prisoner D. was convicted on an indictment which charged him with unlawfully conspiring with F. M. C., between the 1st of August and the 4th of November, 1905, by force or fraud to take or decoy away A. M. C., a child under the age of fourteen years, with intent to deprive her lawful guardian, C. J. L., of the possession of the said child. The said F. M. C. was the mother of the child. She had obtained a divorce from her husband, and by an order of the court, dated the 5th of August, 1902, the said C. J. L. had been appointed guardian of the person of the child. In August, 1905, the prisoner, by an agreement between him and F. M. C. undertook to take the child by force or fraud out of C. J. L.'s possession, and he did certain acts for the purpose of carrying out that undertaking.

Held, that whether F. M. C. was or was not protected by the proviso from a prosecution for an offence prohibited by section 56, or for a conspiracy to commit such an offence, her immunity could not afford any protection to the prisoner who had unlawfully conspired with her that he should commit

an offence under the section.—REX v. DUGUID, C.C.R.; 75 L. J. K. B. 470; 94 L. T. 887.

3. *Conspiracy—Indictment—Acts tending to public mischief—Obtaining a passport by false pretences.*—Two defendants were found guilty on an indictment which alleged that they unlawfully conspired together to obtain a passport in the name of one defendant for the use of another defendant, to the injury and prejudice of the lawful, free, and customary intercourse existing between inhabitants of this country and of Russia, to the public mischief of the subjects and the endangerment of the continuance of peaceful relations existing between the King and the Czar and their subjects. On a motion in arrest of judgment, on the ground that the obtaining of a passport by false representation was not a criminal act,

Held, that the indictment was good.

At the trial the judge directed the jury that if they found that the defendants did conspire together to obtain a passport by false representation, and that they knew it was to be used by someone else, that those acts constituted a criminal offence.

Held, that the direction was right.—REX v. BRAILSFORD, K.B.D., 283; [1905] 2 K. B. 730; 75 L. J. K. B. 64; 93 L. T. 401.

4. *Cruelty to animals—Causing animal to be cruelly ill-treated — Performance with savage animals — Bringing tame animal in contact with wild animals—Tame animal attacked and injured—Conviction—Cruelty to Animals Act*, 1849 (12 & 13 *Vict. c.* 92), *s.* 2.—The appellant, a lion-tamer, conducted performances in a cage with lions, and part of the performance consisted of a roundabout of six boats, in each of which was seated a lion, the roundabout being drawn by a pony. At one of these performances, after the appellant had introduced the pony into the cage and attached it to the roundabout, one of the lions jumped out of its boat and raised itself on to the hindquarters of the pony and sniffed at it. The appellant drove the lion back to its boat, but immediately the appellant's attention was diverted from the lion it attacked the pony, causing injuries from which the pony died two days afterwards. A considerable number of performances with the same pony had taken place for several years, and nothing of the kind had happened. Formerly during the performance three or four men with iron bars kept watch on the stage, and recently a man with a fire hose kept watch. The appellant having been convicted, under section 2 of the Cruelty to Animals Act, 1849, of having unlawfully and cruelly caused the pony to be ill-treated,

Held, that there was sufficient evidence of *mens rea* on the part of the appellant to justify the conviction, and that the conviction was right.—THIELBAR v. CRAIGEN, K.B.D.; 93 L. T. 600.

5. *Cruelty to animals—One act—Conviction for cruelty to several animals—Cruelty to Animals Act*, 1849 (12 & 13 *Vict. c.* 92), *ss.* 2, 29.—A conviction under section 2 of the Cruelty to Animals Act, 1849, for having cruelly ill-treated five cows by causing them to be overstocked with milk, was appealed against on the ground that the conviction was bad on its face, in that it was a conviction for five separate and distinct offences.

Held, that an act or omission affecting several animals might constitute one offence under the section, and that it was not necessary that there should be a separate summons and separate conviction in respect of each animal.—REX v. CABLE, K.B.D., 626; [1906] 1 K. B. 719; 75 L. J. K. B. 381; 94 L. T. 772.

6. *Evidence—Medical practitioner—Illegal use of instruments—Admissibility of evidence of felonious use of similar instruments on another woman some nine months before—"Mistake" or "accident"—Offences Against the Person Act*, 1861 (24 & 25 *Vict. c.* 100), *s.* 58.—The prisoner, a medical man, was indicted for feloniously using certain instruments on a certain woman with intent to procure her miscarriage. At the trial the prosecution called as a witness another woman, whose evidence was to the effect that some nine months previously the prisoner had used similar instruments on her, with the avowed intention of bringing about her miscarriage, and that he had then used expressions tending to show that he was in the habit of performing similar operations for the same illegal purpose. The evidence was admitted, and the prisoner was convicted

Held (by Kennedy, Darling, Jelf, Bray, and A. T. Lawrence, JJ., Lord Alverstone, L.C.J., and Ridley, J., dissenting), that the evidence was rightly admitted, and the conviction must be upheld.—REX v. BOND, C.C.R., 586.

7. *Falsification of an account—Employer's account—Falsification of Accounts Act*, 1875 (38 & 39 *Vict. c.* 24), *s.* 1.—By the Falsification of Accounts Act, 1875 (38 & 39 Vict. c. 24): "Whereas it is expedient to amend the law so as to punish the falsification by clerks, officers, servants, and others of their employers' accounts, books, writings, or documents: Be it enacted . . . (1) That if any clerk, officer, or servant, or any person employed or acting in the capacity of clerk, officer, or servant shall wilfully and with intent to defraud, destroy, alter, mutilate, or falsify any book, paper, writing, valuable security, or account which belongs to or is in the possession of his employer, or has been received by him for or on behalf of his employer, or shall wilfully and with intent to defraud, make, or concur in making any false entry in, or omit or alter or concur in omitting or altering any material particular from or in any such book or an document or account, then in every such case the person so offending shall be guilty of a misdemesnour.

Held, that in the second part of the section the word "such" governed not only "book," but also the subsequent words "document or account," and in consequence it is incumbent upon the prosecution to prove that the account alleged to have been falsified "belongs to or is in the possession of his employer, or has been received by him for and on behalf of his employer.—REX v. PALIN, C.C.R., 396; [1906] 1 K. B. 7; 75 L. J. K. B. 15; 93 L. T. 673.

8. *Libel — Criminal information — Libel upon persons discharging public duties imposed by statute—Committee acting under Licensing Act*, 1904—*Libel upon—Jurisdiction of court to grant criminal information.*—The remedy of criminal information for a libel is not confined to cases of libel upon persons acting in a judicial capacity while discharging judicial duties; but the court can in its discretion grant a criminal information for the protection of persons who are discharging public duties imposed upon them by statute, in respect of a libel published of them in the exercise of those duties.

Accordingly, if a libel is published in a newspaper concerning the members of a committee of justices appointed under the Licensing Act, 1903, by the quarter sessions or the general body of justices in a county borough, to carry out the provisions of that Act, and to decide as to the amount of compensation to be levied upon existing licences as

a compensation fund for the extinction of other licences—the libel charging the members of that committee with being influenced by improper motives in fixing the amount of the levy—the court will grant a criminal information upon the ground that the committee are acting in the discharge of public duties imposed upon them by the Act, although they may not be acting in a strictly judicial capacity.—REX *v.* RUSSELL, *K.B.D.*; 93 L. T. 407.

9. *Obscene libel—"Obscene"—Sufficiency of indictment—"To the manifest corruption of the morals of his Majesty's subjects"—Law of Libel Amendment Act*, 1888 (51 & 52 *Vict. c.* 64), *s.* 7.—In an indictment charging the publication of an obscene libel it is sufficient to aver that the publication is obscene, and that it has been unlawfully published. It is unnecessary to aver the "intent" by the use of a common form expression as "to the manifest corruption of the morals of his Majesty's subjects," although, in the opinion of the court, as a matter of practice it were more desirable to do so.

The object of the Law of Libel Amendment Act, 1888, s. 7, which provides that "It shall not be necessary to set out in any indictment . . . instituted against the publisher of any obscene libel the obscene passages, but it shall be sufficient to deposit the book . . . containing the alleged libel with the indictment or other judicial proceeding, together with particulars showing precisely by reference to pages, columns, and lines in what part of the book . . . the alleged libel is to be found, and such particulars shall be deemed to form part of the record . . . ," was to obviate the setting out of the matter by a clear reference to the document deposited. — REX *v.* BARRACLOUGH, *C.C.R.*, 147; [1906] 1 K. B. 201; 75 L J. K. B. 77; 94 L. T. 111.

10. *Wife stealing from husband—Receiving from wife—Felony—Misdemeanour—Sufficiency of averments in indictment—Larceny Act*, 1861 (24 & 25 *Vict. c* 96), *s.* 91—*Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *ss.* 12, 16.—An indictment will lie for a common law misdemeanour in respect to the receiving of property stolen by a wife from her husband. It is not necessary (although better, *per* Channell, J.) in such an indictment to aver that the property was received from the wife.

Rex v. *James*, [1902] 1 K. B. 540, discussed.—REX *v.* PAYNE, *C.C.R.*, 200; [1906] 1 K. B. 97; 75 L. J. K. B. 114; 94 L. T. 288.

See also Fishery, 2; Justices, 1-4.

CROWN:—

1. *Postmaster-General—Liability to be sued in official capacity—Action for negligence of subordinate—Immunity of head of Government department—Telegraph Act*, 1863 (26 & 27 *Vict. c.* 112), *s.* 42—*Telegraph Act*, 1868 (31 & 32 *Vict. c.* 110), *s.* 2.—The Postmaster-General is not liable to be sued in his official capacity for the negligence of a person employed in the telegraph service; his immunity from liability to an action for the default of a subordinate official in the Post Office not being affected by anything contained in the Telegraph Acts, 1863, 1868, and 1878. — BAINBRIDGE *v.* POSTMASTER-GENERAL, *C.A.*, 221; [1906] 1 K. B. 178; 75 L. J. K. B. 366; 94 L. T. 120.

2. *Prerogative—Distress for rent—Chattels belonging to Crown seized on tenant's premises by landlord—Immunity from distraint of Crown chattels.*—Chattels belonging to the Crown are exempt from liability to seizure by distress.

So held, reversing the decision of th county court judge in an action for damages for illegal distress of a horse, the property of the Crown, seized on a farm belonging to the defendant for rent due to her from the tenant, although only formal notice that the horse was Crown property had been given to the bailiff and to the auctioneer, and no legal proceedings in the nature of an extent had been instituted to establish the title of the Crown in the horse.—SECRETARY OF STATE FOR WAR *v.* WYNNE, *K.B.D.*, 235; [1905] 2 K. B. 845; 75 L. J. K. B. 25; 93 L. T. 797.

CUSTOM:—

Validity—Legal origin—Presumption—Right of drying nets on seashore—Character of accreted land—Evidence—Reputation—Depositions—War Office map and chart in possession of Admiralty.—It is a valid custom for fishermen to dry their nets on land situate near the sea in the parish which they inhabit, nor will a modern method of drying invalidate the custom so long as no unreasonable burden is thereby cast on the land. Accreted land is subject to customs binding on the land to which it is accreted. A survey not intended to affect the royal revenues, but to serve temporary private purposes, is not admissible as a public document, nor is one made by a deceased officer in discharge of his duty, when it is not shown that it was his duty to make it. Maps and plans made by the Board of Ordnance in the seventeenth century are not admissible as public documents nor as evidence of reputation. A chart in the possession of the Admiralty, but not an Admiralty chart, is not admissible.

Judgment of Farwell, J. (53 W. R. 55, [1904] 2 Ch. 534), affirmed.—MERCER *v.* DENNE, *C.A.*, 303; [1905] 2 Ch. 538; 74 L. J. Ch. 723; 93 L. T. 412.

CY-PRÈS:—

Will—Real property limitations—Limitation to unborn person void for perpetuity—General intent.—A testator devised real estate to the use of F. G. for his life, remainder to the use of his first and other sons successively for life with remainder, after the death of each such son, to the use of his sons successively in tail male with remainder to the use of the daughters of the sons of F. G. in tail, as in the will mentioned, with remainder to the use of the daughters of F. G. in tail, as therein mentioned, with an ultimate remainder to F. G. in fee.

F. G. never had any children, and on his death the question arose whether, in view of the fact that some of the intervening limitations infringed the rule against perpetuities, the ultimate remainder was void.

It was admitted that the limitations after F. G.'s life estate were void under the rule; but it was suggested that the court could apply the *cy-près* doctrine and alter the limitations so as to give to the sons of F. G. estates in tail male severally and successively, with a contingent remainder if such sons should die without issue other than daughters or issue of daughters to each of such sons in tail general with remainder to the daughters of F. G. in tail general with an ultimate remainder to F. G. in fee.

Held, that, to allow the substitution of the suggested limitations would be a clear extension of the *cy-près* doctrine, which it had been laid down by the authorities—*e.g.*, *Monypenny* v. *Dering*, 2 De G. M. & G. 145, and *Brudenell* v. *Elwes*, 1 East 442, ought not to be extended; and that *Nicholl* v. *Nicholl*, 2 Wm. Bl. 1159, was not an authority upon which such an extension ought to be based.

Decision of Farwell, J. (92 L. T. Rep. 452),

affirmed.—MORTIMER, RE, GRAY *v.* GRAY, *C.A.*; [1905] 2 Ch. 502; 74 L. J. Ch. 745; 93 L. T. 459.
See also Charity, 2.

DAMAGES:—

1. *Breach of contract of carriage—Remoteness—Penalty clause in contract.*—In an action for breach of contract to deliver goods, the measure of damages, setting aside all special damage, is the value of the goods at the place and time at which they ought to have been delivered to the owner.

The respondents had agreed by charter-party to load a cargo of goods of the appellants at a fixed time at a port in the Baltic for conveyance to Cardiff. They did not provide a ship as agreed, and the customers of the appellants, to whom they had sold the goods, bought goods against them, and recovered the price and expenses from the appellants. The charter-party contained a clause: "Penalty for non-performance of this agreement, estimated amount of freight on quantity not shipped in accordance herewith."

Held (reversing the judgment of the court below), that the appellants were entitled to recover from the respondents the whole amount which they had been compelled to pay to their customers.—STRÖMS BRUKS AKTIE BOLAG *v.* HUTCHISON, *H.L.*; [1905] A. C. 515; 74 L. J. P. C. 130; 93 L. T. 562.

2. *Measure of—Advance out of funds of company on fraudulent misrepresentations of director—Insufficient security—Difference between advance and value of security.*—Where the directors of the plaintiff company had been induced by the fraudulent misrepresentations of the defendant, who was one of their number, to make an advance out of the funds of the plaintiff company on the security of a second debenture issued by another company in which the defendant was personally interested, and in the result the debenture proved to be an insufficient security, so that loss was occasioned to the plaintiff company, it was held that the measure of damages to which the plaintiff company was entitled was the difference between the money advanced by it and the value of the debenture at the date of issue.

Peek v. *Derry*, 59 L. T. Rep. 78, 37 Ch. D. 541, at p. 591; on appeal, 61 L. T. Rep. 265, 14 App. Cas. 337, applied.

Decision of Farwell, J., affirmed.—EXPLORING LAND AND MINERALS CO. *v.* KOLCKMANN, *C.A.*; 94 L. T. 234.

3. *Subsidence—Risk of future subsidence—Measure of damages.*—In an action for damages for injury to cotton mills arising from subsidence occasioned by the past working of coal mines underneath the site of the mills, both parties consented to judgment directing an inquiry to ascertain the amount of the damages. That inquiry was referred, pursuant to section 13 of the Arbitration Act 1889, to an official referee, who assessed the necessary repairs at a certain amount, and the depreciation of the premises, including the risk of future damages, at a further amount. That latter amount the colliery owners disputed on the ground (*inter alia*) that the official referee, in estimating the same, had taken into consideration the risk of future subsidence.

Held (Romer, L.J., *dissentiente*), that the risk of future subsidence had been rightly taken into consideration by the official referee.

Decision of Swinfen Eady, J., reversed.—TUNNICLIFFE & HAMPSON (LIMITED) v. WEST LEIGH COLLIERY CO., *C.A.*; [1906] 2 Ch. 22; 75 L. J. Ch. 512; 94 L. T. 715.
See also Highway, 2.

DEED:—

Execution — Alterations after execution — Blanks filled up—Date altered—Alteration immaterial—A deed was executed by all necessary parties other than B., whose signature was necessary for its validity. At the date of execution the date of the day and month were in blank, but the year 1899 was written in full. B. executed the deed some months later in 1900; the blanks were filled up and the year altered from 1899 to 1900.

Held, that the validity of the deed was unaffected by these alterations.

Pigot's case, 11 Rep. 26b, since *Aldous* v. *Cornwell*, 16 W. R. 1045, L. R. 3 Q. B. 513, applies only to material alterations. — CREDITON (BISHOP) v. EXETER (BISHOP), *Ch.D. Swinfen Eady, J.*, 156; [1905] 2 Ch. 455; 74 L. J. Ch. 697; 93 L. T. 157.
See also Evidence, 1.

DISCOVERY:—

Practice—Interrogatories—Action of libel—Plea of privilege—Name of informant—Object of interrogatory.—Where in an action of libel the defendant pleads privilege, the plaintiff will not be allowed to interrogate the defendant as to the names of the persons on whose information the defendant published the words complained of, if it appears that the plaintiff's object is not to rebut the plea of privilege, but to obtain discovery which would enable him to bring actions against other persons.—EDMONDSON *v.* BIRCH, *C.A.*, 52; [1905] 2 K. B. 523; 74 L. J. K. B. 777; 93 L. T. 462.
See also Practice, 10, 11.

DISTRESS:—

1. *Illegal distress—Trespass* ab initio—*Right of landlord to make fresh levy.*—A landlord levied a distress for rent. The bailiff illegally entered the house by breaking the chain of the front door and seized furniture belonging to the plaintiff. . . . After remaining in possession some days he went out and was refused re-admission, and made no attempt to re-enter. Subsequently the landlord levied a fresh distress for the same rent, whereupon the plaintiff brought an action for replevin against him.

Held, affirming the decision of the Divisional Court (*ante*, p. 216), that the second distress was a legal distress.—GRUNNELL *v.* WELCH, *C.A.*, 581.

2. *Landlord and tenant—Implements of trade—"To the value of £5"—Law of Distress Amendment Act*, 1888 (51 & 52 *Vict. c.* 21), *s.* 4—*County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 147.—A hired cab is an implement of trade.

Law of Distress Amendment Act, 1888, s. 4, provides: "From and after the passing of this Act the following goods and chattels shall be exempt from distress for rent—namely, any goods or chattels of the tenant or his family which would be protected from seizure in execution under section 96 of the County Court Acts, 1846, or any enactment amending or substituted for the same."

Section 147 of the County Courts Act, 1888, the present operative section referred to in the above statute, provides: "Every bailiff . . . may seize and take any of the goods and chattels of such person (excepting . . . the tools and implements of his trade to the value of £5 which shall to that extent be protected from such seizure)."

Held, that if there be upon the premises only one implement of trade, and no other goods there, although its value exceeds £5 it cannot be distrained for rent, but comes within the protection of section 147 set out above.—LAVELL *v.*

RICHINGS, *K.B.D.*, 394; [1906] 1 K. B. 480; 75 L. J. K. B. 287; 94 L. T. 515.

3. *Landlord and tenant—Lodger—Distraint of lodgers' goods—Action against bailiff—Lodgers' Goods Protection Act*, 1871 (34 & 35 *Vict. c.* 79), *s.* 2.—Under section 2 of the Lodgers' Goods Protection Act, 1871, an action lies against a bailiff for illegal distraint.

Page v. *Valls*, 19 Times L. R. 393, overruled.—LOWE *v.* DORLING, *K.B.D.*, 28; [1905] 2 K. B. 501; 74 L. J. K. B. 794; 93 L. T. 398.

4. *Landlord and tenant—Waiver of illegal levy—Owner of goods—Uncertificated bailiff—Law of Distress Amendment Act*, 1888 (51 & 52 *Vict. c.* 21), *s.* 7.—Section 7 of the Law of Distress Amendment Act, 1888, enacts: "From and after the commencement of this Act no person shall act as a bailiff to levy any distress for rent unless he shall be authorized to act as a bailiff by a certificate in writing under the hand of a county court judge . . . If any person not holding a certificate under this section shall levy a distress contrary to the provisions of this Act, the person so levying and any person who has authorized him so to levy shall be deemed to have committed a trespass."

Held, that the section constitutes a distress by an uncertificated bailiff an illegal act which inures for the benefit not only of the tenant but of third parties whose goods are on the demised premises.—PERRING *v.* EMERSON, *K.B.D.*, 47; [1906] 1 K. B. 1; 75 L. J. K. B. 12; 93 L. T. 748.

5. *Poor rate—Costs and charges of distress—Distress for sum not exceeding £20—Limitation of amount of costs and charges—Distress (Costs) Act*, 1817 (57 *Geo.* 3, *c.* 93), *s.* 1, *Schedule—Distress (Costs) Act*, 1827 (7 & 8 *Geo.* 4, *c.* 17)—*Distress for Rates Act*, 1849 (12 & 13 *Vict. c.* 14), *s.* 1.—The provisions of the Distress (Costs) Act, 1817, as extended to a distress for poor rate for an amount not exceeding £20 by the Distress (Costs) Act, 1827, are not repealed by the Distress for Rates Act, 1849, but are still in force; and no costs or charges in respect of such a distress can be taken in excess of the amounts prescribed by those statutes.

Judgment of the Court of Appeal affirmed.—COSTER *v.* HEADLAND, *H.L.*; [1906] A. C. 286; 75 L. J. K. B. 483; 94 L. T. 589.

See also Crown, 2.

DIVORCE:—

1. *Adultery of petitioner—Discretion of court*—20 & 21 *Vict. c.* 85, *s.* 31.—The petitioner was an actress, and was at the time of her marriage sixteen years old and an orphan. The respondent seduced her and afterwards married her; he took her to various places and compelled her to obtain money by prostitution, he taking the money and ill-treating her. After about two years she ran away, and while away occasionally obtained money by prostitution, as she was destitute.

The Court held that the facts of the case justified it in pronouncing a decree in the petitioner's favour, notwithstanding her adultery.—DODSON *v.* DODSON, *P.D.*, 220.

2. *Adultery of petitioner—Discretion of court—Principles upon which the discretion is to be exercised—Material facts—Duty of petitioner to disclose material facts—Decree* nisi *refused—Matrimonial Causes Act*, 1857 (20 & 21 *Vict. c.* 85), *s.* 31.—In the exercise of the discretion vested in the court by section 31 of the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), where the petitioner has been found guilty of adultery, regard must be had not only to the persons who are parties to the suit, but also to the interests of society generally, and of public morality. Where it is proved that the petitioner has been guilty of adultery, it is not a sufficient excuse for his or her conduct to show that the adultery happened after the separation of the parties, and that the separation was caused entirely by the bad conduct of the respondent. Such adultery is a material fact which ought to be placed before the court, and the concealment of it is a fraud upon the court.

Constantinidi v. *Constantinidi and Lance*, [1903] P. 246, discussed.—EVANS *v.* EVANS, *P.D.*; [1906] P. 125; 75 L. J. P. 27; 94 L. T. 616.

3. *Claim for damages only—Practice—Matrimonial Causes Act*, 1857 (20 & 21 *Vict. c.* 85), *ss.* 31, 33, 59.—A petition by a husband claiming damages only presented under section 33 of the Matrimonial Causes Act, 1857, is subject to the same provisions as other petitions presented under the same Act.—COX *v.* COX, *P.D.*; [1906] P. 267.

4. *Desertion—Matrimonial Causes Act*, 1857—*Summary Jurisdiction (Married Women) Act*, 1895.—The wife prayed for a dissolution of marriage on the ground of adultery and desertion. Prior to the commencement of the two years necessary to complete the defence of desertion within the meaning of the Matrimonial Causes Act, 1857, the wife had obtained an order under the Summary Jurisdiction Act, 1895, directing that she should be no longer bound to cohabit with the respondent, on the ground that the respondent had been guilty of wilful neglect to provide reasonable maintenance.

The Court held that, if the two years had not been completed prior to the making of the order of the court of summary jurisdiction, it would have had the effect of preventing the desertion from continuing after it. It dismissed the petition for divorce, on the ground that the wife had not proved a case of desertion, but adultery alone.

Smith v. *Smith*, [1905] P. 249, not followed.—DODD *v.* DODD, *P.D.*, 541; [1903] P. 189; 75 L. J. P. 49; 94 L. T. 709.

5. *Desertion—Summary Jurisdiction (Married Women) Act*, 1895, *s.* 5—*Matrimonial Causes Act*, 1857, *s.* 27.—The court held that the provisions of the Summary Jurisdiction (Married Women) Act, 1895, with regard to desertion do not oust the jurisdiction of the Divorce Court with regard to desertion, and hence the matrimonial offence of desertion under the Matrimonial Causes Act, 1857, may be committed nothwithstanding the existence of a separation order made under section 5 of the Summary Jurisdiction Act.—SMITH *v.* SMITH, *P.D.*, 220; [1905] P. 249; 74 L. J. P. 113; 93 L. T. 457.

6. *Foreign court—Jurisdiction—Recognition by English courts—Domicil—Suppression of material fact—Validity of decree in England.*—Where the parties to a marriage solemnized in England are afterwards domiciled in another country, the courts of that country have jurisdiction to dissolve the marriage, and on grounds which would not be sufficient for granting a divorce in England.

Harvey v. *Farnie*, 8 App. Cas. 43, and *Le Mesurier* v. *Le Mesurier*, [1895] A. C. 517, applied.

The resolutions of the judges in *Rex* v. *Lolley*, Russ. & Ry. 237, must be treated as confined to the facts of that case.

A decree for dissolution of marriage, being a judgment affecting the status of the parties, stands on the same footing as a judgment *in rem*, and therefore such a decree granted by a foreign court cannot be impeached in this country while that judgment remains unreversed, by a person not a

party to those proceedings, even on the ground of fraud.

In 1880 a marriage took place in England between two English people. In 1886 the husband petitioned for a divorce on the ground of the wife's adultery, and she presented a cross-petition charging him with cruelty. Both petititions were dismissed, the respective charges being both proved. In 1889 the husband went to New York, where he lived in adultery. The wife remained in England, and lived in adultery there until 1890, when she went to New York and obtained a decree from the court there for the dissolution of her marriage. The husband, who had then acquired a domicil in the State of New York, was served with process, but did not appear. The divorce proceedings in England were not disclosed to the American court, but there was no collusion between the husband and wife.

Held, that the wife must be taken to have adopted the husband's domicil in the State of New York for the purpose of the divorce proceedings; that the court of New York had jurisdiction to dissolve the marriage; that the non-disclosure of the wife's adultery did not affect the jurisdiction; and therefore the decree of the New York court would be recognized and held valid in this country.

Decision of Sir Gorell Barnes, P., affirmed.—BATER v. BATER, *C.A.*; [1906] P. 209; 75 L. J. P. 60; 94 L. T. 835.

7. *Foreign divorce — Foreign domicil — Domicil of husband—Decree of foreign court—Divorce decree recognized by State where husband domiciled—Recognition by English court—Legitimacy Declaration Act*, 1858 (21 & 22 *Vict. c.* 93), *s.* 1.—The English courts will recognize the validity of a decree of divorce pronounced in a State where the husband is not domiciled, if such decree is accepted as valid in the State where he is actually domiciled at the time of the pronouncement.—ARMITAGE *v.* ATTORNEY-GENERAL, *P.D.*; [1906] P. 135; 75 L. J. P. 42; 94 L. T. 614.

8. *Husband's petition—Claim for damages—Assessment—Duty of jury.*—Where a husband petitions for a divorce on the ground of the adultery of his wife with co-respondent, and a claim for damages is made against the latter, the jury are not bound to assess the damages at any sum, however small, if they are of opinion that the conduct of the parties disentitles the petitioner to any compensation, even though adultery is proved.—GIBSON *v.* GIBSON, *P.D.*; 94 L. T. 619.

9. *Nullity of marriage—Petition of husband—Non-consummation—Absence of cohabitation—Order for inspection—Refusal of respondent to comply with order—Presumption—Evidence of incapacity—Incapacity found as a fact.*—Where there has been no cohabitation by the parties to a contract of marriage, and evidence has been adduced of a positive statement made by the respondent in a suit of nullity of marriage that she is incapable of consummating the marriage, these facts, taken in conjunction with the refusal of the respondent to submit to medical inspection when ordered by the court and the general circumstances of the case, are sufficient to entitle the court to find incapacity existing as a fact.

F. v. *P.* (falsely called *F.*), 75 L. T. Rep. 192, and *B.* (otherwise *H.*) v. *B.*, [1901] P. 39, discussed. —W. *v.* S., *P.D.*; [1905] P. 231; 74 L. J. P. 112; 93 L. T. 456.

10. *Restitution of conjugal rights—Judicial separation—Withdrawal from cohabitation—Just cause—Habitual drinking habit—Habitual Drunkards Act*, 1879 (42 & 43 *Vict. c.* 19), *s.* 3—*Licensing Act*, 1902 (2 *Ed.* 7, *c.* 28), *s.* 5.—The wife instituted a suit for restitution of conjugal rights, and in answer the husband pleaded that he had just cause for his withdrawal from cohabitation, alleging that the wife was addicted to habits of intemperance to such an extent that she was a drunkard within the meaning of the Habitual Drunkards Act, 1879, and the Licensing Act, 1902. The husband also prayed for a decree of judicial separation on the ground of cruelty.

The court dismissed the wife's petition and refused the husband's cross-prayer.—BEER *v.* BEER, *P.D.*, 564; 94 L. T. 704.

11. *Settlements—Variation—Power of appointment—Power to appoint in case of second marriage—Interests under first marriage—Matrimonial Causes Act*, 1859 (22 & 23 *Vict. c.* 61), *s.* 5.—By a marriage settlement power was given to a husband, in the event of his surviving his wife, to appoint the capital of the fund which he brought into settlement by deed or by will as to two-thirds of the same in favour of a future wife and the issue of a future marriage. There was a child of the first marriage. The husband obtained a decree absolute for the dissolution of his marriage, and applied to have the settlement varied so as to give him power to settle the two-thirds at once in favour of his second wife and her issue. The court held that it had jurisdiction to make such an order, but under the circumstances of the case declined to make such order to the full extent during the lifetime of the divorced wife, and restricted the power of appointment to one-third of the capital of the trust fund.

In exercising its jurisdiction to vary settlements under section 5 of the Matrimonial Causes Act, 1859 (22 & 23 Vict. c. 61), the court will endeavour, where the application to vary is made by the innocent party, to place the parties in the position they would have occupied if the marriage had not been put an end to by the fault of one of them. But in all cases the claims of any existing issue of the first marriage who possess any rights under the settlement must be carefully considered.—HODGSON ROBERTS *v.* HODGSON ROBERTS, *P.D.*; [1906] P. 142; 75 L. J. P. 48; 94 L. T. 621.

12. *Variation of settlement — Wife's adultery — Husband's adultery—Discretion of court—Conduct of parties—Interests of public morality—Retrospective order—Wife's protected life interest—Jurisdiction—Matrimonial Causes Act*, 1857 (20 & 21 *Vict. c.* 85), *s.* 45—*Matrimonial Causes Act*, 1859 (22 & 23 *Vict. c.* 61), *s.* 5—*Matrimonial Causes Act*, 1878 (41 & 42 *Vict. c.* 19), *s.* 3.—In exercising the discretionary jurisdiction of varying settlements, after a dissolution of marriage, conferred upon the court by the Matrimonial Causes Acts, regard is to be had both to the conduct of the parties and to the interests of society and public morality. Consequently, where the successful petitioner for dissolution of marriage has been guilty of flagrant misconduct, the court will take such misconduct into consideration on a subsequent application to vary the marriage settlements, and may decline to exercise its discretion by reason thereof. The Matrimonial Causes Acts do not give the court power to award anything in the nature of damages as between husband and wife, or to inflict any fine or penalty upon the party guilty of a matrimonial offence. The principle upon which the discretion of the court will be exercised is that the loss which a husband—if himself innocent—has sustained by reason of the misconduct of the guilty wife, may be

repaired by giving him means to the scale of which he may have learnt to accommodate his mode of life. Though the desire to prevent a co-respondent profiting by his own iniquity may justify turning the scale against a guilty wife, this consideration is not to be carried to the extent of depriving her of everything beyond the bare necessities of life in the condition in which she has been brought up.

March v. *March*, 15 W. R. 799, L. R. 1 P. & M. 440, considered and applied.

The powers given to the court by section 5 of the Matrimonial Causes Act, 1859, cannot be exercised retrospectively.

A wife's protected life interest—*i.e.*, a life interest which is to cease upon the happening of certain events, cannot be dealt with by the court under the Matrimonial Causes Acts.—CONSTANTINIDI *v.* CONSTANTINIDI, *C.A.*, 121; [1905] P. 253; 74 L. J. P. 122; 93 L. T. 651.

See also Scotland, Law of, 1.

DOMICIL:—

Change of domicil—Evidence.—In order to establish that a man has acquired a new domicil, other than his domicil of origin, there must be evidence of a fixed determination to change his nationality.

In a case in which an Englishman, having a residence and large property in England, purchased an estate in Scotland and made it his principal place of residence for many years, up to his death, retaining also his English property,

Held (affirming the judgment of the court below), that such residence was not sufficient evidence to establish that he had lost his domicil of origin in England, and acquired a domicil of choice in Scotland.—HUNTLY *v.* GASKELL, *H.L.*; [1906] A. C. 56; 75 L. J. P. C. 1; 94 L. T. 33.

EDUCATION:—

1. *Compensation—Transfer of powers of London School Board to London County Council—Officer of authority whose powers were not transferred—Direct pecuniary loss—Local Government Act*, 1888 (51 & 52 *Vict. c.* 41), *s.* 120—*Education Act*, 1902 (2 *Ed.* 7, *c.* 42), *Schedule II., rr.* 16, 21.—Before the Education Act of 1902 came into force in London, the London School Board directed its precept for a rate to be levied for public education expenses to the Corporation of London. N. was at that time a collector for the Commissioners of Sewers, the rating authority for that corporation, and as such collected the education rate, and received for so doing a certain poundage on the amount collected. When the powers of the school board were transferred to the London County Council the education rate was collected with the poor rate. N., having by the change lost the poundage which he formerly earned, claimed compensation under rule 21 of Schedule II. of the Education Act, 1902, and section 120 of the Local Government Act, 1888, from the London County Council.

Held (by Lord Alverstone, L.C.J., and Ridley, J., Darling, J., dissenting), that compensation could not be claimed, because N. was not in the employment of the authority whose powers had been transferred to the London County Council under the change brought by the Education Act, 1902, nor under the Local Government Act, 1888.—REX *v.* LONDON COUNTY COUNCIL, *K.B.D.*, 439; [1906] 1 K. B. 346; 75 L. J. K. B. 241; 94 L. T. 218.

2. *Local authority—Education authority—Salaries of teachers—Control of managers by education authority—Privity of contract between teacher and education authority—Education Act*, 1902 (2 *Ed.* 7, c. 42), *s.* 7.—A teacher who has been engaged by the managers of a school maintained but not provided by the local education authority cannot sue the local education authority to recover unpaid salary, there being no privity of the contract, although the local education authority may have always paid the salary direct to the teacher up to the period in dispute.—CROCKER v. PLYMOUTH CORPORATION, *K.B.D.*, 391; [1906], 1 K. B. 494; 75 L. J. K. B. 375; 94 L. T. 734.

3. *Non-provided school—Denominational religious instruction—Cost of—Liability of local educational authority—Education Act*, 1902 (2 *Edw.* 7, *c.* 42), *s.* 7.—The local education authority are bound by section 7 of the Education Act, 1902, to pay for denominational religious instruction in non-provided schools.—REX v. WEST RIDING COUNTY COUNCIL, *K.B.D.*; 94 L. T. 674.

4. *Public elementary school—Non-provided school—Mistress—Dismissal—Consent of local education authority—Education Act*, 1902 (2 *Ed.* 7, *c.* 42)—*Powers of sub-committees.*—The managers of a "non-provided" elementary day school, maintained by the local education authority under the Education Act, 1902, gave a teacher notice of dismissal without first obtaining the consent of the local education authority.

Held, that the notice of dismissal was valid, section 7, clause 1 (*c*), of the Education Act, 1902, only making the consent of the local education authority to the dismissal of a teacher a condition on observance of which the managers can require the school to be maintained by the local education authority, but not making its consent a condition precedent to a valid dismissal as between the managers and the teacher.—YOUNG *v.* CUTHBERT, *Ch.D. Buckley, J.*, 296; [1906] 1 Ch. 451; 75 L. J. Ch. 217; 94 L. T. 191.

See also School, 1; Rating, 13.

ELECTION LAW:—

1. *Registration—Occupation franchise—Lodger—Dwelling-house—Part of a house—Landlord residing in house—Control—Representation of the People Act*, 1867 (30 & 31 *Vict. c.* 102), *ss.* 3, 4—*Parliamentary and Municipal Registration Act*, 1878 (41 & 42 *Vict. c.* 26), *s.* 5.—Where rooms in a house are let out to tenants so as to constitute separate dwelling-houses, the mere fact that the landlord resides in the house does not of itself make the tenants lodgers. It is a question of fact in each case depending upon whether the landlord has any right of control over the rooms let to the tenants. If the landlord has no control over the part of the house which is let to a tenant it is immaterial that he retains control over the passages and staircases and other parts which are used in common by the tenants. Nor is the fact that the landlord pays the rates and taxes and executes the repairs to the house inconsistent with an independent occupation, of the part let, by the tenant as an occupier and not as a lodger.—KENT *v.* FITTALL, *C.A.*, 225; [1906] 1 K. B. 60; 75 L. J. K. B. 310; 94 L. T. 76

2. *Registration—Parliamentary franchise—County vote—Ownership claim—Qualifying property situate in borough—Servant of owner entered on Division II. of occupiers' list for same property—Representation of the People Act*, 1832 (2 *Will.* 4, *c.* 45), *s.* 24—*Representation of the People Act*, 1884 (48 *Vict. c.* 3), *s.* 3.—Section 24 of the Representation of the People Act, 1832, enacts that no person shall be entitled to a county vote in respect of his estate as a freeholder in any house "occupied" by himself, capable, as regards value, of conferring on him the right to vote in respect thereof for any borough.

Section 3 of the Representation of the People Act, 1884, enacts that "where a man inhabits any dwelling-house by virtue of any service, and the dwelling-house is not inhabited by any person under whom such man serves in such service, he shall be deemed, for the purposes of this Act and of the Representation of the People Acts, to be an inhabitant occupier of such dwelling-house as tenant."

The fact that a servant of the freehold owner of a dwelling-house situate within a Parliamentary borough has been rightly entered in Division II. of the occupiers' list for the borough as an inhabitant occupier of the dwelling-house by virtue of his service, under section 3 of the Act of 1884, does not oust the occupancy in respect of the dwelling-house of his employer the freeholder, and thereby enable the employer in respect of his ownership of the freehold to obtain a county vote to which he would not otherwise have been entitled, having regard to section 24 of the Act of 1832.—BROOKS *v.* BAKER, *K.B.D.*, 195; [1906] 1 K. B. 11; 75 L. J. K. B. 41; 94 L. T. 97.

3. *Registration—Parliamentary franchise—Mistake—Incorrect entry of voter's name in list—Omission of second Christian name of voter—Objection taken to entry—Absence of declaration—Power of amendment—Parliamentary and Municipal Registration Act,* 1878 (41 *&* 42 *Vict. c.* 26), *ss.* 24, 28 (1).—A voter's name was entered on the overseers' list as Herbert Green, and was duly objected to. The only ground of objection proved was that the right name of the voter was Herbert Ambrose Green. The voter had neither made a claim, nor a declaration under section 24 of the Registration Act, 1878, to correct the misnomer; but upon the hearing of the objection a party agent, on behalf of the voter, requested the barrister to treat the omission of the second Christian name of the voter as a "mistake" and to correct the entry, under section 28 (1) of the Registration Act, 1878. The barrister held that the omission was not a mistake which he was bound to correct after objection had been taken to the entry, and declined to amend and struck the name off the list.

Held, that the omission in the entry on the list of the second Christian name of the voter was a mistake which the barrister was bound to correct, under section 28 (1) of the Registration Act, 1878, even after objection had been taken to the entry, and even although no declaration to correct the entry had been made under section 24 of the Act of 1878.

Soutter v. *Roderick, Barker's case* (1895) Fox & Smith's Registration Cases, p. 36, approved.—GREEN *v.* WANKLYN, *K.B.D.*, 197; [1906] 1 K. B. 394; 75 L. J. K. B. 216; 93 L. T. 770.

4. *Registration—Parliamentary franchise in county—£10 occupation qualification—Claim of two joint occupiers—Value of premises only £20—Third person already on overseers' list, unobjected to, for same premises—Representation of the People Act,* 1867 (30 *&* 31 *Vict. c.* 102). *s.* 27—*Representation of the People Act,* 1884 (48 *Vict. c.* 3), *s.* 5.—The Representation of the People Act, 1867, s. 27, enacts: "In a county where premises are in the joint occupation of several persons as owners or tenants, and the clear yearly value of such premises is such as would, if divided amongst the several occupiers, so far as the value is concerned, confer on each of them a vote, then each of such joint occupiers shall, if otherwise qualified . . . be entitled to be registered as a voter. . . ."

Section 5 of the Representation of the People Act, 1884, enacts: "Every man occupying any . . . tenement in a county, of a clear yearly value of not less than £10, shall be entitled to be registered as a voter . . . in respect of such occupation, subject to the like conditions as a man is at the passing of this Act, entitled to be registered as a voter . . . in respect of the county occupation franchise."

K. and W. claimed to have their names inserted in Division I. of the occupiers' list in a parliamentary county, in respect of a £10 occupation qualification, the nature of their qualification as described in their claims being "offices (joint)." The qualifying premises consisted of a house, of the clear yearly value of only £20, of which the claimants were lessees, and they used, for the purpose of their business, three rooms and a cellar in said house, and also one bedroom occasionally. The remainder of the said house, consisting of three rooms, was, as the barrister found, "occupied" by G. and his wife, G.'s wife being employed and paid by the claimants as their caretaker. G.'s name had been entered by the overseers in Division II. of the occupiers' list in respect of the said house, and no objection had been taken to that entry. There was no evidence, or finding of fact, that G. occupied by virtue of service merely.

The claims of K. and W. were objected to on the grounds that, as the clear yearly value of the whole house was only £20, and inasmuch as G.'s name was ready entered, without objection, in Division II. of the list of occupation electors, in respect of the same premises, the provisions of section 27 of the Act of 1867 and section 5 of the Act of 1884 rendered the claims inadmissible. The revising barrister having allowed the objection to the claims,

The Court, upon the facts of the case as above stated—and refraining to express any opinion as to what its decision would have been if G.'s occupation of the premises had been found to be an occupation by virtue of service merely—affirmed the decision of the revising barrister.—KIRBY *v.* BARBER, *K.B.D.*, 119.

ELECTRIC LIGHT:—

1. *Land acquired for particular purpose—Part not required for that purpose—Application to another permanent purpose—Injunction—Electric Lighting Act,* 1882 (45 *&* 46 *Vict. c.* 56), *s.* 10—*Electric Lighting (Clauses) Act,* 1899 (62 *&* 63 *Vict. c.* 19), *Schedule, clauses* 2 *and* 8.—Where a local authority acquires land, whether compulsorily or by agreement, for a particular purpose, it cannot use any part of the land so acquired for another permanent purpose.—ATTORNEY-GENERAL *v.* PONTYPRIDD URBAN COUNCIL, *Ch.D. Farwell, J.*, 61; [1905] 2 Ch. 441; 74 L. J. Ch. 716.

2. *Nuisance—Leakage of electricity—Explosion—Damage to premises—Electric Lighting Orders Confirmation (No.* 11) *Act,* 1890 (53 *&* 54 *Vict. c. cxcvii.*), *s.* 70.—By a provisional order confirmed by statute the defendants were constituted the undertakers for the supply of electrical energy for lighting purposes in the City of Manchester, and as such undertakers they were under a duty to lay down mains in the streets and to supply electrical energy to persons requiring it. Section 70 of the order provided that "nothing in this order shall exonerate the undertakers from any indictment, action, or other proceeding for nuisance in the event of any nuisance being caused by them." A leakage occurred in one of the defendants' mains opposite the plaintiffs' premises, which caused an explosion and injured the premises.

Held, that this was a nuisance to the plaintiffs for which the defendants were liable.—MIDWOOD *v.* MANCHESTER CORPORATION, *C.A.*, 37; [1905] 2 K. B. 597; 74 L. J. K. B. 884; 93 L. T. 525.

ESTATE DUTY.—See Inland Revenue, 3-5.

ESTOPPEL.—See Bill of Sale, 2; Patent, 3; Ship, 1.

EVIDENCE:—

1. *Deed of grant — Construction — Circumstances under which executed—Improper rejection of evidence —Acts of user before grant.*—When the obvious intention under a deed of grant is to give a title to what has been taken and retained before the actual grant, acts of user before the grant are cogent evidence of the identity of what is granted, for they lead up to and explain what was intended to be conveyed.—VAN DIEMEN'S LAND CO. *v.* MARINE BOARD OF TABLE CAPE, *P.C.*, 498; [1906] A. C. 92; 75 L. J. P. C. 28; 93 L. T. 709.

2. *Privilege—Statement of witness before trial of action.*—The immunity of a witness from legal proceedings in respect of evidence given in a court of justice extends to information communicated to the solicitor engaged in the conduct of the proceedings as to the evidence which the witness is prepared to give.

Judgment of the court below reversed.—WATSON *v.* M'EWAN (or JONES), *H L*; [1905] A. C. 480; 74 L. J. P. C. 151; 93 L. T. 489.

EXECUTOR:—

1. *Administration—Legal personal representative—Right of retainer—Executor of sole trustee—Breach of trust*—Cestui que trust—*Exercise of right of retainer.*—A sole trustee of a fund died insolvent and indebted to beneficiaries. His executrix never acted in the trust.

Held, that the executrix could not be compelled at the instance of the beneficiaries to exercise her right of retainer for their benefit in respect of moneys due from the estate of the deceased trustee to the trust fund.

In re Ridley, [1904] 2 Ch. 774, 9 W. R. Dig. 108, approved.

Fox v. *Garrett*, 28 Beav. 16, overruled.

Sanders v. *Heathfield*, 23 W. R. 331, L. R. 19 Eq. 21, distinguished.—BENETT, RE, WARD *v.* BENETT, *C.A.*, 237; [1906] 1 Ch. 216; 75 L. J. Ch. 122; 94 L. T. 72.

2. *Retainer—Judgment creditor—Judgment against executor—Administration decree.*—A simple contract creditor obtained judgment *de bonis testatoris* against the executrix. The executrix did not plead *plene administravit* or her retainer. Subsequently a decree for administration was made.

Held, that the judgment was conclusive proof that the executrix had assets to satisfy it, and that in the administration action the executrix could not claim to retain a debt due to herself as against the judgment creditor.—MARVIN, RE, CRAWTER *v.* MARVIN, *Ch.D. Swinfen Eady, J.*, 74; [1905] 2 Ch. 490; 74 L. J. Ch. 699; 93 L. T. 599.

See also Attachment, 2; Landlord and Tenant, 7; Partnership, 2.

FACTORY:—

1. *Employing child in meal-times—Dismissal of information—Factory and Workshop Act*, 1901 (1 *Ed.* 7, *c.* 22), *s.* 141.—A child was employed in a factory where the meal-time was from 5.30 to 6 p.m. Work was stopped for the day at 5.30, and the child was employed after that time in wiping the spindles of a machine in a room where the under-manager and several overlookers were present. Notices were exhibited calling attention to the provisions of the Factory Acts against working in meal-times. The justices dismissed an information against the masters for employing a child in meal-time, on the ground that they had used every possible means to carry out the provisions of the Factory and Workshop Act, 1901.

Held, that it could not be said that the masters had used due diligence to enforce the Act within section 141.

Quære, whether the information could have been dismissed within section 16 of the Summary Jurisdiction Act, 1879.—ROGERS *v.* BARLOW, *K.B.D.*; 94 L. T. 519.

2. *Underground bakehouse — Certificate of local authority — Expenses of structural alterations — Apportionment—Landlord and tenant—Covenant to pay outgoings—Right of action—Factory and Workshop Act*, 1901 (1 *Ed.* 7, *c.* 22), *s.* 101, *sub-section* 8. —Where a local authority refuses to certify, under section 101, sub-section 2, of the Factory and Workshop Act, 1901, that an underground bakehouse is suitable to be used as such, unless certain structural alterations are made, by sub-section 8 of that section a court of summary jurisdiction is appointed the sole tribunal to determine whether the owner ought to bear the whole or any part of the expenses of the alterations, and for that purpose to apportion the expenses between the owner and the occupier; and where the owner has made the alterations, he has no right of action against the occupier to recover from him the expenses thereof under a covenant in a lease whereby the occupier has agreed to pay all "outgoings."

Horner v. *Franklin*, [1905] 1 K. B. 479, 53 W. R. Dig. 41, followed.

Goldstein v. *Hollingsworth* [1904] 2 K. B. 578, 53 W. R. Dig. 59, and *Morris* v. *Beal*, [1904] 2 K. B. 585, 53 W. R. Dig. 60, distinguished.—STUCKEY *v.* HOOKE, *C.A.*, 509; [1906] 2 K. B. 21; 75 L. J. K. B. 504; 94 L. T. 723.

See also School, 1.

FISHERY:—

1. *Close time—Bye-law—Alteration of close season —Salmon Fishery Act*, 1873 (36 & 37 *Vict. c.* 71), *s.* 39 (1)—*Salmon Fishery Law Amendment Act*, 1879 (42 & 43 *Vict. c.* 26), *s.* 2.—Section 39 (1) of the Salmon Fishery Act, 1873, enables the conservators of the Severn Fishery Board "to alter the commencement and termination of the annual close season as to the whole or part of the district so that such close season when so altered" should "not be less than 154 days for all modes of salmon fishing except rod and line and" should "not commence later than the 1st day of November in each year."

By bye-law 17 made by the conservators: "The annual close time as to the whole of the Severn Fishery District for all modes of salmon fishing except with rod and line shall commence on the 16th day of August in each year and terminate on the 1st day of February following."

By section 2 of the Salmon Fishery Law Amendment Act, 1879: "Nothwithstanding anything in the Salmon Fishery Acts, 1861 to 1876, contained, the annual close season for putts and putchers shall commence on the 1st of September in each year and terminate on the 1st of May in the ensuing year, both inclusive. None of the provisions of the said Acts as to the weekly close season shall apply to putts and putchers."

Held, that the respondent was justified in fishing with putchers on the 22nd of August, 1905.—PROSSER *v.* CADOGAN, *K.B.D.*; 94 L. T. 777.

2. *Criminal law—Construction of statutes—Malicious Injuries to Property Act*, 1861 (24 & 25 *Vict. c.* 97), *s.* 32—*Salmon Fishery Act*, 1873 (36 & 37 *Vict. c.* 71), *s.* 13.—By section 32 of the Malicious Injuries to Property Act, 1861, as amended by section 13 of the Salmon Fishery Act, 1873, it is an offence to unlawfully and maliciously put lime or any other noxious substance into a salmon river with the intention of destroying fish, notwithstanding that the language of the section of the amending Act cannot be read grammatically with that of the principal Act; the duty of the court, in such cases, being to give effect to the intention of the Legislature —REX *v.* VASEY, *C.C.R.*, 218; [1905] 2 K. B. 748; 75 L. J. K. B. 19; 93 L. T. 671.

3. *Licence to fish—River a tributary of salmon river —Water of river diverted into mill-race and mill-dam —Fishing in dam—Whether dam is a "tributary"—Salmon Fishery Act*, 1865 (28 & 29 *Vict. c.* 121), *ss.* 3, 5, 35—*Freshwater Fisheries Act*, 1878 (41 & 42 *Vict. c.* 39), *ss.* 6, 7.—Under the provisions of the Salmon Fishery Acts a fishery district and fishery board were constituted, and the limits of the district were duly declared. From a river which was a tributary of the River Ouse, which contained salmon, water was diverted into a mill-race, and between the river and the mill-race there was formed a three-cornered dam for the purpose of increasing the water power of a mill. The water from the river entered the mill-race under a bridge, and the dam was fed from the race through an opening in the bank about a yard wide, in front of which there was a grating of iron bars about an inch apart, but there was no clough to hold the water in the dam, and the water flowed to and fro between the race and the dam without hindrance, and when the water in the race was lower than the water in the dam the latter returned into the race. All the water which was diverted from the river into the mill-race and dam either passed over the mill wheel and thence into the river, or continued in an extension of the race and passed into the river about half a mile further down. The mill-dam contained trout, and the dam, race, and river were within the geographical limits of the fishery district.

Held, that the mill-dam was a "tributary" of the river, and that a person fishing for trout therein required the licence of the fishery board.—MOSES *v.* IGGO, *K.B.D.*; [1906] 1 K. B. 516; 75 L. J. K. B. 331; 94 L. T. 548.

4. *Pollution—Oyster beds on foreshore—Occupation —Discharge of sewage into the sea—Damage to oyster beds through acts of sanitary authority—Right of occupier to sue sanitary authority for damages.*—In an action to recover damages from an urban district council for discharging sewage into the sea so as to pollute the plaintiff's oyster storage beds, it appeared that the foreshore on which the beds were situate was part of the waste of the manor, and that the plaintiff and his predecessors had occupied and used the beds for fattening oysters for a period extending as far back as living memory went; that when the plaintiff first acquired the beds, a sewer which had been made by a rural sanitary authority, the predecessors of the defendants, discharged an inconsiderable quantity of sewage into the sea close to the beds; that subsequently the defendants made new sewers and connected them with the old sewer, and thus greatly increased the quantity of sewage discharged from that sewer; and that the plaintiffs beds were thereby contaminated and the oysters therein rendered unsafe for human food.

Held, that the action was maintainable.—FOSTER *v.* WARBLINGTON URBAN COUNCIL, *C.A.*, 575; [1906] 1 K. B. 648; 75 L. J. K. B. 514; 94 L. T. 876.

5. *Sea—Discharge of sewage—Contamination—Public Health Act*, 1848 (11 & 12 *Vict. c.* 63), *s.* 49—*Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 23—*Sea Fisheries Act*, 1868 (31 & 32 *Vict. c.* 45)—*Sea Fisheries Act*, 1888 (50 & 51 *Vict. c.* 54).—A local sanitary authority has no right, either by common law or under the Public Health Acts, to discharge sewage into the sea so as to cause a nuisance.

An injunction to restrain a discharge of sewage by a local sanitary authority may be granted if the prescriptive rights of householders are not interfered with.

Harrington v. *Derby Corporation*, [1905] 1 Ch. 205, 53 W. R. Dig. 138, explained.—HOBART *v.* SOUTHEND, *K.B.D.*, 454; 75 L. J. K. B. 305; 94 L. T. 337.

GARNISHEE—

1. *Attachment of debts—Garnishee order—Discharge of garnishee—Foreign debtor—Foreign garnishee—Possibility of garnishee being sued by debtor in foreign court—Disregard by foreign court of garnishee order—Garnishee not discharged by payment —Ord.* 45, *r.* 1.—In an action against a foreigner residing in Germany the plaintiff recovered judgment and obtained a garnishee order against German bankers who were indebted to the judgment debtor.

Held, that, as the judgment debtor might sue the bankers in Germany for the debt due from them to him and as the German court would not recognize payment under an English garnishee order as a defence to the action on the debt, the garnishee order ought not to have been made.—MARTIN *v.* NADEL, *C.A.*, 525; [1906] 2 K. B. 26; 75 L. J. K. B. 620.

2. *Attachment of debts—Garnishee order—Execution—Rights of garnishor—Garnishee company—Debenture-holder—Priorities—Rules of Supreme Court*, 1883, *ord.* 45; *Part I., App. K., Form* 39.—On an interpleader issue to try the right to the goods seized as between the garnishor and a debenture-holder,

Held, that a garnishee order did not give the garnishor any legal or equitable right in the property of a company in priority to a debenture-holder, who had given valuable consideration for the debenture, where the inference to be drawn from the facts was that the claimant had obtained the debenture simply to secure the amount of his loan without any intention to benefit the garnishees or to collude with them in any way, and therefore that the debenture-holder was entitled to succeed in the issue.—GEISSE *v.* TAYLOR, *K.B.D.*, 215; [1905] 2 K. B. 658; 74 L. J. K. B. 912; 93 L. T. 534.

See also Company, 15

GAS COMPANY:—

1. *Maximum rate of dividend fixed by statute—Income tax paid by company before calculating dividend—Payment of maximum dividend free of income tax.*—The special Act of a gas company provided that the profits of the company to be divided among the shareholders should not exceed 10 per cent. on the share capital.

The company paid income tax on its profits before calculating the dividend.

Held (affirming the judgment of the court below), that in calculating the maximum rate of dividend) income tax thereon must be included, and that the

company was not entitled to pay dividends at the maximum rate free of income tax.

Income tax on profits is not an expenditure necessary to earn such profits.—ASHTON GAS CO. v. ATTORNEY-GENERAL, *H.L.*; [1906] A. C. 10; 75 L. J. Ch. 1; 93 L. T. 676.

2. *Opening road—Reinstatement by local authority—Injury owing to negligent filling in—Gasworks Clauses Act*, 1847 (10 *Vict. c.* 15), *s.* 10—*Metropolis Management Act*, 1855 (18 & 19 *Vict. c.* 120), *s.* 114.—Where a gas company has under its statutory powers opened a street, but the local authority have under section 114 of the Metropolis Management Act, 1855, reinstated such street, the gas company are not liable for damage caused owing to such reinstatement having been done negligently.—CRESSY v. SOUTH METROPOLITAN GAS CO., *K.B.D.*; 94 L. T. 790.

See also Metropolis, 5.

GIFT:—

Delivery—Organ.—C. having lent an organ to a church, which church was vested in trustees upon trust for public worship under the direction of the vicar of the parish, told the plaintiff that he would give him the organ, and handed him a letter written by the then vicar of the parish showing the organ was only lent and the receipts for the organ. Later, when in the church, he put his hand on the organ and said to H., "I have given" or "I give" this to the plaintiff. The organ remained in the church.

The plaintiff claimed the organ, and the vicar disputed the plaintiff's claim.

In an action to recover the organ, damages for its detention, and a declaration of title against the vicar and churchwardens,

Held, that there was a completed gift by C. to the plaintiff; and

Held, further, that the vicar was properly joined as a defendant in the claim for a declaration of title.—RAWLINSON v. MORT, *K.B.D.*; 93 L. T. 555.

HARBOUR:—

1. *Defective berth—Damage by grounding—Duty of harbour authority—Condition of harbour and berth—56 Geo.* 3, *c.* 81, *s.* 27—*Duty of wharfinger to discover danger—Duty to warn vessels.*—The harbour at S. was vested in trustees who own and have the control and management of the harbour and berths therein, one of which is alongside a wharf known as the K. wharf. The trustees invite vessels to use the harbour and levy tolls on vessels doing so. The K. wharf is owned, controlled, and managed by the London, Brighton, and South Coast Railway Co., who collect dues on all goods loaded or discharged at the wharf. Vessels loading or discharging at the wharf have to take the ground at low water at the berth alongside the wharf.

The Trinity House pilots licensed to pilot vessels into and out of the harbour at S. from time to time take soundings in the harbour for the purpose of being able to perform their duty to the ships who employ them, and in pursuance of the directions given them by the pilotage authority. *The B.*, a French steamship, was employed to bring a consignment of flour to R. & A., merchants at S., who owned a warehouse on the K. wharf built on land leased from the railway company. The flour which was carried under bills of lading was to be stored in the warehouse, and the railway company received from R. & A., the consignees of the flour, fees and dues for permission to receive the flour at the wharf. The ship's brokers, who held both the ship's and consignees' bill of lading, expecting the arrival of *The B.*, sent a postcard to the pilots at S. directing them to berth *The B.* on her arrival at the K. wharf, and this was done. At low water *The B.* took the ground and was injured by grounding on a heap of rubbish lying in the harbour alongside the wharf. Neither the trustees nor the railway company as wharfingers had ever sounded the berth, each thinking it was the duty of the other to do so, and also because both relied on the soundings made by the pilots, whom they thought would tell them if anything was wrong. The owners of *The B.* sued the trustees and the wharfingers, the railway company, for the damages sustained by them by reason of the defective condition of the berth, and obtained judgment against both defendants. Both defendants appealed to the Court of Appeal.

Held (confirming the judgment of Bargrave Deane, J.), that the trustees were liable for the damage caused by the defective berth, as they had been guilty of a breach of their statutory duty to remove obstructions for the purpose of preserving the navigation and use of the harbour, and that the railway company, as wharfingers, were liable, for there was at least a duty on them to take reasonable care to find out whether the berth was safe, and that, in the event of the state of the berth being unknown to them, there was a duty on them to warn *The B.* that they did not know what condition the berth was in.—"BEARN," THE, *C.A.*; [1906] P. 48; 75 L. J. P. 9; 94 L. T. 265.

2. *"Port"—Ships loading and unloading—Statutory tolls and dues—Private docks and quays constructed by and belonging to landowner—Claim for exemption—"Limits of the port"—Enlargement—Fiscal port*—Contemporanea expositio—*Carnarvon Harbour Act*, 1793 (33 *Geo.* 3, *c. cxxiii.*)—*Carnarvon Harbour Act*, 1809 (49 *Geo.* 3, *c. xxiv.*)—*Evidence—Admissibility.*—Near the village of Port Dinorwic, which is situate about four miles north of Carnarvon, the plaintiff constructed docks and quays of his own, at which he was in the habit of loading vessels owned or chartered by him with slates from the Dinorwic quarries, which formed part of his estate, for the purpose of their being conveyed by sea to purchasers. These vessels usually passed out of the Menai Straits by the north end thereof. The vessels on their return brought back to Port Dinorwic other goods for the plaintiff's use, and these goods were unloaded at his docks and quays.

The trustees of Carnarvon Harbour Trust contended that Port Dinorwic was within the limits of the port of Carnarvon, and claimed the right to levy tolls on the plaintiff's vessels under the Carnarvon Harbour Acts of 1793 and 1809.

Held, first, that the word "port" in those Acts meant the fiscal port; and that the performance of duties imposed on the trustees by the Acts conferred benefits which were participated in by the plaintiff and which the duties imposed by the Acts were intended to remunerate.

Held, secondly, that that which the plaintiff had himself actually done amounted by his own act to an enlargement of the limits of the fiscal port of Carnarvon, and extended the same to any dock or quay constructed by him subsequent to the acts on his own land beyond the line of high-water mark.

Admissibility of ancient survey as evidence discussed.

Decision of Kekewich, J., affirmed.—ASHETON-SMITH v. OWEN, *C.A.*; [1906] 1 Ch. 179; 75 L. J. Ch. 181; 94 L. T. 42.

See also Rating, 3.

HIGHWAY:—

1. *Diversion of highway—Persons aggrieved—Public interest—Questions left to jury—Highway Act,* 1835 (5 & 6 *Will.* 4, *c.* 50), *s.* 89.—Section 89 of the Highway Act, 1835, provides: "In case of such appeal the justices at the next quarter sessions shall . . . impannel a jury of twelve disinterested men out of the persons returned to serve as jurymen at such quarter sessions, and if after hearing the evidence produced before them the said jury shall return a verdict that the proposed new highway is nearer or more commodious to the public 'or' that the party appealing would not be injured or aggrieved, then the said court of quarter sessions shall dismiss such appeal . . . but if the said jury shall return a verdict that the proposed new highway is not nearer or not more commodius to the public, or that the party appealing would be injured or aggrieved, then the said court of quarter sessions shall allow such appeal, and shall not make such order as aforesaid."

Held, that the word "or" must be read "and," with the result that if the jury return a verdict that the party appealing is aggrieved, the court of quarter sessions must allow the appeal notwithstanding that the jury also return a verdict that the new highway is more commodious.—WALKER *v.* YORK CORPORATION, *K.B.D.*, 493; [1906] 1 K. B. 724; 75 L. J. K. B. 413; 94 L. T. 744.

2. *Local government—Urban sanitary authority—Subsidence of highway caused by mining operations—Measure of damages.* The proprietary right of an urban sanitary authority in a highway which is vested in them under section 149 of the Public Health Act, 1875, is limited to what is necessary to maintain the road as a highway; and accordingly, where the highway has subsided owing to mining operations, the urban sanitary authority are only entiled to recover the cost of making it as commodious as before to the general public, and not the cost of restoring it to its original level.—WEDNESBURY CORPORATION *v.* LODGE HOLES COLLIERY CO., *K.B.D.*, 412; [1905] 2 K. B. 823; 75 L. J. K. B. 112; 93 L. T. 307.

3. *Locomotive—Nuisance—Breaking water-mains—Excessive weight—Repair—Standard of maintenance—Locomotives Acts,* 1861 (24 & 25 *Vict. c.* 70), *s.* 13; *and* 1865 (28 & 29 *Vict. c.* 83), *s.* 12.—The plaintiffs were the highway authority and the owners of the water system within their district.

Held, that the defendant, who was the owner of a heavy traction-engine, was liable to make good damage to a water-main laid under a road and broken by the weight of the engine passing over it, as there was no evidence that the water-main, which had been put down some years before, was not sufficiently strong and well laid to withstand the pressure of the ordinary traffic of the district; or of any negligence on the part of the plaintiffs, in reference to their duty to repair and maintain the road, that contributed to the fracture.—CHICHESTER CORPORATION *v.* FOSTER, *K.B.D.*, 199; [1906] 1 K. B. 167; 75 L. J. K. B. 33; 93 L. T. 750.

4. *Nuisance—Laying rubbish on highway—"Injury, interruption, or personal danger of any person travelling thereon"—Conviction for laying rubble "to the interruption and personal danger" of person travelling on highway—Duplicity—Highway Act,* 1835 (5 & 6 *Will.* 4, *c.* 50), *s.* 72.—By section 72 of the Highway Act, 1835, if any person shall lay any timber, rubbish, or other matter or thing whatsoever upon the highway, "to the injury of such highway, or to the injury, interruption, or personal danger of any person travelling thereon, he shall be liable to be fined."

Held, that this clause creates, not four offences, but two offences only—namely, the doing of any of the specified acts to the injury of the highway, and the doing of them "to the injury, interruption, or personal danger of any person travelling" on the highway, the latter words creating one offence only; and, consequently, a conviction for laying rubble on the highway "to the interruption and personal danger" of any person travelling on the highway is a conviction for one offence only, and is not void for duplicity.

In such case it is sufficient to support the conviction if police constables who know that the obstruction is there see the obstruction while passing along the highway, although there is no evidence that any other person is thereby interrupted or endangered.—SMITH *v.* PERRY, *K.B.D.*; [1906] 1 K. B. 262; 75 L. J. K. B. 124; 94 L. T. 140.

5. *Rights of way—Declaration of road to be a public highway—Consent of "occupier"—Construction—Certiorari—Highways Act,* 1862 (25 & 26 *Vict. c.* 61), *s.* 36.—Section 36 of the Highways Act, 1862, enacts: "Where the inhabitants of any parish are desirous of undertaking the repair of any driftway, or private carriage or occupation road, within their parish, in return for the use thereof, the district surveyor may, at the request of the inhabitants of such parish assembled in vestry duly convened for the purpose, and with the consent in writing of the owner and occupier of every part thereof, apply to the justices in petty sessions to declare such driftway or road to be a public highway to be repaired at the expense of the parish . . ."

Held, the owner and occupier of the road, whose consent in writing must be obtained in writing, does not include persons who have mere rights of way or easements over the road.—REX *v.* SOMERS, *K.B.D.*, 402; [1906] 1 K. B. 326; 75 L. J. K. B. 144; 94 L. T. 194.

6. *Roadside waste—Road between irregular fences—Presumption of dedication—Local Government Act,* 1894 (56 & 57 *Vict. c.* 73), *s.* 26 (1)—*Public Authorities Protection Act,* 1893 (56 & 57 *Vict. c.* 61), *s.* 1—*R. S. C.*, 1883, *ord.* 25, *r.* 5.—The fact that a public highway runs between fences raises the presumption that all the open space between the fences forms portion of the highway, and was intended to be dedicated to the public, unless there is evidence to rebut that presumption. The fact that the fences are irregular, and not in a continuous line, does not by itself rebut the presumption of dedication.

Neeld v. *Hendon Urban District Council,* 81 L. T. N. S. 405, 48 W. R. Dig. 67, and *Countess of Belmore* v. *Kent County Council,* 49 W. R. 459, [1901] 1 Ch. 873, distinguished.

Reg. v. *United Kingdom Electric Telegraph Co.*, 10 W. R. 538, 6 L. T. N. S. 378, and *Harvey* v. *Truro Rural District Council,* 52 W. R. 262, [1903] 2 Ch. 638, followed. — OFFIN *v.* ROCHFORD RURAL COUNCIL, *Ch.D. Warrington, J.*, 244; [1906] 1 Ch. 342; 75 L. J. Ch. 348; 94 L. T. 669.

See also Corporation, 1; Local Government, 9, 10.

HOSPITAL:—

Public health—Infectious hospital—Discharge of patient while still infectious—Liability of local authority—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 124, 131, 132.—The defendants, a local authority, acting under the provisions of the Public Health Act, 1875, provided for the use of the inhabitants of their district a hospital for the

reception of persons suffering from infectious diseases. A visiting physician, who was a competent medical practitioner, was appointed to the hospital, and acted under the general directions of the hospital committee of the defendants, the rules providing (*inter alia*) that he should be responsible for "the treatment of the patients from the beginning to the end of their stay, and also for their freedom from infection when discharged." A son of the plaintiff was treated in the hospital while suffering from a mild attack of scarlet fever and was ultimately discharged by the visiting physician while still in an infectious condition, and under circumstances which a jury found to amount to a want of reasonable skill and care on his part in and about the discharge; after the boy had returned home, he communicated the disease to three other children of the plaintiff. The plaintiff then sued the defendants to recover the expense to which he had been put in regard to the illness of his other children owing to the premature discharge of his son from the hospital by the visiting physician,

Held, that the plaintiff was not entitled to recover, for the legal obligation of the defendants extended only to the provision of reasonably skilled and competent medical attendance for the patients, which they had discharged, and that there was no absolute undertaking or obligation on their part that no patient should be discharged by the visiting physician while still in a condition which might cause infection.—EVANS *v.* LIVERPOOL CORPORATION, *K.B.D.*; [1906] 1 K. B. 160.

HOUSE OF LORDS:—

Practice—Peer's right to be heard at the bar—Barrister.—A barrister who is also a peer may argue as counsel on an appeal at the bar of the House of Lords, but may not appear to argue before Committees of the House or before the House when sitting under the presidency of the Lord High Steward on a criminal case.—LORD KINROSS, RE, *H.L.*; [1905] A. C. 468.

HUSBAND AND WIFE:—

1. *Joint account—Overdraft—Security given by wife.*—On the 4th of December, 1902, a marriage took place. The husband at that time had an account at a bank in S. This account was on the 17th of December, 1902, transferred to the joint names of himself and his wife, and drawn on by both husband and wife. On the 18th of May, 1903, when the husband was absent, the wife deposited with the bank the deeds of a house belonging to her, and charged them for the debt then or thereafter to become due to the bank from her either solely or jointly with any other person, and agreed to execute a legal mortgage containing a covenant for payment and a power of sale and other proper clauses. The wife died on the 27th of August, 1904, leaving furniture worth £300 to the husband absolutely, and the house she had mortgaged to the bank, worth about £1,400, to her husband for life, with remainder to her next-of-kin. The overdraft on the 18th of May, 1903, was £107, and at the date of her death it was £414. The wife had paid in about £100 into the account.

Held, that the true inference was that the husband and wife agreed to provide jointly for current household expenses, and that each of them ought to pay one moiety of the overdraft.—SHAW, RE, SHAW *v.* JONES, *Ch.D. Swinfen Eady, J.*; 94 L. T. 93.

2. *Married woman—Purchase of goods—Liability—"Contract otherwise than as agent"—Married Women's Property Act*, 1893 (56 & 57 *Vict. c.* 63), *s.* 1.—In order that a contract entered into by a married woman may bind her separate property under the Married Women's Property Act, 1893, it must affirmatively be shown that she entered into the contract otherwise than as agent.

In 1903 a married woman, while living with her husband, bought from a tradesman certain articles of dress suitable to her position and with the consent of her husband. She had made previous purchases and paid for them with her own cheques, and on the occasion in question was debited with the amount charged as "Mrs. H.," but was without any separate property of her own.

Held (Lords Robertson and Atkinson dissenting), that there was no evidence that she contracted "otherwise than as agent" within the meaning of section 1 of the Married Women's Property Act, 1893, and therefore that she was not liable.

Decision of the Court of Appeal affirmed.—PAQUIN *v.* BEAUCLERK, *H.L.*, 521; [1906] A. C. 148; 75 L. J. K. B. 395; 94 L. T. 350.

3. *Summary jurisdiction — Appeal — Separation order—Application for discharge of order—Fresh evidence—Time for appeal—Summary Jurisdiction Act*, 1848 (11 & 12 *Vict. c.* 43), *s.* 11—*Summary Jurisdiction (Married Women) Act*, 1895 (58 & 59 *Vict. c.* 39), *ss.* 7, 8.—An application under section 7 of the Summary Jurisdiction (Married Women) Act, 1895, to alter, vary, or discharge an order made under that Act, is on the same footing, as far as fresh evidence is concerned, as an application for a new trial. When, therefore, there is fresh evidence—that is, evidence which could not reasonably have been made available at the date of the order, or relating to something which has happened since the date of the order, either party is entitled to take out a fresh summons under the section, and have the case determined. There is no time limit fixed, and section 11 of the Summary Jurisdiction Act, 1848, prescribing six months as the time within which an application must be made, does not apply.—WEIGHTMAN *v.* WEIGHTMAN, *P.D.*; 94 L. T. 620.

INCOME TAX.—See Inland Revenue, 8-16; Trustee, 3.

INJUNCTION:—

1. *Equitable execution—Summons for appointment of receiver—Form of summons—Injunction restraining judgment debtor from dealing with property—R. S. C.*, 1883, *Appendix K, Form* 61 (a).—Where a judgment creditor applies for leave to issue a summons for the appointment of a receiver of the rents and profits of the judgment debtor's property by way of equitable execution, the summons ought not, as a matter of course, to contain an injunction, as in Form 61 (*a*) of Appendix K to the Rules of the Supreme Court, restraining the judgment debtor from dealing with the property. Such an injunction ought only to be granted where there is evidence of danger that the property may be made away with before the hearing of the summons.—LLOYD'S BANK *v.* MEDWAY UPPER NAVIGATION CO., *C.A.*, 41; [1905] 2 K. B. 359; 74 L. J. K. B. 851; 93 L. T. 224.

2. *Trespass—Father and son—Parental obligations.*—A son, aged thirty-five, strong in body, and by education capable of earning his living, insisted on visiting his father's house and staying there contrary to his father's wishes. The father was willing to maintain him elsewhere.

In an action brought by the father against the son for an injunction restraining the son from entering or remaining, &c.

Held, that a case for granting an injunction had not been made out; it was inadvisable to put it in the power of a father to get his son committed to prison for coming to visit him.

Observations on the duties of parents to children. —WATERHOUSE *v.* WATERHOUSE, *Ch.D. Buckley, J.*; 94 L. T. 133.

INLAND REVENUE:—

1. *Carriage—Licence—Exemption—Customs and Inland Revenue Act*, 1888 (51 *&* 52 *Vict. c.* 8), *s.* 4 (3).—A governess cart that was used for collecting debts and obtaining orders by a travelling upholsterer, and which was used for the conveyance of goods and solely in connection with the business, is not a vehicle "constructed or adapted for use and is used solely for the conveyance of any goods . . . in the course of trade," and so exempt from requiring a carriage licence.—WHITHAM *v.* MORRIS, *K.B.D.*; 93 L. T. 813.

2. *Carriage tax—"Constructed or adapted for use and is used solely for the conveyance of any goods"—Exemptions—Customs and Inland Revenue Act*, 1888 (51 *&* 52 *Vict. c.* 8), *s.* 4, *sub-section* 3.—The respondent was summoned under section 4 of the Customs and Inland Revenue Act, 1888, for keep ng a carriage without a licence. The vehicle in question was known in the carriage trade as a governess cart, and was used solely by the respondent for the purpose of his business as a general broker and wardrobe dealer, and never for the purposes of pleasure. The justices held that the vehicle came within the exception in the section 4, sub-section 3, as being "a vehicle which is constructed or adapted for use and is solely for the conveyance of any goods or burdens in the course of trade or husbandry" and dismissed the summons.

Held, that the word "solely" in the exception governed the words "constructed or adapted for use" as well as the words "and is used"; and therefore that the vehicle in question did not come within the exception, and that the respondent was liable to the tax.

The *dictum* in *Hanworth* v. *Williams*, 67 J. P. 315, 19 Times L. R. 384, to the contrary effect, dissented from.

Danby v. *Hunter*, 28 W. R. 228, 5 Q. B. D. 20, doubted.—MOORE *v.* LEWIS, *K.B.D.*, 194; [1906] 1 K. B. 27; 75 L. J. K. B. 89; 93 L. T. 812.

3. *Estate duty—Lunacy—Lunatic entitled to both real and personal estate—Estate duty payable for real estate out of personalty—Charge for next-of-kin—Surplus rents—Finance Act*, 1894 (57 *&* 58 *Vict. c.* 30), *s.* 9, *sub-section* 1.—A testatrix, by her will, gave all her real and personal estate to D., her sole executor, upon trust, in certain events which had taken place, for her brother, a lunatic. She died in 1896. D., as committee as well as executor, paid all the estate duty, for realty and personalty, out of personalty. The lunatic died in 1903 intestate. The lunatic's next-of-kin claimed that they were entitled to a charge on the real estate for the duty so paid out of the personalty, on the ground that during the lunatic's life the income of the realty being more than enough for his support, the surplus rents had been accumulating and were quite enough to have satisfied the estate duty.

Held, on the assumption that a charge on the real in favour of the personal estate was created by such payment, which point the court refused to decide, the accumulation of rents ought to have borne the charge, which must be considered to have been discharged thereout; and therefore that the claim of the next-of-kin failed. — HOLE, RE, DAVIES *v.* WITTS, *Ch.D. Farwell, J.*, 73; [1905] 2 Ch. 384; 74 L. J. Ch. 689; 93 L. T. 153.

4. *Estate duty—Property passing on death—Finance Act*, 1894 (57 *&* 58 *Vict. c.* 30), *s.* 5, *sub-section* 3; *s.* 21, *sub-section* 5—*Finance Act*, 1896 (59 *&* 60 *Vict. c.* 28), *ss.* 14, 15, *sub-section* 1.—Certain property described as the husband's fortune, and other property described as the wife's fortune, were settled upon trust (subject to certain life interests) to sell and invest and pay out of the income during the joint lives of husband and wife an annuity of £400 to the wife, and the residue of the income during the life of the wife to the husband; and after the death of the wife, if the husband survived, to pay the whole income to the husband for life; and after the death of the husband to pay the whole income to the wife for life, and after the death of the survivor upon certain trusts for children; and failing children, that the trustees should, after the death of the husband and wife, stand possessed of the husband's fortune in trust for his executors, &c., and should stand possessed of the wife's fortune, if the wife should survive the husband, for her executors, &c. There was no issue of the marriage, and the wife survived her husband. The question was whether estate duty was payable on the wife's fortune.

Held, following *Attorney-General* v. *Penrhyn*, 83 L. T. 103, that the case was not within the saving clause in section 15, sub-section 1, of the Finance Act, 1896, and, following *Attorney-General* v. *Strange*, 46 W. R. 663, [1898] 2 Q. B. 39, not within section 21, sub-section 5, of the Finance Act, 1894, but that, following *Attorney-General* v. *Wood*, 45 W. R. 663, [1897] 2 Q. B. 102, the case was within the meaning of section 5, sub-section 3, of the Finance Act, 1894, and that so much therefore of the wife's fortune as formed part of the capital which produced the income of £400 a year must not be deemed to have passed on the husband's death. Estate duty was therefore payable on the wife's fortune, except as to so much as her share of the capitalized value of the fund which produced the income of £400 a year.—ATTORNEY-GENERAL *v.* GLOSSOP, *K.B.D.*, 376; [1906] 1 K. B. 284; 75 L. J. K. B. 151; 94 L. T. 27.

5. *Estate duty—Settlement estate duty—Incidence of duties and interest—General residue insufficient—Annuities payable out of particular fund—Liability of legatee of particular residue—Finance Act*, 1894 (57 *&* 58 *Vict. c.* 30), *s.* 5, *sub-section* 1; *s.* 6, *sub-section* 2; *s.* 9, *sub-section* 1; *s.* 14, *sub-section* 1—*Finance Act*, 1896 (59 *&* 60 *Vict. c.* 28), *s.* 19, *sub-section* 1.—A testator, who died in the year 1895, bequeathed "all my moneys invested in and upon any stocks or funds, whether in or out of the United Kingdom, and all my railway stocks, shares, debentures, and bonds, and generally all and every my securities for money" to trustees upon trust during the life of his sister to pay out of the income three annuities of £1,000, £500, and £500 respectively, and the residue thereof to his brother W. during his life.

After the death of the testator's sister the trustees were to hold the trust fund, as to two sums of £21,000 and £18,000, upon certain trusts in favour of two of the testator's brothers and their issue; and to stand possessed of the residue upon trust for W. for life, with remainders over. The testator bequeathed all the residue of his personal estate of whatever kind to W., subject to the payment of his funeral and testamentary expenses and debts, and certain annuities.

The residuary personalty was insufficient to pay

the testator's debts and funeral and testamentary expenses, so a part of the estate duty had to be paid out of the trust fund.

Held, that the interest given to W. in each case was not a share of the fund, but an interest in the actual residue after payment respectively of the annuities and the two sums of £21,000 and £18,000; and therefore the annuities and those two sums were not liable to diminution by reason of the estate duty having to be borne by the fund or on account of the settlement estate duty being payable in respect of the fund.

Decision of Kekewich, J. (92 L. T. Rep. 758), affirmed.—DE QUETTEVILLE *v.* DE QUETTEVILLE, *C.A.*; 93 L. T. 579.

6. *Excise—Retail sale of beer—Licence for one shop—"Soliciting, taking, or receiving orders" at unlicensed premises—Person who has licence for one shop soliciting orders at unlicensed shop—Liability for act of servant—Revenue Act*, 1867 (30 & 31 *Vict. c.* 90), *s.* 17.—Section 17 of the Revenue Act, 1867, provides that: "If any person shall solicit, take, or receive any order for spirits, wine, or other article, for the dealing in, retailing, or selling whereof an excise licence is by law required, without having in force a proper excise licence authorizing him so to do," he shall be liable to a penalty.

Held, that this section requires a proper excise licence to be taken out with respect to the shop or premises at which the soliciting or accepting of orders takes place, although the person who so solicits or accepts the order is himself duly licensed to deal in or sell the particular article at other premises; and, consequently, a person commits a breach of this section who, although he has in force in respect of one shop a proper excise licence for the retail sale of beer for consumption off the premises, solicits or accepts, either by himself or by his assistant or servant, at another shop, in respect of which he has no such licence, orders for beer for the selling whereof an excise licence is required, which orders are to be forwarded to and to be executed from the licensed premises, and in such case the licensed person for whom the order is accepted is equally liable whether the order is accepted by himself or by his assistant in the shop.—ELIAS *v.* DUNLOP, *K.B.D.*; [1906] 1 K. B. 266; 75 L. J. K. B. 168; 94 L. T. 164.

7. *Imported watches—Customs Act*, 1842 (5 & 6 *Vict. c.* 47), *s.* 59—12 *Geo.* 2, *c.* 26.—Imported gold and silver watches are not "plate" within the meaning of section 59 of the Customs Act, 1842, and a seller of such watches which have not been assayed, stamped, and marked as required by the Customs Act, 1842, is not, therefore, liable to the penalties imposed by 12 Geo. 2, c. 26.—GOLDSMITHS' COMPANY *v.* WYATT, *K.B.D.*, 144; [1905] 2 K. B. 586; 74 L. J. K. B. 822; 93 L. T. 515.

8. *Income tax—Annuity or annual payment—Deduction of income tax—Income Tax Acts*, 1842 (5 & 6 *Vict. c.* 35), *s.* 102; *and* 1853 (16 & 17 *Vict. c.* 34), *s.* 40—*Customs and Inland Revenue Act*, 1888 (51 & 52 *Vict. c.* 8), *s.* 24, *sub-section* 2.—The plaintiff was the owner of a leasehold interest, expiring in 1912, in certain property which was sub-let to the defendants. The net rent accruing to the plaintiff after payment of rent to the superior landlord was £1,625 per annum. The plaintiff agreed to sell the defendants his reversion in consideration of a cash payment of £1,000 and the execution of a deed whereby the defendants covenanted to pay to the plaintiff £1,625 per annum to the end of the term. The defendants claimed to deduct income tax from the annual sum of £1,625 under section 40 of the Income Tax Act, 1853.

Held, that the object of the transaction being to secure to the plaintiff to the end of the term the same net amount that he had previously received as rent, the payments were annual payments within section 40 of the Income Tax, 1853, and that therefore the deduction had been properly made.—CHADWICK *v.* PEARL LIFE ASSURANCE CO., *K.B.D.*, 78; [1905] 2 K. B. 507; 74 L. J. K. B. 671; 93 L. T. 25.

9. *Income tax—Annuity payable under contract—Annual sum consisting partly of capital and partly of interest—Income Tax Act*, 1842 (5 & 6 *Vict. c.* 35), *s.* 102—*Income Tax Act*, 1853 (16 & 17 *Vict. c.* 34), *s.* 2, *Schedules C and D.*—By virtue of contracts made in 1849 and 1854 between the East India Company and a railway company the Secretary of State for India had the option of purchasing the railway by payment of an annuity. Before the time limited for exercising the option arrived, the Secretary of State concluded a bargain with the railway company, which was sanctioned by an Act of Parliament of 1879, as to the terms on which the purchase of the railway by payment of an annuity should be carried out. The terms contained a statement that the amount of the annuity of £5 12s. 6d. into which every £100 stock of the company was intended to be commuted at the price of £125 was calculated on the basis of £5 7s. 6d., part thereof being interest at the rate of £4 6s. per cent. per annum on the said amount of £125, and of a sum of 5s. other part thereof being the amount required to be set aside for the purpose of a sinking fund.

Held, that, notwithstanding the fact that the bargain was concluded before the time limited for exercising the option arrived, and notwithstanding the statement as to the manner in which the annuity was calculated, the principle of *Secretary of State for India* v. *Scoble*, 51 W. R. 675, [1903] A. C. 299, applied, and income tax was payable only on so much of the annuity as in accordance with that case really represented interest.—EAST INDIAN RAILWAY *v.* SECRETARY OF STATE FOR INDIA, *C.A.*, 4; [1905] 2 K. B. 413; 74 L. J. K. B. 779; 93 L. T. 220.

10. *Income tax—Depreciation by reason of wear and tear—Customs and Inland Revenue Act*, 1878 (41 & 42 *Vict. c.* 35), *s.* 12.—The appellants, a firm of shipowners, were the owners of a fleet of vessels, whose average age during the years of assessment was thirty-one years, also of a wooden hulk forty years old used by them in a coal-bunkering business. Prior to the first year of assessment the appellants had been allowed from their gross profits deductions by reason of wear and tear of sums amounting in all to 96 per cent. of the prime value, including sums expended on them by way of additions and repairs, other than ordinary repairs. The Commissioners of Inland Revenue found as a fact that the breaking-up value of the ship was considerably more than 4 per cent. of the prime cost, together with the repairs and additions referred to, and refused to allow any further sum for depreciation in respect of the ships under section 12 of the Customs and Inland Revenue Act, 1878, or in respect of the hulk, on the ground that it was not "plant" within the meaning of the section.

Held, that the commissioners were not entitled to take the depreciation allowed in previous years, and that they were bound under section 12 to make a just and reasonable allowance in respect of the

diminution in value by reason of wear and tear during the years of assessment.

Held, also, that the hulk was plant within the section 12.—HALL *v.* RICKMAN. *K.B.D.*, 380; [1906] 1 K. B. 311; 75 L. J. K. B. 178; 94 L. T. 224.

11. *Income tax—Exemption—Society—Income Tax Act*, 1842 (5 & 6 *Vict. c.* 35), *s.* 163.—A society whose aggregate annual income is less than £160 is not entitled to claim exemption from income tax under section 163 of the Income Tax Act, 1842, as extended by the Finance Act, 1894.

Judgment of the court below reversed.—CURTIS *v.* OLD MONKLAND CONSERVATIVE ASSOCIATION, *H.L.*; [1906] A. C. 86; 75 L. J. P. C. 31; 94 L. T. 7.

12. *Income tax—Husband and wife—Deed of separation — Alimony—Deduction of income tax—Income Tax Act*, 1842 (5 & 6 *Vict. c.* 35), *s.* 102.—Where a wife is entitled under a deed of separation to an annuity by way of alimony, the husband may deduct income tax in respect of the annuity.

Warren v. *Warren*, 43 W. R 490, followed.

Decision of Kekewich, J. (*ante*, p. 448), affirmed.—BARRY'S TRUSTS, RE, BARRY *v.* SMART, *C.A.*, 621.

13. *Income tax—Profits—Trade carried on abroad—Mining—Exhaustion of nitrate grounds—Deduction—Income Tax Acts*, 1842 (5 & 6 *Vict. c.* 35), *ss.* 100, 159, *Schedule D, case* 1, *rr.* 1, 3; *and* 1853 (16 & 17 *Vict. c.* 34), *s.* 2, *Schedule* D.—An English company acquired land abroad for commercial purposes, the upper surface of which was gradually exhausted in the production of nitrates and iodine, which were sold and large profits realized. The amount and value of the soil utilized could be ascertained.

Held, that in estimating the yearly profits of the company under Schedule D of the Income Tax Acts, no deduction could be allowed in respect of such exhaustion of capital.

Decision of the Court of Appeal (53 W. R. 257, [1905] 1 K. B. 184), affirmed.—ALIANZA CO. *v.* BELL, *H.L.*, 413; [1906] A. C. 18; 75 L. J. K. B. 44; 93 L. T. 705.

14. *Income tax—Profits or gains of profession or vocation—Minister of chapel—Grant from "Stipend Augmentation Fund"—Income Tax Act*, 1853 (16 & 17 *Vict. c.* 34), *s.* 2, *Schedule D.*—The minister of a chapel received a grant from a fund called the "Ministers' Stipend Augmentation Fund."

That fund was vested in trustees, and managed by a committee.

The income of the fund was to be applied by the committee towards the augmentation of the stipends of ministers of such congregations as they might from time to time in this discretion select.

Each grant was to be made for the current year only, and, in making such grant, regard was to be paid to the state and condition of the congregation, and their ability to make adequate provision for their minister. The private income, the stipend received from the congregation, the age, training, and length of service of each applicant for a grant was also taken into consideration. Each grant was paid half-yearly, and ceased on the death, resignation, or removal of the recipient, and any part of the grant then unpaid was not paid at all either to him or his successor.

Held (reversing the judgment of Phillimore, J.), that the amount of the grant was part of the profits or gains of the minister in his profession or vocation, and that he was chargeable with income tax in respect thereof.—POYNTING *v.* FAULKNER, *C.A.*; 93 L. T. 367.

15. *Income tax—Profits or gains arising from trade—"Person residing in the United Kingdom"—"Trade exercised within the United Kingdom"—Company owning mines abroad—Registration abroad—Head office abroad—Business mainly conducted in London—Income Tax Act*, 1853 (16 & 17 *Vict. c.* 34), *s.* 2, *Schedule D.*—A company possessed of diamond mines in Cape Colony, and carrying on the business of diamond merchants, was registered as a ilmited company in Cape Colony, and had its head office at Kimberley, where the general meetings of the shareholders were held. It had also an office in London, and the majority of the directors resided in England.

Held, having regard to all the circumstances of the case, which showed that the real business of the company was conducted in London, first, that the company was resident within the United Kingdom; and, secondly, that it exercised trade within the United Kingdom, so as on both grounds to be chargeable with income tax on the profits of its trade under Schedule D of the Income Tax Act. 1853.—DE BEERS CONSOLIDATED MINES *v* HOWE, *C.A.*, 9; [1905] 2 K B. 612; 74 L. J. K. B. 934; 93 L. T. 63.

16. *Income tax, Schedule A—Sewer or sewage carrier—"Hereditament capable of actual occupation"—Assessment*—16 & 17 *Vict. c.* 34.—The Income Tax Commissioners for a district affirmed an assessment made upon a sewerage board under Schedule A of 16 & 17 Vict. c. 34, in respect of some 2½ miles of the length of a sewer or sewage carrier passing through or over land in a parish forming part of their district. The sewerage board appealed on the ground that they had no land in the parish and that their interests in the realty were easements only acquired for the purpose of the sewer or sewage carrier.

Held, that the appellants were liable to the assessment.

Taylor v. *Oldham*, 4 Ch. D. 39, discussed.—YSTRADYFODWG AND PONTYPRIDD SEWERAGE BOARD *v.* BENSTED, *K.B.D.*, 440; [1906] 1 K. B. 294; 75 L. J. K. B. 202; 94 L. T. 20.

17. *Inhabited house duty—Office for professional purpose*—48 *Geo.* 3, *c.* 55, *Schedule B, r.* 2—57 *Geo.* 3, *c.* 25, *s.* 1—*House Tax Act*, 1851 (14 & 15 *Vict. c.* 36), *Schedule—Customs and Inland Revenue Act*, 1878 (41 & 42 *Vict. c.* 15), *s.* 13. *sub-section* 2.—The respondent occupied premises consisting of a dwelling-house and an office; the latter he used for professional purposes, the former as a residence. Both buildings were within the same curtilage, and there was only one entrance from the street, which was common to the office and dwelling-house. The building of the office was not physically joined to the house, nor was there any covered passage between the two, though they were within the same curtilage; persons passing from one to the other had not to go outside the curtilage.

Held, that this office was not so separate and so distinct as to be a tenement within the meaning of sub-section 2 of section 13 of the Customs and Inland Revenue Act, 1878, and that it was therefore not entitled to the exemption given by that sub-section.—NICHOLLS *v.* MALINS, *K.B.D.*, 404; [1906] 1 K. B. 272; 75 L. J. K. B. 140; 94 L. T. 161.

18. *Inhabited house duty—Separate dwellings—Revenue Act*, 1903 (3 *Ed.* 7, *c.* 46), *s.* 11, *sub-section* 1 (a).—A house was divided into separate sleeping "cubicles" to accommodate 343 working men, each man having a separate cubicle, arranged on three landings round a central hall, with reading and

dining-rooms, &c., on the ground floor which were used in common by the inmates.

Held, that these cubicles were sleeping places, and could not properly be said to be places in which anybody dwelt, and were in consequence not separate dwellings within the meaning of section 11 of the Revenue Act, 1903.—LONDON COUNTY COUNCIL *v.* COOK, *K.B.D.*, 403; [1906] 1 K. B. 278; 75 L. J. K. B. 187; 93 L. T. 836.

19. *Stamp—Conveyance on sale*—Ad valorem *duty—Purchase-money on contingency—Stamp Act*, 1891 (54 *&* 55 *Vict. c.* 39), *ss.* 56, 57.—A company agreed to sell its undertaking to a new company, part of the consideration being that the purchasing company should, after providing for certain payments to their own shareholders, pay to the vendors a dividend of 3 per cent. per annum upon the amount paid up on the original capital issued by the new company.

Held, that, though payable on a contingency, this was "money payable periodically" within section 56, sub-section 2, of the Stamp Act, 1891.—

Order of the Court of Appeal (53 W. R. 325, [1905] 1 K. B. 174) affirmed.—UNDERGROUND ELECTRIC RAILWAYS CO. *v.* COMMISSIONERS OF INLAND REVENUE, *H.L.*, 381; [1906] A. C. 21; 75 L. J. K. B. 117; 93 L. T. 819.

20. *Stamp duty—Deed of "apport"—Conveyance on sale—Stamp Act*, 1891 (54 *&* 55 *Vict. c.* 39), *ss.* 14 (4), 54.—By a deed of "apport," made between M. & Co. (Limited) (called therein the "old company"), whose registered address was in London, with a branch in Paris, of the one part, and M. & Co. (Paris) (Limited) (called the "new company"), whose registered address was also in London, of the other part, the property therein enumerated was conveyed by the old company to the new company—namely, the above-mentioned branch business in Paris, the goodwill, fixtures, fittings, stock, French trade-marks, leases of the above premises, and benefit of contracts, and included certain other land and buildings therein described—and in consideration of the above the new company allotted to the the old company 72,000 shares in its share capital of a nominal value of £1 each, 40,446 being in respect of the movable property, and 31,554 in respect of the immovable property. The instrument stated that the shares were not yet issued (created), but that they would be, and would then be issued and delivered in England to the old company.

All the property comprised in the deed was situate in France, it was executed by both parties in France, and as between the parties by the law of France the property passed as from the date thereof.

Held, that the deed was not chargeable as a "conveyance on sale" under the Stamp Act, 1891.—MAPLE & CO. *v.* INLAND REVENUE COMMISSIONERS, *K.B.D.*; [1906] 1 K. B. 591; 75 L. J. K. B. 344; 93 L. T. 832.

21. *Stamp duty—Mexican gold coupon Treasury note—"Promissory note"—Stamp Act*, 1891 (54 *&* 55 *Vict. c.* 39), *s.* 33.—The following instrument was negotiated in this country: "United States of Mexico. Four-and-a-half per cent. gold coupon Treasury note. No. 7781. 1,000 dollars. United States of Mexico acknowledge themselves indebted and promise to pay to bearer on the 1st of June, 1905, one thousand dollars (1,000 dollars) in gold coin of the United States of America, and also to pay interest on said principal sum in like gold coin at the rate of four-and-a-half per cent. per annum from the 1st of June, 1903, semi-annually on the first days of December and June in each year upon surrender of the annexed coupons as they respectively mature. Both as to principal and interest, this Treasury note shall be for ever exempt from any taxes or assessments which may at present exist or be hereafter imposed by the United States of Mexico. The principal and interest of this Treasury note are payable in the City of New York at the office of Speyer & Co., or at the option of the holder in London, England, at the office of Speyer Brothers, in sterling at the fixed rate of 4.85 dollars to the pound sterling. This note is redeemable at par and accrued interest at the option of the United States of Mexico at any time before maturity on sixty days' notice, to be given by publication in two newspapers of general circulation in said city of New York and in two newspapers of general circulation in said city of London; notice having been so given, interest on this Treasury note shall cease on the day so designated for redemption."

It was found as a fact that it was capable of being sold on the Stock Exchange.

Held, that it was only liable to stamp duty under section 33 of the Stamp Act, 1891, as a "promissory note," and not as a "debenture" or "marketable security."—SPEYER *v.* INLAND REVENUE COMMISSIONERS, *K.B.D.*; [1906] 1 K. B. 318; 75 L. J. K. B. 132; 93 L. T. 839.

22. *Succession duty—Alienation of succession—Disentailing deed—Conveyance to purchaser in fee—Devise by alienee—Death of tenant for life—Liability of devisee to duty on original succession—Succession Duty Act*, 1853 (16 *&* 17 *Vict. c.* 51), *s.* 15.—A tenant for life of settled real estate, and the tenant in tail in remainder, having executed a disentailing deed, joined in conveying a parcel of land, part of the estate, in fee to a purchaser. The purchaser devised the parcel of land to his wife, who devised it to their daughter, who paid succession duty in respect thereof on her mother's death. Subsequently the tenant for life died.

Held, that succession duty was payable by the daughter on the death of the tenant for life also, the duty to be calculated with reference to the life of the daughter.

In re Cooper and Allen, 25 W. R. 301, 4 Ch. D. 802, overruled.

Solicitor-General v. *Law Reversionary Interest Society*, 21 W. R. 854, L. R. 8 Ex. 233, discussed.

Decision of the Court of Appeal (52 W. R. 518, [1904] 1 K. B. 762) affirmed.—NORTHUMBERLAND (DUKE) *v.* ATTORNEY-GENERAL, *H.L.*, 31; [1905] A. C. 406; 74 L. J. K. B. 734; 93 L. T. 88.

23. *Succession duty—Payment by instalments—Charge on estate—Limited owner—Heir of entail—Finance Act*, 1894 (57 *&* 58 *Vict. c.* 30), *s.* 9, *sub-section* 6.—There is no impossibility in the law of Scotland in holding that a charge on land can be created by statute without executive provisions for enabling it to appear on the record.

An heir of entail has a limited interest in the estate within the meaning of the Finance Act, 1894.

Therefore, where an heir of entail exercised his option of paying off the succession duty to which he was liable by instalments, but took no steps to make the sum so paid a charge on the estate,

Held, that he had, by virtue of section 9, sub-section 6. of the Finance Act, 1894, a transmissible title at his death to an amount to be raised out of the estate equal to the instalments so paid, upon which the Crown was entitled to claim succession duty.

Judgment of the Court of Session reversed (Lord Robertson dissenting).—LORD ADVOCATE *v.*

COUNTESS OF MORAY, *H.L.*; [1905] A. C. 531; 74 L. J. P. C. 122; 93 L. T. 569.

INSURANCE:—

1. *Company—Life assurance—Company combining other businesses with life assurance—Separate account—Form of scheme—Life Assurance Companies Act,* 1870 (33 & 34 *Vict. c.* 61), *s.* 4.—A company combining the business of life assurance with other business, such as selling tea, were authorized by the court to continue their business on undertaking for the future to carry it on in accordance with a scheme which complied with section 4 of the Life Assurance Companies Act, 1870, by the required separation of the two businesses.

Form of scheme approved.—BRITISH WIDOWS' ASSURANCE CO., RE, *C.A.*, 53; [1905] 2 Ch. 40; 74 L. J. Ch. 525; 93 L. T. 38.

2. *Fire—Subrogation of rights—Indemnity—Compulsory purchase of insured premises—Notice to treat—Fire after notice—Payment by insurers—Acceptance by vendor (assured) of a sum less by the amount paid for the loss.*—During the currency of a policy against fire a corporation served on the assured a notice to treat for the purchase of the insured buildings, under the powers of the Lands Clauses Consolidation Act. Subsequent to the notice, but before anything further had been done under the notice, the premises were destroyed by fire. The insurers paid the agreed amount of the loss to the vendor. The corporation and the vendor agreed the amount of the purchase price, and in so doing took into account the amount which the insurers had paid the vendor, reducing the purchase price by that amount. The insurers sued the vendor to recover the amount which they had paid, alleging that the vendor might have received that amount from the corporation.

Held, that the corporation were not entitled to the benefit of the policy issued to the vendor. The contract was a personal one, and did not pass to the corporation. The contract being one of mere indemnity, the insurers, upon payment of the loss, became entitled to all the rights then vested in the vendor in respect of the destroyed property. Those rights included a right to be paid by the corporation the value of the property as at the date of the notice to treat. It was not legally possible for the vendor to deprive the plaintiffs of the benefit of this right by any agreement with the corporation, and the insurers were entitled to recover the amount.—PHŒNIX ASSURANCE CO. *v.* SPOONER, *K.B.D.*, 313; [1905] 2 K. B. 753; 74 L. J. K. B. 792; 93 L. T. 306.

3. *Marine—Charterers—Right of charterers to sue on policy—Intention—Construction of charter-party.*—Although the words of a policy are wide enough to include third persons, only those will be included on whose behalf the policy is in fact effected. And where the evidence of such inclusion is to be inferred from the terms used in the charter-party "that the owners shall pay for the insurance of the vessel," this will not be sufficient to enable the charterers to avail themselves of the wide terms of the insurance policy.

Decision of the Court of Appeal (53 W. R. 420, [1905] 1 K. B. 637) affirmed.—BOSTON FRUIT CO. *v.* BRITISH AND FOREIGN INSURANCE CO., *H.L.*, 557; [1906] A. C. 336; 75 L. J. K. B. 537; 94 L. T. 806.

4. *Marine—Insurable interest—Constructive total loss — Policy on disbursements — Advances for "necessaries"—Admiralty Court Act.* 1840 (3 & 4 *Vict. c.* 65), *s.* 6.—The plaintiffs, who had made advances for "necessaries" within the meaning of 3 & 4 Vict. c. 65, s. 6, caused themselves to be insured "at and from Vancouver. . . . and/or places in the United Kingdom, and for thirty days in port after arrival . . . upon any kind of goods . . . and upon the body . . . of and in . . . *The Prince Louis* . . . on disbursements against the risk of total and constructive total loss of ship only." The perils insured against included perils of the seas. During the insured voyage the vessel received such damage from perils of the seas as to amount to a constructive total loss, the cost of repairing her exceeding the value of the ship when repaired. The plaintiffs collected the freight, having a lien on it for advances, and placed it to the credit of their account with the shipowners. The freight thus retained was insufficient to repay the plaintiffs the whole amount of their advances. The plaintiffs had no lien or charge upon the ship.

Held, that, so far as the plaintiff's claim for disbursements was a claim for necessaries within 3 & 4 Vict. c. 65, s. 6, the plaintiffs had an insurable interest to the extent of the unsatisfied balance of the advances. A creditor of a shipowner who has advanced money for the necessary disbursements of the ship has an insurable interest in the debt due to him by the shipowner for such necessaries. Such a debt carries with it the legal right to seize the ship in an action *in rem*. The debt is different from ordinary debts, as the law gives to a creditor for necessaries a kind of security which ordinary creditors do not possess. When the ship is at sea the creditor for necessaries has a real interest in its safety.—MORAN, GALLOWAY, & CO. *v.* UZIELLI, *K.B.D.*, 250; [1905] 2 K. B. 555; 74 L. J. K. B. 494.

5. *Marine—Reinsurance—"£1,000 excess of £500"—Loss of barge-load—£298 paid by insurers—F.P.A. clause—"Each craft to be deemed a separate insurance."*—A policy of reinsurance was effected by the plaintiffs (insurers) with the defendants for "£1,000 excess of £500." The policy contained these clauses: "including all risk of craft and/or raft and/or of any special lighterage, each craft, raft, or lighter to be deemed a separate insurance"; "warranted free from particular average unless the ship or craft or cargo be stranded, sunk . . ." The plaintiffs paid the assured £298, their proportion, in respect of the loss of a barge-load of wheat, which was being carried to the vessel, the barge sinking; the total amount of the plaintiffs' risk in that craft-load was £400. The defendants refused to pay their proportion of the reinsured amount of £1 000 excess of £500.

Held, "£1,000 excess of £500" meant that if the plaintiffs were interested to an amount over £500, then for that excess up to £1,000 the defendants relieve the plaintiffs. The plaintiffs had rightfully paid £298 to the assured, and the defendants were liable to pay their proportion—viz., £70 4s. 4d.—to the plaintiffs. The clause "each craft to be deemed a separate insurance" was put in solely with reference to a particular average claim, and meant that if a craft was lost with part of the whole insured interest, it was to be treated as if it were a separate insurance.—SOUTH BRITISH FIRE AND MARINE INSURANCE CO. OF NEW ZEALAND *v.* DA COSTA, *K.B.D.*, 420; [1906] 1 K. B. 456; 75 L. J. K. B. 276; 94 L. T. 435.

See also Company, 2; Justices, 4.

INTERPLEADER:—

Goods seized by sheriff under fi. fa.—Claim by third person—Part of goods sold under interpleader order—Money paid into court—Form of issue between claimant and execution creditor.—The sheriff seized all the

goods in a house under writs of *fi. fa.* at the suit of T. and other creditors.

The claimant claimed all the goods, and, the other creditors having abandoned their executions, an order was made upon an interpleader summons that the sheriff should sell a sufficient quantity of the goods to satisfy T.'s execution, and should pay the proceeds into court to abide the event of an issue between the claimant and T.

The sheriff sold goods sufficient to satisfy T.'s execution, and paid the proceeds into court. There then remained a large quantity of goods unsold.

Held (allowing the appeal), that the proper form of issue was whether the goods seized and sold by the sheriff, or some part thereof, were the property of the claimant as against T.—TEBB *v.* POWELL, *C.A.*; 93 L. T. 468.

See also Bill of Sale, 1.

JERSEY, LAW of:—

Will—Setting aside—Undue influence—Law of Jersey—Admissibility of evidence—Joinder of parties.—In order to set aside a will on the ground of "undue influence" the exercise of coercion in the particular case must be proved, by means of which the mind of the testator has been coerced into doing that which he did not desire to do.

Observations of Sir J. Hannen in *Wingrove* v. *Wingrove*, 11 P. Div. 81, approved. Judgment of the court below reversed.

By the law of Jersey interested parties and their near relations are not accepted as witnesses in an action. In a case in which it was sought to set aside a will by which a considerable sum had been left to local charities,

Held, that the evidence of the executors was properly excluded; but that various parochial authorities whose co-operation would be useful, if not necessary, if the will were held valid and the trust created by it established, should not have been made parties to the action, and that their evidence, and that of their relatives, was admissible.—BAUDAINS *v.* RICHARDSON, *P.C.*; [1906] A. C. 169; 75 L. J. P. C. 57; 94 L. T. 290.

JUSTICES:—

1. *Appeal—Case stated by justices—Notice of appeal—Case delivered to respondent, but no notice of appeal given—Indorsement on case of acceptance of service—Condition precedent—Jurisdiction to hear appeal—Summary Jurisdiction Act*, 1857 (20 & 21 *Vict. c.* 43), *s.* 2.—By section 2 of the Summary Jurisdiction Act, 1857, either party, if dissatisfied with the determination of the justices, may apply for a case, and such party shall within three days after receiving the case transmit the same to the court, "first giving notice in writing of such appeal, with a copy of the case so stated and signed, to the other party."

An appellant duly delivered a copy of the case to the respondents' solicitors, but he did not with such copy give notice in writing of such appeal, and the respondents' solicitors indorsed upon the case that they accepted service thereof on behalf of the respondents.

Held, that the giving of the notice of appeal was a condition precedent to the right of the appellant to have his appeal heard, and that the court had no jurisdiction to hear the appeal, notwithstanding that the case had been duly delivered to the respondents' solicitors, and that a statement had been indorsed thereon by the respondents' solicitors that they accepted service of the case on behalf of the respondents.—RUST *v.* ST. BOTOLPH, *K.B.D.*; 94 L. T. 575.

2. *Disqualification—Justices incompetent to act sitting on bench—Refusal of renewal by licensing justices—Appeal—Licensing justices sitting on bench at quarter sessions on hearing of appeal—Validity of order.*—Upon an appeal to quarter sessions from an order of licensing justices refusing to renew a licence, two of the licensing justices who were present at the licensing meeting, and who were parties to the making of the order appealed against, sat on the bench with the chairman and justices of quarter sessions during the hearing of the appeal; they retired with the other justices, and returned into court and sat on the bench when the decision was given and an order made dismissing the appeal, but they took no part whatever in court, or when the justices retired, in the discussion of the case or in the decision of the appeal.

Held, that, as the two justices were disqualified from acting on the appeal from their own order, they ought not to have sat on the bench while the appeal was being heard, and their presence on the bench, even though they took no part in the proceedings, rendered the order made by quarter sessions invalid, and the appeal ought to be reheard.—REX *v.* LANCASHIRE JUSTICES, *K.B.D.*; 75 L. J. K. B. 198; 94 L. T. 481.

3. *Felony—Refusal to commit—Case stated—Non-service of notice of appeal and case on respondent—Jurisdiction to state case—Summary Jurisdiction Acts*, 1857 (20 & 21 *Vict. c.* 43), *s.* 2, *and* 1879 (42 & 43 *Vict. c.* 49), *s.* 33.—The court has no jurisdiction to hear an appeal against a decision of justices by way of case stated unless the appellant has given the respondent notice in writing of the appeal, together with a copy of the case, as required by section 2 of the Summary Jurisdiction Act, 1857, and this is so although the appellant has been unable to serve the respondent, having failed to find him notwithstanding every effort to do so.

Syred v. *Carruthers*, (1858) E. B. & E. 469, distinguished.

Semble, justices have no power to state a case under section 33 of the Summary Jurisdiction Act, 1879, where they have dismissed an information for felony and declined to commit the person charged for trial.—FOSS *v.* BEST, *K.B.D.*; [1906] 2 K. B. 105; 75 L. J. K. B. 575.

4. *Insurance—Life—Industrial assurance company—Dispute—Claim for over £20 against a society which issues policies also for less amounts—Jurisdiction of justices as regards policy exceeding £20—Collecting Societies and Industrial Assurance Companies Act*, 1896 (59 & 60 *Vict. c.* 26), *ss.* 1, 7.—Section 7 of the Collecting Societies and Industrial Assurance Companies Act, 1896, only gives jurisdiction to a court of summary jurisdiction in cases where the dispute arises with reference to a life policy granted for a less sum than £20.—COWLING *v.* TOPPING, *K.B.D.*, 423; [1906] 1 K. B. 466; 75 L. J. K. B. 176; 94 L. T. 209.

See also Adulteration, 1; Licensing Law, 1-9.

LAND TRANSFER:—

Mortgage or charge—Registration—Registered proprietor—Fraud—Forged transfer—Rectification of register—Indemnity—Insurance fund—Request to register—Implied warranty of title—Loss by rectification—Land Transfer Act, 1875 (38 & 39 *Vict. c.* 87)—*Land Transfer Act*, 1897 (60 & 61 *Vict. c.* 65), *s.* 7.—A transferee of a charge on registered land in Middlesex took his transfer to the Land Registry for registration, and was accordingly registered as proprietor of the charge. It was afterwards discovered that the transfer was forged by the solicitor

of the original proprietor. The original proprietor obtained an order for rectification of the register. The transferee applied to the registrar for indemnity under section 7 of the Land Transfer Act, 1897, and the registrar made an award in his favour, which was confirmed by Kekewich, J.

Held, on appeal, that as the transferee had no transfer from some person previously on the register, and had not, therefore, in that sense relied on the register, he had suffered no loss by rectification, and was not entitled to any indemnity under section 7.

Per Stirling, L.J.—The registrar under the Land Transfer Acts has a statutory duty of a ministerial character to register transfers of registered charges on registered land, and on the demand of the transferee to issue to him a certificate of proprietorship. It is a breach of duty and a wrong to the existing registered proprietor to remove his name and register the charge in the name of the supposed transferee if the latter has, in fact, no title to require the registrar to do so. And an act of the registrar when called upon to exercise his duty on the request, direction, and demand of another, which is apparently legal, but is, in fact, illegal and a breach of duty, is contemplated by the Act of 1897 as giving rise to rights of indemnity against the Crown. On the principles laid down in *Sheffield Corporation* v. *Barclay*, 54 W. R. 49, there ought to be implied a contract by any person applying for registration to keep the Crown indemnified against any liability which may result from the exercise by the registrar of the supposed duty to register the instrument presented to him. Also a person who brings a transfer to a registering authority and requests him to register it, not only affirms it to be genuine but warrants it to be so.

Decision of Kekewich, J. (53 W. R. 541), reversed.—ATTORNEY-GENERAL *v.* ODELL, *C.A.*, 566; [1906] 2 Ch. 47; 75 L. J. Ch. 425; 94 L. T. 659.

See also Administration, 2; Charity, 4; Practice, 1.

LANDLORD and TENANT:—

1. *Agreement of tenancy—Construction of.*—A tenant entered into possession of premises under an agreement of tenancy "for a period of twelve months with the option of a lease after the aforesaid time at the rental of £30 per annum."

Held, that under the agreement the tenant had a right to claim a lease for a further period of at least one year after the expiration of the first twelve months.—AUSTIN *v.* NEWHAM, *K.B.D.*; [1906] 2 K. B. 167; 75 L. J. K. B. 563.

2. *Covenant—Lease of public-house—Covenant to keep and conduct the house in a regular and proper manner—Knowingly do or suffer any act whereby renewal of licence refused—Act of sub-lessee.*—By a lease of a beerhouse the lessee covenanted that he would at all times during his term keep and conduct the house in a regular and proper manner in every respect, and would not knowingly or willingly do or suffer any act whereby the licence might become indorsed, forfeited, or the renewal thereof refused, and would not commit any offence against the licensing laws for the time being in force. The lessee sublet the house, and the sub-lessee was convicted of permitting drunkenness on the premises, and the renewal of the licence was in consequence refused. In an action by the lessor against the lessee to recover damages for breach of covenant,

Held, that the first part of the covenant was an absolute covenant to keep and conduct the house in a regular and proper manner, and was not qualified by the subsequent part, and that there had been a breach of it entitling the lessor to damages.

Bryant v. *Hancock & Co.*, [1899] A. C. 442, 48 W. R. Dig. 88, distinguished.—PALETHORPE *v.* THE HOME BREWERY, *C.A.*, 489; [1906] 2 K. B. 5; 75 L. J. K. B. 555; 94 L. T. 871.

3. *Covenant not to assign without lessor's consent—Condition to lessor's consent—Covenant by assignee to pay rent during residue of term—Validity of covenant—Action by lessor against assignee—"Fine or sum of money in the nature of a fine payable for or in respect of such consent"—Conveyancing and Law of Property Act*, 1892 (55 & 56 *Vict. c.* 13), *s.* 3.—A lease contained a covenant by the lessee not to assign the demised premises without the consent of the lessors, such consent not to be unreasonably withheld. The lessee, being desirous to assign, applied to the lessors for the necessary consent. The lessors required as a condition to their consent that the assignee should covenant that he would pay the rent reserved during the remainder of the lease. A licence to assign was accordingly granted by the lessors in the form of an indenture, to which the assignee was a party, and which contained a covenant by the assignee that he would pay the rent reserved by the lease during the residue of the term. In an action by the lessors against the assignee under the covenant to recover rent which accrued due after a subsequent assignment,

Held, that section 3 of the Conveyancing Act, 1892, afforded no defence to the action; for, even if the covenant was for the payment of a "fine or sum of money in the nature of a fine," the effect of the section was not to make such a payment illegal, but merely to read into the lease as between the parties to the lease a proviso that no such sum should be payable, and the assignee was not in a position to complain of a breach of that proviso.

Semble, per Vaughan Williams and Stirling, L.JJ., that the covenant was not a covenant for the payment of a "fine or sum of money in the nature of a fine" within the meaning of section 3 of the Conveyancing Act, 1892.—WAITE *v.* JENNINGS, *C.A.*, 511; [1906] 2 K. B. 11; 75 L. J. K. B. 542.

4. *Covenant to repair—Lessor's liability—Old building—Natural decay—Construction.*—The principle of construction that, under a covenant to repair, the covenantor need not renew a building worn out by age or decaying from faulty construction applies to the case of a lessor as well as to the case of a lessee who has entered into such a covenant; and for the purpose of construing such a covenant there is in this respect no distinction between the two cases.—TORRENS *v.* WALKER, *Ch.D. Warrington, J.*, 584; [1906] 2 Ch. 166; 75 L. J. Ch. 645.

5. *Lease—Long term—Option to purchase fee—Rule against perpetuities—Covenant running with land—32 Hen.* 8, *c.* 34.—An option in a lease to purchase the fee simple is something wholly outside the relations of landlord and tenant, with which alone the statute 32 Hen. 8, c. 34, deals, and therefore cannot be enforced as running with the land within the purview of that statute, though such a contract in a lease may be good as binding the heirs and assigns, provided it does not infringe the law against perpetuities.

Decision of Warrington, J. (53 W. R. 203), affirmed.—WOODALL *v.* CLIFTON, *C.A.*, 7; [1905] 2 Ch. 257; 74 L. J. Ch. 555; 93 L. T. 257.

6. *Lease—Specific performance—Reservation of minerals—Covenant to erect houses—Particulars of*

houses specified—Lessee owner of minerals—Compromise of action brought by mortgagor—Damages.—The defendant had, in 1894, taken a lease of a certain piece of land for ninety-nine years, by which he covenanted to erect seven dwelling-houses similar to those already erected in a certain road, and to deliver them up at the end of the term in good and substantial repair. The lease also contained a reservation of the mines and minerals (which did not belong to the lessor) in favour of the person who would, if the lease had not been made, be for the time being entitled thereto, with power to enter upon the demised premises and occupy the surface thereof and to work the minerals under the lands, without leaving any support for the surface or any buildings thereon, and for that purpose to sink pits and to make pit-hills and spoil-banks, paying reasonable compensation to the lessee and his assigns for the damage so caused. The lands the subject of the lease had been assigned by the lessor, and the assignee mortgaged them to the plaintiff. The defendant was also by another lease granted by the owner of the minerals, and prior in date to the present one, entitled to the mines and minerals under the demised land. As the defendant had not complied with his covenant to erect the seven houses, although he had erected other buildings, the mortgagor had brought an action for possession on the ground of the breach, but that action had been compromised. The plaintiff, who was the mortgagee of the demised land, now sued for specific performance of the covenant to build the seven houses.

Held, that the defendant was bound to comply with his covenant to build, notwithstanding that he was entitled under his mining lease to use the whole surface of the land for mining operations; that the particulars of the houses to be erected under the covenant were sufficiently specified so that specific performance could be decreed; that a a decree for specific performance was the only remedy available, as the damages for the injury done to the reversion would necessarily be infinitesimal on account of the length of the lease, and would therefore be no adequate compensation for the depreciation of the reversion: and also that the compromise of the action brought by the mortgagor for possession on the ground of noncompliance with the covenant to build was no defence to the present action, as the mortgagor's action was not maintainable, and therefore its compromise could not affect the mortgagee.—MOLYNEUX *v.* RICHARD, *Ch.D. Kekewich, J.*, 177; [1906] 1 Ch. 34; 75 L. J. Ch. 39; 93 L. T. 698.

7. *Lessor tenant for life—Covenant by lessor and assigns—Death of lessor—Liability of executors.*—The plaintiffs were the executors of one Bath and the defendants the executors of one Bowles, and the action was brought for the balance of compensation for certain crops, &c., pursuant to a covenant in a lease granted by Bowles to Bath.

Bowles was tenant for life, and under the powers of the Settled Land Acts granted the lease, and by its terms it was provided: "And the lessor hereby for himself and his assigns covenants with the lessee that he will pay the tithe rent-charge on the said premises, also that he, the lessor, or his assigns, or the succeeding tenants will at the expiration or sooner determination of the said term take and pay for the growing crops and manure then upon the said demised premises and the unexhausted tillages and dressings according to the custom of the country at a fair valuation to be made by two valuers, one to be chosen by each party, or, in the event of their differing, then by a third person to be chosen by such valuers."

After certain other provisions the lease provided that in the event of the lessor or his assigns desiring during the said term to resume possession the lessor or his assigns should pay to the lessee, his executors, administrators, or assigns, for the growing crops, &c., "and for the unexhausted tillages and dressings the like amount as he or they would be entitled to upon quitting, pursuant to the covenant of the lessor in that behalf before contained."

The lessor having died, the owners of the fee simple sold a certain portion of the demised property to the C. F. E. (Limited), subject to the tenancy and to the payment of compensation, &c., under the lease. The plaintiffs paid rent in respect of this portion to the C. F. E. (Limited), and, notice having been given by the C. F. E. (Limited) to the plaintiffs that they intended to resume possession, it was agreed that the C. F. E. (Limited) should pay the plaintiffs £50 in respect of the unexhausted improvements.

The C. F. E. (Limited) being wound up, the plaintiffs could not obtain this amount, and they then sued the defendants on the covenant by Bowles in the lease.

Held (affirming the decision of the learned county court judge), that the defendants were not liable.—BATH *v.* BOWLES, *K.B.D.*; 93 L. T. 801.

8. *Notice to landlord of defective state of repair—Contract by landlord to repair—Injury to wife of tenant—Remedy of tenant—Remedy of wife.*—A. lets a house to B. C., the wife of B., as agent of B., subsequently agrees with A. that B. would continue in occupation of the said premises on the condition that A. does the repairs, which are badly needed. A. does not repair, and C. is seriously injured owing to the defective condition of the kitchen floor.

Held (Mathew, L.J., dissenting), that C. had no cause of action; not on the contract because she was no party to it; not in tort because it could not be shown that A. owed any duty to her so as to make him liable for misfeasance.

Per Mathew, L.J.—C. had a cause of action, on the ground that A. induced her to continue on the premises by a representation which proved to be untrue.—CAVALIER *v.* POPE, *C.A.*, 68; [1905] 2 K. B. 757; 74 L. J. K. B. 857; 93 L. T. 475.

9. *"Outgoings"—Covenant by tenant to pay "outgoings"—Paving expenses—Liability of tenant.*—Action to recover £22 13s. 3d. paid by the plaintiff to the Sheffield Corporation as to the proportion of expenses incurred under section 150 of the Public Health Act, 1875, in levelling, paving, and making good a road abutting on premises of which the plaintiff was lessor and the defendants were lessees; the plaintiff contended that the defendants were liable under a covenant contained in the lease of the premises to repay the amount. The lease was for twenty-one years, at an annual rent of £105 16s. clear of all deductions (except property tax), and contained covenants by the lessees to pay the rent reserved and "all rates, taxes, and outgoings now payable or hereafter to become payable in respect of the said premises." There was also a repairing covenant in the lease. The county court judge held, upon the authority of *Hill* v. *Edwards*, (1885) Cab. & Ell. 481, and *Tidswell* v. *Whitworth*, (1867) L. R. 2 C. P. 326, that the plaintiff could recover, and gave judgment for the defendants.

The Court allowed the appeal, holding that paving expenses were "outgoings" within the covenant, and that no distinction could for this

purpose be drawn between such expenses and expenses incurred for work, such as sanitary work, done on the demised premises.—GREAVES *v.* WHITMARSH, WATSON, & Co., *K.B.D.*; [1906] 2 K. B. 340; 75 L. J. K. B. 633.

10. *Sale of the reversion—Covenant for quiet enjoyment—Liability of lessor.*—A lease contained the following covenant for quiet enjoyment: "And the lessor for himself, his heirs, executors, administrators, and assigns doth hereby covenant with the lessee that the lessee . . . shall and may peaceably enjoy the demised premises during the said term without any interruption or disturbance by the lessor or any person claiming under him." A breach of this covenant was committed by the assignee of the reversioner.

Held, that the lessor was not liable for wrongful or negligent acts committed by an assignee of the reversioner whom he has not expressly or impliedly authorized to do the acts.—WILLIAMS *v.* GABRIEL, *K.B.D.*, 379; [1906] 1 K. B. 155; 75 L. J. K. B. 149; 94 L. T. 17.

11. *Yearly tenancy—Construction of agreement.*—By an agreement of tenancy certain licensed premises were let from a certain date "until such tenancy should be determined as hereinafter mentioned," at an annual rent of £70 clear of all deductions except landlord's property tax, payable quarterly. The tenant agreed further to keep the premises in repair, not to assign or underlet without notice, to keep up the licences wherever necessary, and the landlord had the right to eject the tenant for misconduct. The tenancy was terminable by three months' notice in writing.

Held, that, having regard to the above terms, the agreement was one for a yearly tenancy, terminable only by a three months' notice expiring at the end of any full year.—LEWIS *v.* BAKER, *K.B.D.*, 146; [1905] 2 K. B. 576; 74 L. J. K. B. 617; 93 L. T. 267.

See also Distress, 1-4; Negligence, 2.

LANDS CLAUSES ACTS:—

1. *Compulsory purchase—Purchaser compelled to take a conveyance—Form of conveyance—Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 118), *ss.* 75, 81, 82—*Finance Act*, 1895 (58 *Vict. c.* 16), *s.* 12.—A local authority had under a compulsory purchase paid the purchase-money into court, accepted title and taken possession, but refused to take a conveyance.

Held, on summons by vendor, that they were compelled to take a conveyance to be settled in case of difference by the court.

In re Pigott and Great Western Railway Co., 29 W. R. 727, 15 Ch. D. 146; *Harding* v. *Metropolitan Railway Co.*, 20 W. R. 321, 7 Ch. 154; and *Wolverhampton and Walsall Railway Co.* v. *London and North-Western Railway Co.*, 16 Eq. 439, 22 W. R. Dig. 118, followed.—CARY-ELWES' CONTRACT, RE, *Ch.D. Swinfen Eady, J.*, 480; [1906] 2 Ch. 143; 75 L. J. Ch. 571; 94 L. T. 845.

2. *Costs—Apportionment—Funds in court—Reinvestment in land—Part only of invested money provided from funds in court—Costs of application and expenses.*—Upon an application for reinvestment in land of a fund paid into court by the London County Council as the price of land bought by the council under compulsory powers of purchase, the fund in court formed less than half the sum proposed to be reinvested.

Held, that the usual order must be made as to costs, following the form appearing on p. 2457 of Seton's Forms of Judgments and Orders, no special provision being made for the apportionment of the surveyor's and conveyancing fees.—J. W. CLARK (DECEASED), RE, *Ch.D. Swinfen Eady J.*, 385; [1906] 1 Ch. 615; 75 L. J. Ch. 325.

3. *Notice to treat for part of building—Particulars of claim subject to apportioned rent—Summons under section* 119 *to apportioned rent at less than the sum claimed—Notice to take whole under section* 92—*Compromise—Delay—Acquiescence—London County Council (Improvements) Act*, 1900 (63 & 64 *Vict. c. cclxix.*), *s.* 38.—In May and November 1901, respectively notices to treat for part of a manufactory were served upon the owner and lessees of premises. Before the end of January, 1902, they had forwarded claims and particulars subject to an apportioned rent of £200 per annum. The parties negotiated at considerable expense with regard to the amount of the apportioned rent, and ultimately, after a summons issued under section 119 of the Lands Clauses Consolidation Act, 1845, on the 18th March, 1904, the claimants agreed to an apportionment at £100 per annum. An offer of considerably less than the amount claimed having been made to the lessees at this apportioned rent, they required the whole manufactory to be taken under section 92. In their action the plaintiffs moved for an interim injunction to restrain further proceedings under the notices to treat.

Held, that the mere lapse of time standing alone counted for nothing, as the compensation asked had never been agreed to provided the reduction in the apportioned rent was consented to, and that the claimants had not forfeited their right to insist on the whole manufactory being taken by simply making their claim.

Gardner v. *Charing Cross Railway Co.*, 2 John. & Hem. 248, followed.—LAVERS *v.* LONDON COUNTY COUNCIL, *Ch.D. Kekewich, J.*; 93 L. T. 233.

4. *Sale of copyholds—Vendor dying before completion—Fine on admittance of vendor's heir—Vendor's costs of title—Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 18), *s.* 82.—A company agreed to purchase copyholds under the Land Clauses Acts. Vendor died before completion.

Held, that the company were bound to pay the costs of constituting a proper person to convey, including the costs of procuring the admission of the vendor's heir as tenant and the fine payable thereon.

In re Liverpool Improvement Act, 16 W. R. 667, 5 Eq. 282; *In re Dublin (South) City Market Co.*, 25 L. R. Ir. 265; *In re Lloyd and North London Railway Act*, 1861, 44 W. R. 522, [1896] 2 Ch. 397; and *In re Bear Island Defence Works and Doyle*, [1903] 1 Ir. 164, applied.—LONDON UNITED TRAMWAYS ACT, 1900, RE, *Ch.D. Swinfen Eady, J.*, 328; [1906] 1 Ch. 534; 75 L. J. Ch. 223; 94 L. T. 608.

See also Arbitration, 1; Lunatic, 2.

LEASE:—

1. *Forfeiture on liquidation—Relief against—Sale within a year of forfeiture—What amounts to, within meaning of section* 2, *sub-section* 2, *of the Conveyancing Act*, 1892.—The M. B. Co., defendants, were mortgagees in possession of the freehold of certain premises leased to the H. C. Co. This company went into liquidation, and thereby incurred a forfeiture for breach of a covenant in their leases against bankruptcy. The receiver appointed by the H. C. Co., to enable him to take advantage of the provision for relief against such a forfeiture under section 14, sub-sections 1 and 6, of the Conveyancing Act, 1881, and section 2, sub-section 2, of the Conveyancing Act, 1892, entered into a contract for sale within

one year from the date of the company going into liquidation, but such contract was conditional only and entered into solely for the purpose of obtaining the benefit of the provisions in the Acts.

Section 14, sub-section 1, of the Conveyancing Act, 1881, provided for relief against forfeiture. Sub-section 6 of this section excludes from such relief breaches of conditions for forfeiture on the bankruptcy of a lessee.

Section 2, sub-section 2, of the Conveyancing Act, 1892, extended these provisions for relief given by section 14 to a case of forfeiture on bankruptcy, but for one year only from the date of the bankruptcy; but, in case of a sale within one year, the provisions for relief were made applicable.

On a motion in the action by the M. B. Co. for possession of the premises for the forfeiture,

Held, there was no sale within the meaning of section 2, sub-section 2, of the Conveyancing Act, 1892. To come within the provisions of that section and sub-section a sale must be completed by conveyance, or the contract entered into must be an absolute contract for sale.—CASTLE & SONS, RE, MITCHELL *v.* CASTLE & SONS, *Ch.D. Joyce, J.*; 94 L. T. 396.

2. *Grant of land for specific purpose—Light—External or party-wall—Trespass—Derogation from grant—Authority of architect—London Building Act,* 1894 (57 & 58 *Vict. c.* ccxiii.), *s.* 5, *sub-section* 16.—The defendants, who owned some land, which was covered with buildings, leased a portion of that land to the plaintiffs for the purpose of erecting a warehouse and showrooms, for which purpose a large amount of light would be necessary, the plans which were approved by the defendants showed that there were to be windows in the external wall of the new buildings adjacent to the land retained by the plaintiffs. By another agreement the defendants undertook to demolish the buildings on the demised land. Some rafters and purlins of the buildings on the defendants' land were left projecting a few inches over the land leased to the plaintiffs, and they were supported by stanchions which stood partly on the plaintiffs' land. These purlins and rafters were, with the consent of the plaintiffs' architect, but without the knowledge or consent of the plaintiffs themselves, built into the external wall of the plaintiffs, which was built entirely on the plaintiffs' land. The stanchions were also grouted in to the wall, the plaintiffs' wall and the defendants' building being in fact connected. The local authority took proceedings against the plaintiffs to close the windows in that external wall, which they alleged had become a party wall through the acts of the defendants. The plaintiffs brought this action to restrain the defendants from using their wall and to compel them to remove the rafters and purlins from the wall.

Held, that the use by the defendants of the plaintiffs' wall which had led to the local authority's demand was a trespass and amounted to a derogation from their grant, and the injunction asked for was accordingly granted.

Held, also, that it was not within the scope of the plaintiffs' architect's authority to sanction the rafters and purlins being built into the plaintiffs' wall, and that the plaintiffs were not bound by it. —BETTS *v.* PICKFORDS, *Ch.D. Kekewich, J.*, 476; 94 L. T. 363.

See also Mines, 1; Mortgage, 3.

LIBEL:—

Fair comment — Privilege — Malice — Extrinsic evidence.—In an action of libel a plea that the words are fair comment on a matter of public interest may, like a plea that the words were published on a privileged occasion, be rebutted by proof of malice, and the plaintiff may prove such malice by extrinsic evidence.

Campbell v. *Spottiswoode*, 11 W. R. 569, 3 B. & S. 769, and *Merivale* v. *Carson*, 36 W. R. 231, 20 Q. B. D. 275, discussed.—THOMAS *v.* BRADBURY, AGNEW, & Co., *C.A.*, 608.

See also Criminal Law, 8, 9; Discovery, 1.

LICENSING LAW:—

1. *Justices—Bias—Reference of renewal of licence to quarter sessions—Licensing justice subsequently appointed to sit on compensation committee—Renewal of licence refused—Validity of order—Licensing Act,* 1904 (4 *Ed.* 7, *c.* 23), *s.* 1, *sub-section* 2; *s.* 5, *sub-section* 5.—When the justices of a licensing district acting under section 1, sub-section 2, of the Licensing Act, 1904, refer the matter of the renewal, with their report thereon, to quarter sessions, the reference to quarter sessions is not in the nature of an appeal. Therefore, although in a particular case a justice might have taken such an active part as a member of the licensing committee as to be ineligible, on the ground of bias, to sit at quarter sessions, there is nothing in the Act to prevent him taking part in the subsequent proceedings, since the report to quarter sessions is in the nature of a motion rather than a decision.—REX *v.* CHESHIRE JUSTICES, *K.B.D.*, 482; [1906] 1 K. B. 362; 75 L. J. K. B. 290; 94 L. T. 412.

2. *Justices — Renewal of licence—Report — Proceedings before compensation committee—Judicial proceedings—Jurisdiction to state a case—Licensing Act,* 1904 (4 *Ed.* 7, *c.* 23), *ss.* 1 (2), 5 (2).—Where the question of the renewal of a licence is referred to quarter sessions under section 1 (2) of the Licensing Act, 1904, the proceedings before quarter sessions or before the committee appointed by the quarter sessions under section 5 (2) of the Act are judicial proceedings, and the justices have power to state a case for the opinion of the High Court.

Morgan v. *Aylesford Justices*, [1906] 1 K. B. 437, explained. — REX. *v.* SOUTHAMPTON JUSTICES, *K.B.D.*, 484; [1906] 1 K. B. 446; 75 L. J. K B. 295; 94 L. T. 437.

3. *Objection to licence—House unnecessary—Report by justices of district to quarter sessions—Evidence—Licensing Act,* 1872 (35 & 36 *Vict. c.* 94], *s.* 42—*Licensing Act,* 1904 (4 *Ed.* 7, *c.* 23), *s.* 1.—Where the question of the renewal of a licence has been referred under the Licensing Act, 1904, by the licensing justices for the district to quarter sessions the report made by such licensing justices is not evidence upon which the quarter sessions can act, as they can only act upon evidence given before them upon oath.—DARTFORD BREWERY CO. *v.* LONDON QUARTER SESSIONS, *K.B.D.*; [1906] 1 K. B. 695; 75 L. J. K. B. 597; 94 L. T. 782.

4. *Offences — Selling intoxicating liquor without licence—Offence of trifling nature—Summary Jurisdiction Act,* 1879 (42 & 43 *Vict. c.* 49), *s.* 16.—For an incoming tenant of a public-house to carry on the business of the house for a period of nine days without a licence is a serious offence; and the facts that the outgoing tenant has been duly licensed, and that for nine days after his departure, the period in question, no sessions set at which a temporary transfer of his licence could be applied for, do not warrant a court of summary jurisdiction in treating the offence as one of a trifling nature within the meaning of section 16 of the

Summary Jurisdiction Act, 1879.—BARNARD *v.* BARTON, *K.B.D.*; [1906] 1 K. B. 357; 75 L. J. K. B. 326.

5. *Provisional licence—Period of seven years—Confirming authority—Licensing Acts*, 1828 (9 *Geo.* 4, *c.* 61), *s.* 13; 1874 (37 & 38 *Vict. c.* 49), *s.* 22; 1904 (4 *Ed.* 7, *c.* 23), *s.* 4, *sub-section* 3.—Licensing Act, 1874, s. 22: "Any person interested in any premises about to be constructed . . . for the purpose of being used as a house for the sale of intoxicating liquors . . . may apply to the licensing justices and the confirming authority for the provisional grant and confirmation of a licence in respect of such premises. . . . A provisional grant and order of confirmation shall not be of any validity until it has been declared to be final by an order of the licensing justices. . . ."

Licensing Act, 1904, s. 4, sub-section 3: "The justices may, if they think fit, instead of granting a new on-licence as an annual licence, grant the licence for a term not exceeding seven years."

Held, that the powers of granting a provisional licence under section 22 of the Licensing Act, 1874, are applicable to the grant of a licence for a period of seven years under section 4, sub-section 3, of the Licensing Act, 1904; it is no objection to such a grant that the licence will not commence to run from or determine on the 5th of April of any year in accordance with section 13 of the Alehouses Act, 1828, as amended by section 33 of the Licensing Act, 1902.—REX *v.* JOHNSTONE, *K.B.D.*, 347; [1906] 1 K. B. 228; 75 L. J. K. B. 229; 94 L. T. 377.

6. *Removal of licence—Power to attach conditions to licence—Licensing Acts*, 1872 (35 & 36 *Vict. c.* 94), *s.* 50; 1874 (37 & 38 *Vict. c.* 49), *s.* 22; *and* 1904 (4 *Ed.* 7, *c.* 23), *s.* 4, *sub-section* 2.—Section 4, sub-section 2, of the Licensing Act. 1904, does not apply to orders for removal of a licence, and licensing justices are, therefore, not entitled under that section to attach conditions to an order for removal, securing the monopoly value of an on-licence to the public.—REX *v.* DRINKWATER, *K.B.D.*, 95; [1905] 2 K. B. 469; 74 L. J. K. B. 722; 93 L. T. 165.

7. *Renewal of licence—House not required—Licensing justices delegating their powers to sub-committees—Report of sub-committee—Duty to communicate to licensee—Report of house to quarter sessions—Question as to other houses in neighbourhood not reported—Admissibility of—Licensing Act*, 1904 (4 *Ed.* 7, *c.* 23), *s.* 1, *sub-section* 2; *s.* 5, *sub-section* 2.—During the hearing of an application for the renewal of a licence before the committee of quarter sessions appointed for that purpose, questions were asked on behalf of the applicant for renewal, of a witness in cross-examination, whether it was not the fact that there were other licensed houses in the neighbourhood of the applicant's house the licensees of which had been convicted for offences against the licensing laws, and whether it was not the fact that other licensed houses in the neighbourhood were not so well conducted as the applicant's house, and generally as to the conduct and management of other licensed houses in the neighbourhood, which had not been referred to quarter sessions. The committee having disallowed the questions in so far as they related to houses the renewal of the licences of which had not been referred to quarter sessions,

Held, that the mere fact that the questions related to houses which had not been reported to quarter sessions, was not a sufficient reason for disallowing the questions and excluding the evidence, and that the answers to the questions ought to have been admitted.

The justices of a licensing district can make inquiry as to licensed houses in their district by means of sub-committees, provided that they afterwards bring the knowledge they so obtain to the notice of the persons interested.—MORGAN *v.* AYLESFORD JUSTICES, *K.B.D.*; 1906, 1 K. B. 437; 75 L. J. K. B, 266; 94 L. T. 483.

8. *Renewal of licence—Order for "alterations" in premises—Structural alterations—Order to keep entrance door locked—Licensing Act*, 1902 (2 *Ed.* 7, *c.* 28), *s.* 11. *sub-section* 4.—Section 11, sub-section 4, of the Licensing Act, 1902—which empowers licensing justices, on renewing a licence, to order that such alterations as they think reasonably necessary to secure the proper conduct of the business shall be made in that part of the premises where intoxicating liquor is sold or consumed—only gives power to the justices to order structural alterations.

Upon an application for the renewal of a licence the licensing justices, purporting to act under section 11, sub-section 4, of the Licensing Act, 1902, made an order that the entrance door from one of two streets upon which the licensed premises abutted should be kept locked and not used except for certain purposes, the object being to confine the sale of liquor to that part of the premises which opened on to the other street.

Held, that this was not an order for a structural alteration, and was not within the power of the licensing justices under section 11, sub-section 4.—SMITH *v.* PORTSMOUTH JUSTICES, *C.A.*, 598; [1906] 2 K. B. 229; 94 L. T. 407.

9. *Renewal of licence—Compensation authority—Refusal to renew licence—Appeal to quarter sessions of county—Licensing Act*, 1904 (4 *Ed.* 7, *c.* 23), *s.* 8 (2).—The refusal by justices of a county borough, acting as the compensation authority under the Licensing Act, 1904, to renew a licence subject to the payment of compensation is final, and no appeal therefore will lie from their decision to the quarter sessions of the county under section 27 of the Alehouse Act, 1828.—REX *v.* SOUTHAMPTON JUSTICES, EX PARTE FULLER & Co., *K.B.D.*, 530; [1906] 1 K. B. 505; 75 L. J. K. B. 322; 94 L. T. 442.

10. *Sale of beer in unlicensed place—Liability of master for illegal act of servant—Licensing Act*, 1872 (35 & 36 *Vict. c.* 94).—The respondent, who held an off-licence for the sale of beer at his brewery premises, employed a drayman to deliver beer. The drayman had no authority to sell beer, but only to deliver it, and he had been expressly forbidden to sell beer. The drayman, however, sold and delivered beer in the street contrary to the above orders.

Held, that the respondent was not liable to be convicted under section 3 of the Licensing Act, 1872, for selling by retail intoxicating liquor at a place where he was not authorized to do so, as the drayman had no authority at all to sell beer.—BOYLE *v.* SMITH, *K.B.D.*, 519; [1906] 1 K. B. 432; 75 L. J. K. B. 282; 94 L. T. 30.

See also Mortgage, 4.

LIMITATIONS, STATUTE of:—

1. *Action in county court—Subsequent proceedings in respect of same cause of action in High Court—Concealed fraud—Misrepresentation—Knowledge of facts*—Res judicata—*Lapse of time—Statute of Limitations* (21 *Jac.* 1, *c.* 16), *s.* 3.—In 1890 the plaintiff effected a policy of insurance on his life with the defendants, relying upon the inducements

of its agent that (*inter alia*) he would have to pay only a fixed periodical premium.

In 1898 a claim was for the first time made on the plaintiff for payment of an increased premium. The plaintiff, being desirous not to forfeit his policy, paid the amount demanded under protest.

In April, 1898, he issued a plaint in the county court to recover a sum as an overpayment, but the county court judge, in May, 1898, decided that he was not entitled to succeed.

Meetings of policy-holders were held from time to time in 1900, when it was resolved to bring an action in the name of the plaintiff against the defendants. But it was subsequently determined to await the decision of the court in an action which had been insituted against the defendants by another policy-holder.

That other action was tried before Kekewich, J., in July, 1902, when his lordship held that the defendants had no right to increase the premiums as the age of the assured increased. The defendants appealed, and the Court of Appeal took a different view from that of Kekewich, J., but held that the policy was tricky and could be rescinded. The House of Lords, in July, 1904, affirmed the decision of the Court of Appeal.

In September, 1904, the plaintiff issued his writ in the present action, claiming rescission of his policy on the ground of misrepresentations.

Held, that the county court judge having in May, 1898, decided what was the true meaning of the policy, and his decision not having been appealed from, the plaintiff must be taken to have known at that date what was the nature of the contract between the defendants and himself and all the facts which would have enabled him to bring an action for misrepresentation; and that the Statute of Limitations was therefore a bar to the present action, the period at which the statute began to run being that at which the plaintiff knew the facts, and not that at which he ascertained the proper construction to be placed upon them.

Decision of Swinfen Eady, J., reversed.—MOLLOY *v.* MUTUAL RESERVE LIFE INSURANCE CO., *C.A.*; 94 L. T. 756.

2. *Legacy — Action to recover — Express trust — Implied trust—Real Property Limitation Act*, 1874 (37 & 38 *Vict. c.* 57), *s.* 8.—An executrix by investing and otherwise dealing with the property of beneficiaries, and by acting as defendant on behalf of herself and other beneficiaries, does not constitute herself an express trustee, and therefore an action against such executrix by a legatee to recover a legacy is capable of being barred by section 8 of the Real Property Limitation Act, 1874.—MACKAY, RE. MACKAY *v.* GOULD, *Ch.D. Kekewich, J.*, 88; [1906] 1 Ch. 25; 75 L. J. Ch. 47; 93 L. T. 694.

3. *Share of an intestate's estate—Administration—Law of Property Amendment Act*, 1860 (23 & 24 *Vict. c.* 38), *s.* 13.—Under a power of appointment conferred by a marriage settlement M. C. appointed a sum of £5,000, which her father had covenanted to bring into the settlement, to her son, J. F. C. He died a bachelor and intestate, whereupon his mother, M. C., and sister, E. M. P., became entitled to his estate in equal shares. The mother died in 1862, having appointed her daughter, E. M. P., her son-in-law, G. P., and J. C. C. to be her executors, and she gave to her daughter, E. M. P., a life interest in her share of J. F. C.'s estate. The sum of £5,000 was paid to E. M. P. and G. P. in 1864, and was treated by G. P. as his absolute property. G. P. died in 1884, and gave his wife, E. M. P., a life nterest in his property, and appointed F. P. to be his residuary legatee. E. M. P. died in 1903. In an action brought by the administrator of J. F. C. against the executors G. P. and legal personal representatives of F. P.,

Held, that the estate of G. P. was liable to the estate of M. C. for a moiety of the sum of £5,000, and that the Statute of Limitations did not run, because there had not been anyone in existence with a present right of receiving the share of the intestate's estate and capable of giving a discharge for the same, inasmuch as J. C. C, the co-executor with G. P. and E. M. P., although capable of giving a good discharge for the share, could not have recovered M. C.'s share in any proceedings which he might have taken against G. P. and E. M. P.—PARDOE, RE, MACLAUGHLIN *v.* PENNY, *Ch.D. Kekewich, J.*, 210; [1906] 1 Ch. 265; 75 L. J. Ch. 161; 94 L. T. 88.

4. *Solicitor's costs — Part payment — Retainer of moneys due to client.*—Where a debtor owes a creditor several debts, some of which are statute-barred and some of which are not, and pays a sum without appropriating it to any particular debt, or the creditor retains moneys which he has collected on behalf of the debtor, no promise to pay the statute-barred debts can be inferred.

Waugh v. *Cope*, 6 M. & W. 824, followed.—BOSWELL, RE, MERRITT *v.* BOSWELL, *Ch.D. Kekewich, J.*, 306; 75 L. J. Ch. 234; 94 L. T. 243.

See also Vendor and Purchaser, 14.

LOCAL GOVERNMENT:—

1. *Board of guardians—Disqualification—Interest in contract—Time when guardian ceases to be a member —Local Government Act*, 1894 (56 & 57 *Vict. c.* 73), *s.* 46, *sub-sections* 1, 7.—A member of a board of guardians who is concerned in a contract entered into with the board is disqualified for being a member, and the disqualification does not cease by reason of the termination of the contract.—REX *v.* ROWLANDS, *K.B.D.*; [1906] 2 K. B. 292; 75 L. J. K. B. 501.

2. *Bye-laws—New street—Air space and ventilation —One "domestic building"—Occupation—Communication—Frontage—Tests of definition.*—Defendants were proposing to erect a long construction on a strip of land extending for about a hundred yards from D.-road, within the district to which the bye-laws of the W. G. Urban District Council applied, along the G. N. Railway. The erection consisted of three blocks of stables and coach-houses with lofts above joined by two lower brick and slate "lean-to's" which were also suitable to be fitted as stables. There was communication from end to end leading to a garden and the termination of the stables remote from D.-road. On the remaining side there was a paved yard and fence. There was ventilation, but no "air space" on the side towards the railway. The bye-laws of the W. G. Urban Sanitary Authority required an open space of 24 feet in front and 200 square feet, exclusively belonging to such building, in the rear of any new domestic building. If the stables and coach-houses fronted on D.-road the bye-laws had been complied with. The council asserted that the erection constituted more than one building not fronting on D.-road, and that the defendants' plans infringed the bye-laws as to laying out new streets.

Held, that the erection constituted one building, and that the bye-laws as to air space were not infringed.

It seems that the fact that the erection might easily be adapted for occupation by more than one person will not prevent its being held to be one

building, as the question must be dealt with on the facts as they exist, and the test of occupation is misleading. A better test is the existence of means of communication between the blocks, and the situation and control of the outer door.—ATTORNEY-GENERAL *v.* MELVILLE, *Ch.D. Kekewich, J.*; 93 L. T. 612.

3. *Constitution of county borough—Adjustment of financial relations between county and borough—Compensation to county—Local Government Act*, 1888 (51 & 52 *Vict. c.* 41), *s.* 32.—Where a borough is constituted a county borough, and an adjustment respecting the financial relations between the county and the county borough is made under section 32 of the Local Government Act, 1888, compensation may be awarded to the county in respect of the cessation of the liability of the borough to contribute to the county funds for the maintenance of county bridges and main roads and for certain other miscellaneous expenses.

Judgment of Channell, J. (1905, 2 K. B. 340), affirmed.—DURHAM COUNTY COUNCIL *v.* WEST HARTLEPOOL BOROUGH, *C.A.*; [1906] 2 K. B. 186; 94 L. T. 689.

4. *Contract for supply of water by one local authority to another—Sanction of Local Government Board—Enlargement of district—Penalty clause—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 61, 174 (2).—In 1882 the plaintiffs entered into an agreement with the defendants with the sanction of the Local Government Board under section 61 of the Public Health Act, 1875, by which the plaintiffs agreed to supply water to the defendants for certain places within their district. In 1895 the plaintiffs and defendants entered into an agreement for the supply to the defendants' district, or such part thereof as the defendants might wish to supply, or any place outside their district which for the time being they might contract to supply, of a certain quantity of water, the minimum amount being largely increased beyond the amount of the former contract. It was provided that unless the consent of the Local Government Board to the agreement was obtained within six calendar months, or such sanction was ascertained to be unnecessary, the agreement should be void. The board refused to give a general sanction in respect of the area comprised in the agreement.

Held, that the sanction of the board in 1882 referred only to the places mentioned, and no sanction having been given to the agreement of 1895 within the prescribed time, it was void.

Decision of Swinfen Eady, J. ([1905] 1 Ch. 53), reversed.

Held, also (Vaughan Williams, L.J., dissenting), that section 174, sub-section 2, of the Public Health Act, 1875, was directory only, and therefore the omission of any penalty clause did not render the agreements invalid.—SOOTHILL URBAN COUNCIL *v.* WAKEFIELD RURAL COUNCIL, *C.A.*; [1905] 2 Ch. 516; 74 L. J. Ch. 703; 93 L. T. 711.

5. *Diseases of Animals Acts—Inspector appointed by local authority—Sheep detained by inspector on suspicion of having sheep-scab—Negligence of inspector—Liability of local authority—Principal and agent—Sheep-scab Order*, 1898, *Arts.* 2, 14—*Diseases of Animals Act*, 1894 (57 & 58 *Vict. c.* 57), *ss.* 2, 22, 35 (*xiii.*).—A veterinary inspector, who was appointed by a local authority under the Diseases of Animals Act, 1894, for the purpose of carrying out the provisions of that Act and the orders of the Board of Agriculture made thereunder, detained a ram offered for a sale in a market belonging to the plaintiff under a mistaken suspicion that it was suffering from scab. In doing so the inspector was guilty of negligence, and the plaintiff was caused a loss.

Held, that the local authority were not liable to make good the loss so occasioned to the plaintiff, because the order of the Board of Agriculture in question, under which the inspector purported to act, imposed the duty on the inspector, and not upon the local authority.—STANBURY *v.* EXETER CORPORATION, *K.B.D.*, 247; 75 L. J. K. B. 28; 93 L. T. 795.

6. *Guardian of the poor—Disqualification—County court administration order—Composition or arrangement with creditors—Local Government Act*, 1894 (56 & 57 *Vict. c.* 73), *s.* 46 (1) (*c*).—A person who has made a request for and obtained an order in the county court under section 122 of the Bankruptcy Act, 1883, for the administration of his estate and payment of his debts by instalments, has "made a composition or arrangement with his creditors" within section 46 (1) of the Local Government Act, 1894, and has therefore become disqualified from holding office of guardian of the poor.—BRADFIELD *v.* CHELTENHAM UNION, *Ch.D. Buckley, J.*, 611; 75 L. J. Ch. 618.

7. *Public health—Cleansing of cesspools—Construction—"And" whether conjunctive or distributive—Bye-laws—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 42 *and* 44.—The Public Health Act, 1875, s. 42, enacts: "Every local authority may, and when required by order of the Local Government Board shall, themselves undertake or contract for . . . the cleansing of earth-closets, privies, ashpits, and cesspools."

Held, that the word "and" is to be read distributively, and that the local authority therefore have power to undertake the cleansing of earth-closets, privies, and ashpits without undertaking the cleansing of cesspools.—STAINLAND INDUSTRIAL SOCIETY *v.* STAINLAND URBAN COUNCIL, *K.B.D.*, 282; [1906] 1 K. B. 233; 75 L. J. K. B. 190; 94 L. T. 214.

8. *Rating—Light railway—"Used only as a railway"—Light Railways Act*, 1896 (59 & 60 *Vict. c.* 48), *s.* 12, *sub-sections* 1, 2—*Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 211, *sub-section* 1 (b).—Section 211 of the Public Health Act, 1875, which gives the power to levy district rates provides (sub-section 1 (*b*)) as follows: "The owner of any tithes . . . or the occupier of any land used as arable meadow or pasture ground only . . . and the occupier of any land covered with water or used 'only' as a canal or towing-path for the same, or as a railway constructed under the powers of any Act of Parliament for public conveyance, shall be assessed in respect of the same in the proportion of one-fourth part only of such net annual value thereof."

Held, that the word "only" must be read with "railway."

Section 12, sub-section 1, of the Light Railways Act, 1896, provides: "The Clauses Acts, as defined by this Act, and the enactments mentioned in the second schedule to this Act, shall not apply to a light railway authorized under the Act except so far as they are incorporated or applied by the order authorizing the railway." Sub-section 2: "Subject to the foregoing provisions of this Act and to any special provisions contained in the order authorizing the railway, the general enactments relating to railways shall apply to a light railway under this Act in like manner as they apply to any other railway; and, for the purposes of these enactments and of the clauses Acts, so far as they are incor-

porated or applied by the order authorizing the railway, the light railway company shall be deemed a railway company, and the order this Act a special Act, and any provision thereof a special enactment. . . ."

A light railway was constructed under an order made in pursuance of the Light Railways Act, 1896, the following clauses of the order being material: (16) Notwithstanding anything in this order contained the company shall not acquire or be deemed to acquire any right other than that of user of any road along or across which they lay the railway. (17) Nothing in this order or in any bye-law made under this order shall take away or abridge the right of the public to pass along or across every part of any road along or across which the railway is laid with carriages not having flange wheels or wheels suitable only to run on the rails of the railway. (49) The company may use on the railway carriages with flange wheels or wheels suitable only to run on the rails of the railway, and subject to the provisions of this order, the company shall have the exclusive use of the railway for carriages with flange wheels or other wheels suitable only to run on the rails of the railway. (50) If any person (except by agreement with the company, or otherwise as by the order provided) uses the railway, or any portion thereof, with carriages having flange wheels or other wheels suitable only to run on the rails of the railway, such person shall for every such offence be liable to a penalty not exceeding twenty pounds.

Held, that the land occupied by the lines of the rails of the light railway was land used only as a railway, and that the light railway was a railway constructed under the powers of an Act of Parliament for public conveyance within the meaning of section 211 (1) (*b*) of the Public Health Act, 1875.—WAKEFIELD LIGHT RAILWAY *v.* WAKEFIELD CORPORATION, *K.B.D.*, 495; [1906] 2 K. B. 140; 75 L. J. K. B. 388; 94 L. T. 543.

9. *Sewers—Drain vested before* 1894 *in highway authority not being a local authority—Public Health Act*, 1875 (38 & 39 *Vict. c.* 35), *s.* 4—*Local Government Act*, 1894 (56 & 57 *Vict. c.* 73), *s.* 25.—Where before the year 1894 a drain was vested in a highway authority which was not also a sanitary authority, and was consequently not a sewer within the definition in section 4 of the Public Health Act, 1875, it did not upon the passing of the Local Government Act, 1894, become a sewer by reason of its becoming vested under section 25 of that Act in a district council which was both a highway authority and a sanitary authority. — WILLIAMSON *v.* DURHAM RURAL COUNCIL, *K.B.D.*; [1906] 2 K. B. 65; 75 L. J. K. B. 498.

10. *Sewer—Nuisance—Highway board — Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 4, 95—*Local Government Act*, 1894 (56 & 57 *Vict. c.* 73), *s.* 25. —Public Health Act, 1875, s. 4: "'Sewer' includes sewers and drains of every description . . . except drains in or under the control of any authority having the management of roads and not being a local authority under this Act." Local Government Act, 1894, s. 25 (1): "As from the appointed day, there shall be transferred to the district council of every rural district all the powers, duties, liabilities . . . of any highway authority in the district, and highway boards shall cease to exist and rural district councils shall be the successors . . . of the highway authority."

Held, that a drain formerly under the control of a highway board did not become a "sewer" after the coming into operation of section 25 of the Local Government Act, 1894, although but for section 4 of the Public Health Act, 1875, it would have been a "sewer" within the meaning of that Act.—ECCLESIASTICAL COMMISSIONERS *v.* DURHAM RURAL COUNCIL, *K.B.D.*, 491.

11. *Street—Making up street—Expenses—Owner residing outside district of local authority doing work —Power to charge such owner—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 150.—A local authority acting under section 150 of the Public Health Act, 1875, and making up streets under that section, has no power to charge any part of the expense on frontagers who reside outside the boundary of the local authority.—HORNSEY CORPORATION *v.* BIRKBECK BUILDING SOCIETY, *K.B.D.*, 528; [1906] 1 K. B. 521; 75 L. J. K. B. 348; 94 L. T. 700.

LODGING-HOUSE:—

1. *Common lodging-house—Charitable institution—Lodgers received without payment — Registration—Inspection—Common Lodging-houses Act*, 1851 (14 & 15 *Vict. c.* 28)—*Common Lodging-houses Act*, 1853 (16 & 17 *Vict. c.* 41), *s.* 3—*Common Lodging-houses Act, Ireland*, 1860 (23 & 24 *Vict. c.* 26), *s.* 3—*London County Council (General Powers) Act*, 1902 (2 *Ed.* 7, *c. clxxiii.*), *Part IX.*—Notwithstanding the repeal of the Common Lodging-houses Act, Ireland, 1860, the term "common lodging-house" in the Common Lodging-houses Acts, 1851 and 1853, must be interpreted according to the definition of "common lodging-house" contained in section 3 of the Act of 1860. A charitable institution, therefore, which provides free lodgings is not a "common lodging-house" within those Acts, as people are not harboured or lodged there for hire in accordance with the definition in section 3 of the Act of 1860.

Logsdon v. *Booth*, 48 W. R. 266, and *Logsdon* v. *Trotter*, 48 W. R. 365, distinguished.

Gilbert v. *Jones*, *ante*, p. 94, [1905] 2 K. B. 691, overruled.—PARKER *v.* TALBOT, *C.A.*, 132; [1905] 2 Ch. 643; 75 L. J. Ch. 8; 93 L. T. 522.

2. *Common lodging-house—No charge made for lodging—Common Lodging-houses Act*, 1851—*London County Council (General Powers) Act*, 1902, *Part I.*—The Common Lodging-houses Act, 1851, being a sanitary Act, it is immaterial that any institution be carried on for gain, or that any charge be made to the inmates for the purpose of bringing the institution within the provisions of the Act.

The principle laid down in *Logsdon* v. *Booth*, 48 W. R. 266, [1900] 1 Q. B. 401, and *Logsdon* v. *Trotter*, 48 W. R. 365, [1900] 1 Q. B. 617, followed. —GILBERT *v.* JONES, *K.B.D.*, 94; [1905] 2 K. B. 691; 74 L. J. K. B. 929; 93 L. T. 520.

LUNATIC:—

1. *Administration—Lunatic intestate—Allowances to presumptive next-of-kin.*—Sums were advanced to brothers and sisters, presumptive next-of-kin, of a lunatic intestate during his life under orders in lunacy, and were expressed to be advanced as part of the shares of such next-of-kin to which they would become entitled upon surviving the lunatic, and were directed to be taken into account if they so survived.

Held, that the children of one of the next-of-kin dying in the life of the lunatic were not liable to bring into hotchpot the sums so received by their parent.

Proud v. *Turner*, 2 P. W. 560, and *Lloyd* v. *Tench*, 2 Ves. sen. 215, discussed.

Statute of Distributions (22 & 23 Car. 2, c. 10) explained and discussed. — GIST, RE, GIST *v.* TIMBRILL, *Ch.D. Swinfen Eady, J.*, 104; [1906] 1 Ch. 58; 75 L. J. Ch. 19; 94 L. T. 89.

2. *Lunatic not so found—Tenant for life of settled land—Persons appointed to exercise powers of committee—Power of sale—Lands Clauses Act,* 1845 (8 & 9 *Vict. c.* 18), *s.* 7—*Settled Land Act,* 1882 (45 & 46 *Vict. c.* 38, *ss.* 3, 53, 62—*Lunacy Act,* 1890 (53 & 54 *Vict. c.* 5), *ss.* 116, 120, 128.—The court has no power to authorize the person who has been appointed by the judge in lunacy, under section 116, sub-section 2, of the Lunacy Act, 1890, to exercise, as regards the estate of a person of unsound mind not so found by inquisition, such of the powers of the Act as are made exercisable by the committee of the estate of a person of unsound mind so found by inquisition, to sell land, of which the person of unsound mind is tenant for life, either under the Lands Clauses Act, 1845, or under the Settled Land Act, 1882.

In re Baggs [1894] 2 Ch. 416n, approved and followed.—S. S. B., RE, *C.A.*, 429; [1906] 1 Ch. 712; 75 L. J. Ch. 522; 94 L. T. 599.

3. *Person "lawfully" detained under the Idiots Act,* 1886—*Appointment of committee—Jurisdiction—Idiots Act,* 1886 (49 *Vict. c.* 25)—*Lunacy Act,* 1890 (53 *Vict. c.* 5), *s.* 116, *sub-section* 1 (*c*).—The court has jurisdiction under section 116, sub-section 1 (*c*), of the Lunacy Act, 1890, to make an order appointing a committee of the estate of a person of unsound mind lawfully detained in an asylum under the provisions of the Idiots Act, 1886.

In re Watkins, 44 W. R. 609, [1896] 2 Ch. 336, distinguished.—WHALLEY, RE, *C.A.*, 349; [1906] 1 Ch. 565; 75 L. J. Ch. 328; 94 L. T. 423.

4. *Vesting order—Criminal lunatic—Jurisdiction—Trustee Act,* 1850 (13 & 14 *Vict. c.* 60), *s.* 5—*Lunacy Act,* 1890 (53 & 54 *Vict. c.* 5), *ss.* 136, 340, 342.—Under section 5 of the Trustee Act, 1850, the court had power to make a vesting order when any person was entitled jointly with any lunatic or person of unsound mind, words which included a criminal lunatic. The Act of 1850 was repealed by the Lunacy Act, 1890, s. 342: "The Acts mentioned in the fifth schedule are hereby repealed to the extent set forth in the third column of the same schedule. Provided that this repeal shall not affect any jurisdiction or practice established, confirmed, or transferred, or salary or compensation or superannuation secured by or under any enactment repealed by this Act."

Sections 136 and 341 of the Act of 1890 in substance re-enact section 5 of the Act of 1850 as regards any trustee who is a lunatic or person of unsound mind, but section 340, sub-section 1, of the Act of 1890 enacts that, "save as in this Act otherwise expressly provided, this Act shall not extend to criminal lunatics."

Held, that the court had jurisdiction to make a vesting order in the case of a criminal lunatic, inasmuch as the jurisdiction exercised under section 5 of the Act of 1850 was preserved by the saving clause, section 342 of the Act of 1890.—R., RE, *C.A.*, 578; [1906] 1 Ch. 730; 75 L. J. Ch. 421; 94 L. T. 494.

See also Australia, Law of, 3; Inland Revenue, 3; Poor Law, 3.

MARGARINE:—

1. *Importation otherwise than in packages marked "Margarine"—Conviction—Right of appeal—Sale of Food and Drugs Act,* 1899 (62 & 63 *Vict. c.* 51), *ss.* 1, 25, 28.—No appeal on a question of fact lies to quarter sessions from a conviction by justices under section 1 of the Sale of Food and Drugs Act, 1899.—REX *v.* OTTO MONSTED (LIMITED), *K.B.D.*; 75 L. J. K. B. 629.

2. *"Marvo"—Sale of butter substitute otherwise known as margarine—Margarine Act,* 1887 (50 & 51 *Vict. c.* 29), *s.* 3.—The respondent went into the appellant's shop and asked for half a pound of "Marvo," and was served with a substance from a box labelled "Margarine," which substance, before being handed to the respondent, was wrapped in paper on which was printed in ½in. letters "Margarine." Inside the package was found a slip on which was printed: "Marvo (registered by Act of Parliament). Without this slip none is genuine"; and behind the counter was a notice: "Notice.—'Marvo,' the new butter substitute, equal in flavour to the finest dairy butter. To comply with the provisions of the Food and Drugs Act is sold as 'Margarine.'"

Held, the appellant had not sold a substance prepared in imitation of butter under a name other than margarine, within section 3 of the Margarine Act, 1887.—TANNER *v.* DYBALL, *K.B.D.*; 94 L. T. 539.

See also Adulteration, 3.

MARKET:—

Toll — Bye-law — Hawking — Manufacturer of mineral waters calling on customers.—By a bye-law of the borough of D., "every person or persons who shall hawk or expose about the town for sale" certain articles should pay a toll.

The respondent, who was in the employ of a manufacturer of mineral waters at R., brought into the borough of D. a van laden with mineral waters. He called at the houses and shops of regular customers to sell and deliver to them any mineral waters they might require. The goods were not cried in the street, and no effort was made to attract casual customers.

Held (*dissentiente* Darling, J.), that the respondent had not hawked or exposed about the town for sale the mineral waters, within the meaning of the bye-law.—PHILPOTT *v.* ALLRIGHT, *K.B.D.*; 94 L .T. 540.

MARRIAGE:—

1. *Contract—Marriage brokage contract—Illegality—Contract to procure introductions to persons generally—Part performance—Right to recover back money paid under contract.*—A marriage brokage contract is not confined to a contract for reward to procure an introduction to a particular person with a view of marriage, but includes a contract to procure introductions to persons generally with a view to marriage; and the court will order money paid under such a contract to be repaid, even though some step has been taken by the other party towards the performance of the contract.

Judgment of the Divisional Court ([1905] 1 K. B. 24, 53 W. R. Dig. 97) reversed.—HERMANN *v.* CHARLESWORTH, *C.A.*, 22; [1905] 2 K. B. 123; 74 L. J. K. B. 620; 93 L. T. 284.

2. *Marriage by repute—Divided repute—Illicit commencement—Evidence—Presumption.*—A. and B. lived together with two children from about 1878 to 1893. They were generally reputed to be husband and wife, and the children their lawful children, although there was some evidence dividing the repute. The eldest child, a daughter, was born in 1873 in her maternal grandmother's house, and registered by B. in her maiden name. The second child, a son, was born in 1879, while A. and B. were living together, and was registered in A.'s name. No record of any marriage could be found.

Held, that A. and B. had been husband and wife, but that the son was their only legitimate child.—HAYNES, RE, HAYNES *v.* CARTER, *Ch.D. Kekewich, J.*; 94 L. T. 431.

MARRIED WOMAN:—

1. *Husband and wife—Action of detinue by wife against husband—Married Women's Property Act,* 1882 (45 & 46 *Vict. c.* 75), *ss.* 12, 17.—Under section 12 of the Married Women's Property Act, 1882, an action of detinue by a married woman against her husband in respect of her personal property is maintainable.—LARNER *v.* LARNER, *K.B.D.*, 62; [1905] 2 K. B. 539; 74 L. J. K. B. 797; 93 L. T. 537.

2. *Policy — Appointment — After-married wife — Married Women's Property Act,* 1870 (33 & 34 *Vict. c.* 93), *s.* 10.—Policies were taken out by a married man with trusts (expressed to be in accordance with the Married Women's Property Act, 1870) for his "widow or widow and children" as he should appoint. He appointed to an after-married wife.

Held, that she was a "wife" within the statute.

Held, also, that if she was not within the statute then the policies were not within the Act either, and she took by appointment without reference to the Act.

In re Brown's Policy, 51 W. R. 364, [1903] 1 Ch. 188, followed.—PARKER'S POLICIES, RE, *Ch.D. Swinfen Eady, J.*, 329; [1906] 1 Ch. 526; 75 L. J. Ch. 297; 94 L. T. 477.

MASTER AND SERVANT:—

1. *Employers' liability—Accident—Compensation—Defence of no claim being made within statutory period—Evidence of claim—Workmen's Compensation Act,* 1897 (60 & 61 *Vict. c.* 37), *s.* 2—*Workmen's Compensation Rules,* 1898-1900, *r.* 17.—On the 4th of November, 1902, the applicant, while engaged in taking a pulley off a shaft at the works of the respondents, by whom he was employed as engineer, placed the pulley on some steps, and as he descended the steps the pulley fell upon his head and fractured his skull. After a month's absence he returned to work with his employers, by whom he was dismissed in May, 1903. In November, 1903, he became totally incapacitated from work, and was eventually confined in a lunatic asylum, where he now was.

In October, 1905, his wife on his behalf applied for compensation. The respondents by their answer, which followed F. 8 in the Appendix to the Workmen's Compensation Rules, 1898-1900, stated that they desired to bring to the notice of the judge the fact that on the 9th of December, 1902, the applicant accepted £2 in full satisfaction of all claims in respect of the accident, and a receipt in writing for the same was signed by the applicant. The respondents stated further that they intended to rely on the fact that the claim for compensation was not made within six months from the occurrence of the accident, and they denied their liability to pay any further compensation. At the hearing before the deputy county court judge the receipt referred to in the answer was not put in evidence. The judge held that there was no evidence of a claim being made within the statutory period, and dismissed the application.

The Court of Appeal allowed the appeal, being of opinion, having regard to the terms of rule 17 of the Workmen's Compensation Rules, 1898-1900 and to the principles laid down by Lord Halsbury in *Powell* v. *Main Colliery Co.*, [1900] A. C. 371, that the particulars of demand and the answer under the Workmen's Compensation Act, 1897, ought not to be construed with the same strictness as if they were pleadings in the High Court, and they thought that the statement in the answer that £2 had been paid by the respondents in full satisfaction of all claims in respect of the accident afforded some evidence of a claim for compensation having been made within the time.—LOWE *v.* MYERS & SONS, *C.A.*; [1906] 2 K. B. 265; 75 L. J. K. B. 651.

2. *Employers' liability—Accident—Compensation—Contract of employment—Contract not to be terminated without notice—Closing of works—Implied term of contract to find work for workman—Claim for wages—Custom—Reasonableness of.*—The plaintiff was in the regular employment of the defendants at their tinplate works as a rollerman; he was employed in doing piecework, and was paid according to the amount of work he did, and the terms of his employment were partly contained in printed rules applicable to all the workmen, one of which provided that no person regularly employed should quit or be discharged from the works without giving or receiving twenty-eight days' notice in writing. On the 20th of July, 1903, the defendants, without notice, shut down their works upon the ground that they could not get orders at remunerative prices. On the 3rd of August they gave the usual twenty-eight days' notice to terminate the contract, and and this notice expired and terminated the contract with the workmen on the 31st of August. The plaintiff attended the works on the 20th of July, but received no work, and earned no wages between that date and the 31st of August, when his contract expired by the notice. He claimed wages for that time upon the ground that until the contract was put an end to on the 31st of August the defendants were bound in law in to provide him with a reasonable amount of work, and thereby enable him to earn wages. The defendants set up the defence that they were not bound in law to provide the plaintiff with work, and, further, they set up a custom in the tinplate trade by which employers were entitled to shut down their works if they could not obtain orders at remunerative prices.

Held, both upon principle and authority, that, apart from custom, it was an implied term of the contract that the plaintiff was entitled to have, and the defendants were bound to provide the plaintiff with, a reasonable amount of work and wages until the termination of the contract by the notice; that upon the facts the alleged custom set up by the defendants had not been established, and that, even if it had been established, it would not be a reasonable custom.—DEVONALD *v.* ROSSER, *K.B.D.*; 93 L. T. 274.

3. *Employers' liability—Accident—Compensation—Dependant—Desertion by husband of wife—Workmen's Compensation Act,* 1897 (60 & 61 *Vict. c.* 37), *s.* 7, *sub-section* 2; *First Schedule, s.* 1, *sub-section* 2.—A. was married to B. in 1882, and lived with her till June, 1905. He then left her owing to a quarrel, being at the time out of work. He took with him one child, whom he subsequently sent back to B. After A. left her B. supported herself, partially by occasional work and partially by charity of relatives. Within three months from the time A. left B, A. met with an accident, resulting in his death, he having been at the time in employment for three weeks, during which he did not contribute to his wife's support.

Held, B was wholly dependent upon her deceased husband within section 7, sub-section 2, of the Workmen's Compensation Act, 1897.—COULTHARD *v.* CONSETT IRON CO., *C.A.*, 139; [1905] 2 K. B. 869; 75 L. J. K. B. 60; 93 L. T. 756.

4. *Employers' liability—Accident—Compensation—Dependants—Partial dependency—Amount of compensation—Workmen's Compensation Act,* 1897 (60 & 61 *Vict. c.* 37), *Schedule I., clause* 1 (a) (*ii.*).—A workman was killed by an accident arising out of and in the course of his employment. During the

last three years his weekly earnings had been 19s. 10½d., and his wife earned 1s. 10½d. a week in addition. They had no other means of living. His widow having claimed compensation under the Workmen's Compensation Act, 1897, as in part dependent upon his earnings within Schedule I., clause 1 (*a*) (ii.), to the Act, the employers contended that in order to arrive at the sum which would be "reasonable and proportionate to the injury to" the widow within the meaning of the clause, the amount required to maintain him in his lifetime must be deducted from his earnings, and the maximum sum payable as compensation must be proportionately reduced. The county court judge awarded £150.

Held, that the principle for the assessment of compensation was the same as in the case of total dependency, except that in the case of partial dependency the applicant's other source of income should be taken into account; that the amount required to maintain the deceased man in his lifetime did not enter into the calculation, and that the county court judge had not misdirected himself in assessing the compensation at £150.—OSMOND *v.* CAMPBELL, *C.A.*, 117; [1905] 2 K. B. 852; 75 L. J. K. B. 1; 93 L. T. 724.

5. *Employers' liability—Accident—Compensation—Employment in agriculture—Agricultural work—Workmen's Compensation Act*, 1900 (63 & 64 *Vict. c.* 22), *s.* 1, *sub-sections* 1 *and* 3.—In an arbitration under the Workmen's Compensation Acts, 1897 and 1900, it appeared that the applicant was a carpenter, that he was employed on a farm as the farm carpenter, that he acted as gamekeeper for three months in the year, and that he helped in such work as harvesting, rick-making, and carting.

Held, that there was evidence which justified the county court judge in finding that the applicant was employed in agriculture within the meaning of the Act of 1900.—SMITH *v.* COLES, *C.A.*, 81; [1905] 2 K. B. 827; 75 L. J. K. B. 16; 93 L. T. 754.

6. *Employers' liability—Accident—Compensation—Employment in coal mine—Gradual injury to hand and knee—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 1 (1).—One coal miner was incapacitated for work by "beat hand," and another by "beat knee." "Beat hand" is an injury caused by an abscess gradually produced by the jar, friction, or pressure to the hand caused by using the pick; and "beat knee" is an injury caused by an abscess in the knee gradually developed by long-continued kneeling whilst at work. Both are common injuries in the ordinary course of work in a coal mine.

Held (dismissing the appeals), that the injuries were not caused by "accident" within the meaning of section 1 (1) of the Workmen's Compensation Act, 1897.—MARSHALL *v.* EAST HOLYWELL COAL CO., *C.A.*; 93 L. T. 360.

7. *Employers' liability—Accident—Compensation—Employment "on or in or about" an "engineering work"—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 7, *sub-section* 1.—An "engineering work" within section 7 of the Workmen's Compensation Act, 1897, means a work carried on in a definite area, or areas, but such areas need not necessarily be contiguous.

The respondents were contractors, and had undertaken the work of reconstructing a tramway which ran through the streets of a town. New rails for the tramway were brought to the town by railway, and, by an arrangement between the respondents and the railway company, were unloaded and stacked in a yard belonging to the railway company till they were required for use on the tramway. The appellant was employed by the respondents in unloading and stacking the rails in the yard when he met with an accident. The yard abutted upon a street through which the tramway would ultimately run when completed, but at the time of the accident no work on the tramway was actually going on, at any point nearer than 700 yards from the place where the accident happened.

Held (affirming the judgment of the court below), Lord Loreburn, L.C., and Lord James of Hereford dissenting, that the appellant was not, at the time of the accident, employed "on or in or about" an "engineering work" within the meaning of section 7 of the Workmen's Compensation Act. 1897.—BACK *v.* DICK, KERR, & CO., *H.L.*; [1906] A. C. 325; 75 L. J. K. B. 569; 94 L. T. 802.

8. *Employer's liability—Accident—Compensation—Engineering work—Construction—Mechanical power—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 7, *sub-section* 2.—A. contracted with B. to erect a machine on the third floor of B.'s building. C., who was in the employment of A., had to superintend the carrying out of the work. The machine was delivered in parts at B.'s building, and the heavy parts of the machine were raised to the third floor by pulleys, whilst the lighter parts were carried up by the lift, to work which mechanical power was required. When all the parts were on the third floor, and whilst C. was engaged in erecting the machine, for which no mechanical power was required, a piece slipped and injured C.

Held, the erecting of the machinery was a distinct and separate part of the contract from the delivery of the parts on to the third floor. The erection alone constituted the "construction" within the meaning of the statute, and as no mechanical power was required for that purpose, the injured workman was not entitled to compensation under the Act.—MURPHY *v.* O'DONNELL, *C.A.*, 149.

9. *Employers' liability—Accident—Compensation Engineering work—Repair of tramway—Area of the undertaking—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 7.—In an arbitration under the Workmen's Compensation Act, 1897, it appeared that the applicant was employed by a municipal corporation, who were the owners of an electric tramway, in the work of repairing the overhead wires when necessary. Having done some repair at a point on the tramway, he was proceeding with a machine which he used in the work to another point on the tramway about three-quarters of a mile distant for the purpose of doing some repair there. When he was about 200 yards away from the first point, and while he was either on or in close proximity to the tramway, he was accidentally injured.

Held, that, inasmuch as there was evidence on which the county court judge could find that the obligation of the corporation to repair extended to the whole area of the tramway, he was justified in holding that at the time of the accident the applicant was employed on, in, or about engineering work—viz., the repair of the tramway.—ROGERS *v.* CARDIFF CORPORATION, *C.A.*, 35; [1905] 2 K. B. 832; 75 L. J. K. B 22; 93 L. T. 683.

10. *Employers' liability—Accident—Compensation—"Engineering work"—Repairs—Machinery driven by mechanical power—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *ss.* 1, 7.—A workman in the employ of a firm whose business was the manufacture of lifts, was sent by them to examine and

repair an hydraulic lift at Blenheim. While repairing it, and while availing himself of the hydraulic power of the lift itself, partly to put him in a position to carry out the repairs, and partly to test how far they had been effective, he met with an accident in consequence of an unexpected movement of the lift, for which he had been awarded compensation by the county court judge.

The Court of Appeal dismissed the appeal.—TULLOCK *v.* WAYWOOD & Co., *C.A.*; [1906] 2 K. B. 261; 75 L. J. K. B. 557.

11. *Employers' liability—Accident—Compensation—Engineering work—Tramway, alteration of—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 7.—A workman was employed by a contractor who had entered into a contract with a telephone company to carry telephone wires across and under a certain street. The telephone company had statutory power to carry the wires under the street. Two tramway lines, one up and one down, were laid along the street. The contractor made a trench from one side of the street as far as the outside rail of the down line, and also a trench in the space between the up and down lines, and was proposing to connect these two trenches by means of a hole under the down line for the purpose of carrying the wires. One of his workmen was engaged in making the hole by means of an iron bar when a passing tramcar killed him. His widow claimed compensation under the Workmen's Compensation Act, 1897, upon the ground that at the time of the accident the deceased workman was employed on or about engineering work—namely, the alteration of the tramway. The county court judge found that the work was not an alteration of the tramway, and that the Act did not apply.

Held (by Collins, M.R., and Mathew, L.J., Romer, L.J., dissenting), that the space between the up and down lines was part of the tramway, and that, as there was a physical alteration in the surface of the street at that place, the deceased man was employed on or about the alteration of the tramway, and the Act applied.—ADAMS *v.* SHADDOCK, *C.A.*, 97; [1905] 2 K. B. 859; 75 L. J. K. B. 7; 93 L. T. 725.

12. *Employers' liability—Accident—Compensation—Factory—Gas mains—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 7.—A workman was employed by a gas company in opening up a road under which a gas main was laid so as to get at the main. While doing so he was injured by an accident. The gas company owned the gasworks where the gas was manufactured and the mains under the roads in the district which were connected with the gasworks and were used for distributing the gas to the consumers' houses. The place where the accident happened was about a quarter of a mile from the gasworks, and there was no steam, water, or other mechanical power used there. In proceedings to assess compensation under the Workmen's Compensation Act, 1897, it was admitted that the gasworks themselves were a factory.

Held, that the gas mains did not form part of the factory, and that the applicant was not employed on or about a factory when the accident happened.—SPACEY *v.* DOWLAIS GAS AND COKE Co., *C.A.*, 138; [1905] 2 K. B. 879; 75 L. J. K. B. 5; 93 L. T. 685.

13. *Employers' liability—Accident—Compensation—"Serious and wilful misconduct"—Workmen's Compensation Act*, 1897.—The fact that the consequences of an act of misconduct are serious is not enough to make it "serious and wilful misconduct" within the meaning of the Workmen's Compensation Act, 1897.

A workman was killed in a lift in his employers' workshop. Workmen were forbidden to use the lift except under conditions which did not exist in this case, and there was no evidence as to how he came to be in the lift, or how the accident happened.

Held (reversing the judgment of the court below), that there was no evidence that the workman had been guilty of "serious and wilful misconduct" so as to deprive his widow of the right to compensation under the Workmen's Compensation Act, 1897.—JOHNSON *v.* MARSHALL, SONS, & Co., *H.L.*; 94 L. T. 828.

14. *Employers' liability—Accident—Compensation—Shipwright—Ship moored to jetty of dock—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *ss.* 1, 7.—A workman employed to do repairs in a ship, which, though attached to the jetty of a dock by a rope, is wholly waterborne, and is not making use of the dock in any way, is not a workman entitled to the benefit of the Workmen's Compensation Act, 1897, inasmuch as the person sued is not the occupier of a factory, and, therefore, not an "undertaker" within the Act.

Houlder Line (Limited) v. *Griffin*, 53 W. R. 609, [1905] A. C. 220, followed.—SMITH *v* STANDARD STEAM FISHING Co., *C.A.*, 582; [1906] 2 K. B. 275; 75 L J. K. B. 640.

15. *Wages—Deduction—Set-off—Sum payable under magistrate's order—Truck Act*, 1831 (1 & 2 *Will.* 4, *c.* 37), *s.* 3.—Section 3 of the Truck Act, 1831, prohibits an employer deducting from the wages earned by a workman any sum of money (other than medical attendance, &c., under sections 23 and 24), even if such money is due and payable to the employer under an order of a court of competent jurisdiction.

Decision of the Court of Appeal (52 W. R. 564, [1904] 2 K. B. 44) reversed.—WILLIAMS *v.* NORTH'S NAVIGATION COLLIERIES, *H.L.*, 485; [1906] A. C. 136; 75 L. J. K. B. 334; 94 L. T. 447.

16. *Wrongful dismissal—Damages for—Duty of judge — Justification — Jury.* — Misconduct inconsistent with the fulfilment of express or implied conditions of service will justify dismissal, but there is no fixed rule of law defining the degree of misconduct which will suffice.

In cases of alleged wrongful dismissal, where the trial takes place before a judge and jury, it is for the judge to direct them by informing them of the nature of the acts which as a matter of law justify dismissal, and he may guide them by calling their attention to the facts material to the determination of the issues raised.—CLOUSTON & Co. *v.* CORBY, *P.C.*, 382; [1906] A. C. 122; 75 L. J. P. C. 20; 93 L. T. 706.

METROPOLIS:—

1. *Building—Party structure—Interference—Notice—Railway company—Demolition of building for purposes of station—London Building Act*, 1894 (57 & 58 *Vict. c. ccxiii.*), *ss.* 5 (31), 90 (1)—*Railways Clauses Consolidation Act*, 1845 (8 *Vict. c.* 20), *ss.* 16, 45—*Charing Cross, Euston, and Hampstead Railway Act*, 1893 (56 & 57 *Vict. c. ccxiv.*), *ss.* 5, 31.—A railway company in the metropolis acquired land for "extraordinary purposes" under section 45 of the Railway Clauses Act, 1845, and for the purposes of constructing a station proceeded to demolish the building standing thereon under the powers conferred upon them by their special Act, but without having given to

the adjoining owner the notice required to be given by a "building owner" by section 90, sub-section 1, of the London Building Act, 1894. An action for an injunction having been brought by the adjoining owner to restrain interference with the party-wall,

Held, that the railway company were not exempted either by the terms of their special Act or by section 201, sub-section 8, of the London Building Act, 1894, from the provisions of section 90, sub-section 1, of the latter Act as to notice.

Held, also, that no substantial interference with the party structure had in fact taken place, and that therefore the railway company was not a "building owner" within the meaning of section 5, sub-section 31, of the London Building Act, 1894.—LEWIS & SOLOME *v.* CHARING CROSS, EUSTON, AND HAMPSTEAD RAILWAY, *Ch.D. Warrington, J.*, 435; [1906] 1 Ch. 508; 75 L. J. Ch. 282; 94 L. T. 732.

2. *Bye-law—Daily removal of house refuse—Notice to occupiers to place movable receptacles on kerbstone—Refusal of sanitary authority to remove refuse placed elsewhere—Public Health (London) Act*, 1891 (54 & 55 *Vict. c.* 76), *ss.* 16 (2), 30.—A bye-law made by the London County Council under section 16, sub-section 2, of the Public Health (London) Act, 1891, provided that where a sanitary authority arrange for the daily removal of house refuse in their district, or any part thereof, the occupier of any premises in such district, or part thereof . . . shall at such hour of the day as the sanitary authority shall fix . . . deposit on the kerbstone or on the other edge of the footpath immediately in front of the house or in a conveniently accessible position on the premises as the sanitary authority may prescribe by written notice served upon the occupier, a movable receptacle in which shall be placed for the purposes of removal by . . . the sanitary authority of the house refuse." A sanitary authority issued notices under the bye-law to the occupiers of all houses in a certain area in their district requiring each occupier to deposit on the kerbstone or edge of the foothpath in front of his house a movable receptacle containing the house refuse. The respondent was occupier of a detached house situated within the prescribed area of the notice, which had a garden in front and was approached by a carriage drive. He refused to comply with the notice to place his house refuse on the kerbstone, but was willing to place, and did place, the refuse receptacle in a conveniently accessible position on his front premises. The sanitary authority refused to take it away unless the receptacle was put on the kerbstone, and the respondent thereupon took proceedings against the authority under section 30 of the Public Health (London) Act, 1891.

Held, that the sanitary authority was not empowered under the bye-law to give a general notice to every occupier of premises within a particular area to place the refuse receptacle on the kerbstone for removal, and their refusal to remove the house refuse of this particular occupier from what was found as a fact to be a conveniently accessible position on his premises was a refusal without reasonable cause within the terms of the section.

Semble, that it was no objection to the validity of the bye-law that the placing of the receptacles on the kerbstone would cause a temporary obstruction of the highway. — WANDSWORTH BOROUGH *v.* BAINES, *K.B.D.*, 457; [1906] 1 K. B. 470; 75 L. J. K. B. 158; 94 L. T. 211.

3. *Bye-law — Litter in streets — Repugnancy to statute.* — By a bye-law of the London County Council made under section 23 of the Municipal Corporations Act, 1882, and section 16 of the Local Government Act, 1888: "No person shall sweep or otherwise remove from any shop, house, or vehicle into any street any waste-paper, shavings, or other refuse, or, being a costermonger, newsvendor, or other street trader, throw down and leave in any street any waste-paper, shavings, or other refuse. . . . Any person who shall offend against any of these bye-laws shall be liable for each offence to a fine not exceeding 40s."

An information was preferred within the metropolis for contravening this bye-law, which was dismissed on the ground that the bye-law was *ultrà vires* as dealing with a nuisance already punishable when the bye-law was made, under section 60 of the Metropolitan Police Act, 1839, which imposes a penalty on any person "who in any thoroughfare shall throw or lay . . . any litter or rubbish."

Held, that the bye-law was good.—BATCHELOR *v.* STURLEY, *K.B.D.*; 93 L. T. 539.

4. *Dangerous structure—Party-wall—Party-wall in dangerous state—Inspection by district surveyor—Right of council to two sets of fees for inspection—London Building Act*, 1894 (57 & 58 *Vict. c. ccxiii.*), *s.* 113; *Schedule* 3, *Part* 2.—A party-wall separating the premises of two adjoining owners became dangerous, and the steps prescribed by the "dangerous structures" provisions of the London Building Act, 1894, were duly taken with regard to it, and an inspection of the party-wall was made by the district surveyor. The county council paid to the district surveyor two sets of fees in respect of his inspection of the party-wall, which was the dangerous structure in question, and claimed to recover the two sets of fees from the owners. They had already recovered one set of fees from one of the owners.

Held, that the party-wall was only one dangerous structure within the meaning of the Act, and that the county council were entitled to recover only one set of fees in respect of the surveyor's inspection of the same.—LONDON COUNTY COUNCIL *v.* SHEINMAN, *K.B.D.*; 93 L. T. 505.

5. *Excavation for gas pipes—Making good and reinstating—Insertion of concrete course—Metropolis Management Act*, 1855 (18 & 19 *Vict. c.* 120), *ss.* 111, 114—*Metropolis Management Amendment Act*, 1862 (25 & 26 *Vict. c.* 102), *s.* 82.—A gas company having opened certain streets for the purpose of laying, altering, and repairing their pipes, the local authority thought it expedient to fill in the ground and make good the surface under section 114 of the Metropolis Management Act, 1855, instead of permitting the work to be done by the gas company. In order that the surface of the street should be made as good and remain as good as it was before, the local authority inserted a course of concrete where there was no concrete before, and where there was concrete before put in an extra thickness of concrete. The magistrate found the insertion of such concrete was reasonable and necessary.

Held, that the local authority could recover from the gas company the cost of such concrete.—COMMERCIAL GAS CO. *v.* POPLAR CORPORATION, *K.B.D.*; 94 L. T. 222.

6. *Formation of or laying out new street—Conditions of sanction by London County Council—Erection of new building upon either side or upon site abutting upon roadway—London Building Act*, 1894 (57 & 58 *Vict. c. ccxiii.*).—C. was the owner of a piece of land bounded by two railways, the only approach

being through a tunnel under one of the railways. He submitted to the L.C.C. a plan for a proposed road which was to go through the tunnel (which was to be widened) and across the piece of land, and to cross the railway on the other side of the land by a bridge and to run from thence into a highway.

The sanction of the L.C.C. to this plan was given on the condition that the road should be clearly defined and thrown open as a highway within a certain time, and that no new building should be commenced to be erected upon either side of such roadway, or upon a site abutting on such roadway, unless such roadway had been defined and thrown open throughout its entire length, and other conditions had been complied with.

Owing to the fact that C. had been unable to come to terms with the railway company with regard to the widening of the tunnel and the building of the bridge, he had been unable to comply with the requirements of the L.C.C., but he leased a piece of the land and proceeded to erect thereon a factory and dwelling-house, giving his lessee right of access over the site of the proposed road, which was then a cart trackway, and thence over the intervening piece of land. The nearest point of the plot of land so leased to the site of the proposed roadway was 187ft. He also proceeded to put fresh clinkers upon the roadway, and extended the sewer up the roadway, with which the drainage of the factory was connected.

Held, that C. had not commenced to form or lay out the new street or roadway sanctioned by the L.C.C., and that he had not commenced to erect new buildings upon either side of such roadway, or upon a site abutting on such roadway.—LONDON COUNTY COUNCIL *v.* COLLINS, *K.B.D.*; 93 L. T. 540.

7. *House refuse—Removal of—Trade refuse—Refuse of hotels—Public Health (London) Act*, 1891 (54 *&* 55 *Vict. c.* 76), *ss.* 30, 141.—Ashes from the grates, sawdust from the kitchen floors, empty sauce bottles and tins from the kitchen, straw cases for bottles, tea leaves, waste paper, egg shells, lemon peel, dust from rooms and staircases, small quantities of broken crockery and glass, being the refuse of an hotel, is "house refuse" within the meaning of sections 30 and 141 of the Public Health (London) Act, 1891, and not "trade refuse."—WESTMINSTER CORPORATION *v.* GORDON HOTELS (LIMITED), *K.B.D.*; [1906] 2 K. B. 39; 75 L. J. K. B. 438; 94 L. T. 521.

8. *New road—Frontage—Apportionment of expenses—Metropolis Local Management Acts*, 1855 *and* 1862.—Where the local authority by resolution, in pursuance of the powers vested in them by the Metropolis Local Management Acts, 1855 and 1862, apportioned the expenses of paving a new road among all the owners of the frontage, and subsequently revoked such apportionment and, by a fresh resolution, apportioned such expenses among a certain number of owners, making a merely nominal charge in respect of the remaining owners,

Held, that such subsequent apportionment was wrong in principle and invalid. — ELSDON *v.* HAMPSTEAD CORPORATION, *Ch.D. Joyce, J.*, 43; [1905] 2 Ch. 633; 75 L. J. Ch. 27; 93 L. T. 335.

9. *Open space—Hoarding or screen—Adjoining landowners—Access of light—Building—Metropolitan Open Spaces Acts*, 1877 (40 *&* 41 *Vict. c.* 35), *s.* 1; 1881 (44 *&* 45 *Vict. c.* 34), *s.* 5; 1887 (50 *&* 51 *Vict. c.* 32), *s.* 4—*Disused Burial-grounds Act*, 1884 (47 *&* 48 *Vict. c.* 72), *s.* 3.—Under the Metropolitan Open Spaces Acts, 1877, 1881, and 1887, and the Disused Burial-grounds Act, 1884, a local authority is entitled to erect a screen upon an open space of which it has the control, and thereby prevent an adjoining owner from acquiring by prescription a right to an access of light to his windows over such open space.

Decision of the Court of Appeal (52 W. R. 114, [1903] 2 Ch. 556) reversed, and that of Buckley, J. (51 W. R. 109, [1903] 1 Ch. 109), restored.—PADDINGTON CORPORATION *v.* ATTORNEY-GENERAL, *H.L.*, 317; [1906] A. C. 1; 75 L. J. Ch. 4; 93 L. T. 673.

10. *Paving—Passage not being a thoroughfare—Requirement of owner to pave a second time with different material—Metropolis Management Act*, 1855 (18 *&* 19 *Vict. c.* 120), *ss.* 99, 100.—The owner of a court, passage, or public place, not being a thoroughfare, who has once in obedience to a notice in that behalf under section 100 of the Metropolis Management Act, 1855, paved or covered the same to the satisfaction of the vestry, cannot be called upon a second time to pave or cover it with a different material; all he can be required to do is to repair the existing pavement or covering.—HARRISON *v.* OWNER OF NEW-STREET-MEWS, *K.B.D.*; [1906] 1 K. B. 703; 75 L. J. K. B. 510.

11. *Paving new street—"Intersection"—Metropolis Local Management Act*, 1862 (25 *&* 26 *Vict. c.* 102), *s.* 77.—At the junction of two streets, B.-walk and W.-road, was a granite crossing which was on the soil of W.-road, and it connected the footpath on the side of W.-road at the junction with B.-walk.

Held, that this granite crossing was "paving at the points of the intersection" of the streets within section 77 of the Local Management Act, 1862, and rightly charged on the frontagers of B.-walk when that street was being paved.—BRIDGETT *v.* WANDSWORTH CORPORATION, *K.B.D.*; 93 L. T. 519.

12. *Poor—Provision of casual wards—Metropolitan Common Poor Fund—Land on which wards built—Payments for lands.*—The H. Union acquired in 1838 and 1849 certain land upon which were erected casual wards, the money for their erection having been borrowed, which was repaid by instalments out of the Metropolitan Common Poor Fund. The H. Union sought to recover the value of the land out of the Metropolitan Common Poor Fund in the half year ending Michaelmas, 1903,

Held, that this sum could not be recovered in one half year, and rules *nisi*, directed to the auditor who had disallowed the item, for a *certiorari* to quash the disallowance, and for a *mandamus* to grant a certificate of allowance, accordingly quashed.

Quære, whether the H. Union were not entitled to the fair value of the land for the half year out of the Metropolitan Common Poor Fund.—REX *v.* MOWATT, *K.B.D.*; 93 L. T. 789.

13. *Privy—Emptying of—"Street or public place"—Privy on private property adjoining public road—Emptying of during prohibited hours—Offence—Metropolitan Police Act*, 1839 (2 *&* 3 *Vict. c.* 47), *s.* 60, *sub-section* 4.—Section 60 of the Metropolitan Police Act, 1839, provides that "Every person who in any street or public place within the limits of the metropolitan police district shall be guilty of any of the following offences shall be liable to a penalty"—that is to say, (4) "Every person who shall empty . . . any privy between the hours of six in the morning and twelve at night."

Held, that the provision in sub-section 4, as to the emptying of privies, is not limited to the case of privies which are actually in "any street or public place," but applies to and includes the case of privies which are in private property, but which

closely adjoin "any street or public place"; and, therefore, a person may be convicted under the sub-section who, during the prohibited hours, empties a privy situate on private property some forty yards from the nearest street or public place.—HOWARD *v.* DANIELS, *K.B.D.*; 93 L. T. 669.

14. *Public health — Drain communicating with sewer—Nuisance—Taking up and relaying drain—"Reconstruction" or "repair"—Bye-laws—Metropolis Management Act*, 1855 (18 & 19 *Vict. c.* 120), *s.* 202. —The London County Council made a bye-law that a person who should entirely or partially reconstruct any pipe or drain communicating with a sewer should deposit plans of the proposed work, with the proviso that plans should not be required in the case of any repair which did not involve the entire reconstruction of the pipe or drain; and another bye-law as to ventilation, which was to apply to every person who should reconstruct in an existing building any pipe or drain communicating with a sewer.

Premises situate in the metropolis were drained at the rear by a line of pipes which took the surface water drainage of the premises through two gullies in the yard and which communicated with the sewer. This line of pipes was not laid upon concrete and was not ventilated, and, the drain having become a nuisance, notice was served on the owner to abate the same. The owner opened up the ground, took up the pipes, most of which were defective or broken, and relaid the drain in the same line upon a foundation of concrete. He put in four new lengths of pipes and a new gully and connection, replacing in the drain one old pipe and gully only, and leaving in the ground an old pipe which was not defective.

Held, that the work done to the drain was a "reconstruction" of the drain, and not merely a "repair" of it, and that the bye-laws applied.—AGAR *v.* NOKES, *K.B.D.*; 93 L. T. 605.

15. *Public health—Public convenience—Approaches—Subway—Trepass—Sub-soil of roadway and footway—Injunction—Public Health (London) Act*, 1891 (54 & 55 *Vict. c.* 76), *s.* 44.—By the Public Health (Metropolis) Act, 1891, s. 44, power was given to the sanitary authority to construct and maintain public sanitary conveniences, and for this purpose the subsoil of the roadway, exclusive of the footway adjoining a building, was vested in the sanitary authority.

Where the sanitary authorities had made such conveniences in the roadway beneath the soil connected by a subway from pavement to pavement, with an exit in the footway adjoining respondents' premises, and who were owners of the soil *ad medium filum*, an injunction was granted directing the sanitary authorities to remove that portion of the structure only which encroached upon the footway. In other respects the matter was in the discretion of the authorities.

Decision of Joyce, J., to this effect (50 W. R. 268, [1902] 1 Ch. 269) restored, and that of the Court of Appeal (52 W. R. 596, [1904] 1 Ch. 759) reversed (Lord James of Hereford dissenting).—WESTMINSTER CORPORATION *v.* LONDON AND NORTH-WESTERN RAILWAY CO., *H.L.*, 129; [1905] A. C. 426; 74 L. J. Ch. 629; 93 L. T. 143.

16. *Street—Widening—Compulsory powers—House—Adjudication to take whole—Part to be thrown into street—Prior agreement to re-sell surplus portion subject to right of pre-emption*—Bona fides—*Michael Angelo Taylor's Act*, 1817 (57 *Geo.* 3, *c. xxix*), *ss.* 80, 96.—An adjudication under Michael Angelo Taylor's Act is only binding if, after considering the facts, the local authority giving the notice *bonâ fide* believes that the property adjudicated to be necessary is necessary for the purpose of carrying out the proposed widening: *Gard* v. *Commissioners of Sewers*, 28 Ch. D. 486, 33 W. R. Dig. 106, and *Lynch* v. *Commissioners of Sewers*, 34 W. R. 226, 32 Ch. D. 72, followed.

When the local authority wishes to take the whole of a house, but the owner only desires them to take part, the question to be determined is whether what will be left will be a house, regard being had to the work by way of shoring and reconstruction which the owner is willing to do.

Quære, can a local authority under Michael Angelo Taylor's Act acquire some only of the several interests in the premises which go to make up the freehold.—DENMAN *v.* WESTMINSTER CORPORATION, *Ch.D. Buckley, J.*, 345; [1906] 1 Ch. 464; 75 L. J. Ch. 272; 94 L. T. 370.

17. *Street—Widening streets—Compulsory purchase—Sub-lessee—Michael Angelo Taylor's Act*, 1817 (57 *Geo.* 3, *c. xxix.*), *ss.* 80, 96.—Where a local authority took a house let in separate floors for street widening under Michael Angelo Taylor's Act, s. 80, the owner of the ground-floor is not necessarily entitled to restrain the local authority from taking more than is wanted to be thrown into the street. Where the danger, inconvenience, and excessive cost of severance resulted in a *bonâ fide* adjudication that it was necessary to acquire the whole building, this was not vitiated by a prior agreement to re-sell the surplus portion, subject to the owner's right of pre-emption under section 96.

Teuliere v. *Vestry of St. Mary Abbotts, Kensington*, 30 Ch. D. 642, 34 W. R. Dig. 102, and *Gordon* v. *Vestry of St. Mary Abbotts, Kensington*, [1894] 2 Q. B. 742, followed.—PESCOD *v.* WESTMINSTER CORPORATION, *Ch.D. Swinfen Eady, J.*, 89; [1905] 2 Ch. 475; 74 L. J. Ch. 664; 93 L. T. 160.

18. *Street—Widening street—Power to take part of house—Michael Angelo Taylor's Act* (57 *Geo.* 3, *c. xxix.*), *ss.* 80, 82.—A local authority requiring part of a house for the purpose of widening a street under Michael Angelo Taylor's Act may be compelled by the owner to take the whole as a condition of taking the part, if the removal of the part would destroy the house as a house.

Gibbon v. *Paddington Vestry*, 49 W. R. 8, [1900] 2 Ch. 794, followed.—THOMPSON *v.* HAMMERSMITH CORPORATION, *Ch.D. Buckley, J.*, 279; [1906] 1 Ch. 299; 75 L. J. Ch. 129; 94 L. T. 135.

19. *Structure—Projection beyond general line of buildings—London Building Act*, 1894 (57 & 58 *Vict. c. ccxiii.*), *s.* 22; *s.* 73, *sub-section* 8.—An iron framework affixed to the front wall of a building by means of bolts and stay rods, was filled in on the front and sides with leaded glass, and covered on the top with zinc, came forward about 4 feet 6 inches from the front wall of the building, the bottom being about 11 feet above the pavement.

Held, that the iron framework was not a "building structure" within the meaning of section 22, sub-section 1, of the London Building Act, 1894, and following *Hull* v. *London County Council*, 49 W. R. 396, [1901] 1 K. B. 580, that it was not a "projection" within section 73, sub-section 8, of that Act.—LONDON COUNTY COUNCIL *v.* SCHEVZIK, *K.B.D.*, 168; [1905] 2 K. B. 695; 74 L. J. K. B. 959; 93 L. T. 550.

20. *Thames—Alteration—Removing part of bank to repair—Metropolis Management (Thames River Prevention of Floods) Amendment Act*, 1879 (42 & 43 *Vict. c. cxcviii.*), *s.* 23.—By section 23 of the Metropolis Management (Thames River Prevention

of Floods) Amendment Act, 1879: "From and after the passing of this Act, if any person make any alteration to any bank, so as to affect the security of the premises upon which the same is situate, or of any other premises adjacent or near thereto, from flooding caused by the overflow of the River Thames, without the previous sanction in writing of the board, such person shall be liable to a penalty. . . ."

It became necessary to repair part of a bank which the respondents were liable to repair and maintain, and to replace certain old piles and camp shedding by new in the same or similar positions, and to do so the respondents removed certain portions of the timber capping and 2ft. in height of the camp shedding.

Held, that this was not an "alteration to any bank" within the meaning of the section.—LONDON COUNTY COUNCIL *v.* LONDON, BRIGHTON, AND SOUTH COAST RAILWAY CO., *K.B.D.*; [1906] 2 K. B. 72; 75 L. J. K. B. 613; 94 L. T. 773.

21. *Thames—Sewers—District sewer constructed by vestry with consent of the Sewer Commissioners draining houses directly into the Thames—Notice to discontinue drainage—Houses connected up with main drainage system—Expenses—Liability—Metropolis Management Act*, 1855 (18 *&* 19 *Vict. c.* 120), *s.* 135 —*Amending Act*, 1858 (21 *&* 22 *Vict. c.* 104), *s.* 1.—At the time of the passing of the Metropolis Management Act, 1855, a group of houses in London near the Thames were drained into the river by means of a drain constructed with the consent of the Metropolitan Commissioners of Sewers. In 1903 the Thames Conservancy gave notice requiring the plaintiffs, who were the successors of the vestry, to discontinue the passage of sewage into the Thames from this drain, and it was agreed by the plaintiffs and the defendants that the only practical mode of complying with the notice was to bring the sewage into the metropolitan main drainage sewer in the neighbouring street The necessary work was then done by the plaintiffs, and the action was brought to decide whether they or the London County Council, as the successors to the Metropolitan Board of Works, should bear the expense.

Held, that as the London County Council were not under any legal obligation to provide means of preventing the sewage of houses from passing into the river, the declaration of their liability asked for by the plaintiffs for the expenses of constructing the new sewer must be refused.—WESTMINSTER CORPORATION *v.* LONDON COUNTY COUNCIL, *K.B.D.*, 616; 75 L. J. K. B. 549; 94 L. T. 791.

22. *Unsound food—Article not intended for food—Liability of seller—"Liable to be seized"—Public Health (London) Act*, 1891 (54 *&* 55 *Vict. c.* 76), *s.* 47 (3).—An article of food is liable to be seized within the meaning of the Public Health (London) Act, 1891, s. 47 (3), if it is in fact unsound or unfit for the food of man, whether or not it is at the time of seizure intended for the food of man or exposed for sale.

Reg. v. *Dennis*, [1904] 2 Q. B. 458, considered and distinguished.—GRIVELL *v.* MALPAS, *K.B.D.*; [1906] 2 K. B. 32; 75 L. J. K. B. 647.

23. *Unsound meat—Proceedings—Consent of local authority to proceedings instituted by their inspector—Public Health (London) Act*, 1891 (54 *&* 55 *Vict. c.* 76), *ss.* 47, 99 (4), 107 (3), 123.—A summons was taken out by a sanitary inspector of a borough council under section 47 of the Public Health (London) Act, 1891, against a person for having on his premises unsound meat intended for sale for human food. It appeared on the face of the summons that the information was laid by and the summons issued to the respondent on behalf of the borough council, whereas in fact the inspector had not obtained the express consent of his council to issue the summons.

Held, that the conviction was not bad *ab initio*, as the words "on behalf of the borough council" could be rejected as surplusage, since a private individual could institute proceedings before justices under the above section.

Allman v. *Hardcastle*, 89 L. T. 553, 52 W. R. Dig. 112, considered and applied.—GIEBLER *v.* MANNING, *K.B.D.*, 527; [1906] 1 K. B. 709; 75 L. J. K. B. 463; 94 L. T. 580.

MINES:—

1. *Lease — Construction — Covenant to "fairly, duly, and honestly win" the whole of the coal demised.* —The respondents let to the appellants for twenty-one years a seam of coal lying under certain land belonging to them, at an annual rent of £100 per acre of coal gotten in any one year, as soon as the lessees should begin working the coal, and until then at an annual rent of £5.

The lease contained a covenant by the lessees that they would at all times during the term "fairly, duly, and honestly win, work, recover, obtain, and get the whole of the . . . seam of coal hereby demised in a proper and workmanlike manner."

The lease prohibited the sinking of a shaft on the land demised, or breaking open the surface, and it was in the contemplation of both parties that the lessees would get the coal by underground workings from an adjacent colliery belonging to them.

The lessees endeavoured to work the coal, and spent a considerable amount of time and money in attempting to reach it, but found that in consequence of faults in the strata it could not be worked except at a heavy loss, whereupon they abandoned the working.

Held (affirming the judgment of the court below), that the obligation to work the coal was absolute, and that the words "fairly, duly, and honestly" only applied to the method of working after the coal was reached, and that the lessors were entitled to damages for breach of the covenant.—CHARLESWORTH *v.* WATSON, *H.L.*; [1906] A. C. 14; 75 L. J. K. B. 137; 94 L. T. 6.

2. *Right of support to surface—Inclosure of common —Award—Reservation of manorial rights—Working of mines—Compensation—Inclosure Act* (31 *Geo.* 2, *c. x*).—In cases where the minerals under land belong to one person and the surface of the land to another, the law presumes that the surface owner has a right to support, unless the language of the instrument regulating the rights of the parties, or other evidence, clearly shows the contrary, either by express words or necessary implication.

Therefore in a case in which by an Inclosure Act and award certain waste land of a manor was allotted among the commoners, and it was provided that nothing contained in the Act should be construed to diminish the rights of the lord of the manor in respect to his seignory and royalties, except in respect of his ownership of the soil to be inclosed; and, further, that the lord and his successors should hold and should enjoy all mines and quarries under the waste, together with liberty of searching for, winning, and working the same as fully and freely as if the Act had not been passed, and that without making or paying any satisfaction for so doing.

Held (affirming the judgment of the court below), that the nature of the commoners' interest having been extended by the Act, the owner of the minerals must so work them as not to damage such interest by depriving the surface owners of the right of support to which they were entitled at common law, there being nothing in the Act to deprive them of such right.

Love v. *Bell*, 9 App. Cas. 286, followed.

Consett Waterworks Co. v. *Ritson*, 22 Q. B. Div. 318, 708, overruled.—BUTTERKNOWLE COLLIERY CO. *v.* BISHOP AUCKLAND INDUSTRIAL SOCIETY, *H.L.*; [1906] A. C. 305; 75 L. J. Ch. 541; 94 L. T. 795.

See also Landlord and Tenant, 6; Settled Land, 6; Support, 1.

MONEY-LENDER:—

1. *Contracting while unregistered—Money-lenders Act*, 1900 (63 & 64 *Vict. c.* 51), *ss.* 1 *and* 2.—Section 2 (1) (*c*) of the Money-lenders Act, 1900, applies to a money-lender who has not registered himself under the Act, and consequently has no "registered name"; and he cannot sue upon any contract made by him while unregistered, the contract being illegal.—VICTORIAN DAYLESFORD SYNDICATE *v.* DOTT, *Ch.D. Buckley, J.*, 231; [1905] 2 Ch. 624; 74 L. J. Ch. 673; 93 L. T. 627.

2. *Definition—Exception—"Business not having for its primary object the lending of money"—Discounting bills of customers and friends—Financing a business—Money-lenders Act*, 1900 (63 & 64 *Vict. c.* 51), *s.* 6, *sub-section* (d).—A. carried on business as an art dealer for many years prior to 1903, and in the course of his business it was necessary and incidental thereto to give long credit and to take from his customers bills in payment of the amounts they owed to him for their purchases, and to discount and renew the bills from time to time. In 1903 he retired from the business and sold off his stock by public auction, and took bills for the greater part of the purchase-moneys, which he discounted and renewed from time to time, and some of which were still running. After his retirement he carried on business as an expert art valuer and adviser, and he also assisted two art businesses, in which he was largely interested, by discounting for them their customers' bills and by taking bills for the interest from time to time due on the debentures he held in one of those businesses. He also assisted some old friends in the curio trade, and a few persons with whom he had been connected in business, about ten in all, with loans and by discounting bills for them. He did not advertise as a money-lender, and did not discount bills for outsiders. In an action by A. on bills given him in 1904 for a loan made by him to an old customer,

Held, that A. was not, and never had been, a money-lender within the meaning of section 6 of the Money-lenders Act, 1900; and that, as to the bills given on the sale of his stock and renewed and still running, he came within exception (*d*) in the section.—LITCHFIELD *v.* DREYFUS, *K.B.D.*; [1906] 1 K. B. 584; 75 L. J. K. B. 447.

3. *Excessive rate of interest—Harsh and unconscionable transaction—Absence of risk—Reopening of transaction—Money-lenders Act*, 1900 (63 & 64 *Vict. c.* 51), *s.* 1.—P., a widow, was in 1903 in need of a loan. Against the advice of her solicitors, she authorized an architect, with whom she had become acquainted, to obtain it for her; and he eventually obtained an advance of £1,000 at 45 per cent. per annum from a registered firm of money-lenders, on the security of a second mortgage of certain life interests and a reversion to which P. was entitled under settlements and of a life policy which was comprised in the first mortgage, which was to an insurance company. P.'s total income under the settlements amounted to about £1,200 a year; but it was reduced to £600 by the interest and premiums payable on the first mortgage and policy.

The solicitor of the money-lenders having threatened to enforce the security by sale, P. in 1904 obtained through her solicitors a loan at 5¼ per cent., and discharged the claims of the money-lenders. She brought an action against them to obtain the reopening of the transaction on the ground that it was harsh and unconscionable and the rate of interest excessive, and repayment of the excess of interest paid by her.

Held, that the rate of interest was excessive and the transaction harsh and unconscionable, and that the defendants must repay all interest paid above 10 per cent.—PART *v.* BOND, *Ch.D. Joyce, J.*; 93 L. T. 49; *C.A.*, 94 L. T. 390.

4. *Name not registered—Contract—Validity—Money-lenders Act*, 1900 (63 & 64 *Vict. c.* 51), *s.* 2, *sub-sections* 1 (a) (c), 2.—Section 2, sub-section 1 (*c*), of the Money-lenders Act, 1900, applies to an unregistered money-lender so that he cannot make a valid "agreement in the course of his business as a moneylender with respect to the advance and repayment of money, or take any security for money in the course of his business as a money-lender."

Victorian Daylesford Syndicate (*Limited*) v. *Dott* (1905, 2 Ch. 624) approved.

Decision of Kekewich, J. (92 L. T. Rep. 822), affirmed.—BONNARD *v.* DOTT, *C.A.*; [1906] 1 Ch. 740; 75 L. J. Ch. 446; 94 L. T. 656.

5. *Transaction harsh and unconscionable—Right to relief—Money-lenders Act*, 1900 (63 & 64 *Vict. c.* 51), *s.* 1.—The defendant borrowed from the plaintiffs, who were registered money-lenders, £150, giving promissory notes, one of £150 payable in twelve monthly instalments of £12 10s., and another for £72 payable in six monthly instalments of £12. The defendant at the date of the transaction owed £150 to other creditors. He had an income of £1,000 a year and property valued at £9,000. The defendant was a man of business and thoroughly understood the transaction, and there had been no misrepresentation by the money-lenders.

Held, that the defendant was not entitled to relief under the Money-lenders Act, 1900.—CARRINGTONS *v.* SMITH, *K.B.D.*, 424; [1906] 1 K. B. 79; 75 L. J. K. B. 49; 93 L. T. 779.

MORTGAGE:—

1. *Bankruptcy—Act of—Defaulting stockbroker—Securities mortgaged to bank—Knowledge by mortgagee of the act of bankruptcy—Right to redeem—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 43, 49.—A firm of stockbrokers became defaulters on the Stock Exchange, and, in pursuance of the rules of the Stock Exchange, the official assignee of the Stock Exchange collected their assets.

The firm had previously lodged with a bank various stock and share certificates as security for a loan by the bank. The bank was aware of the assignment to the official assignee of the Stock Exchange.

On these facts, and on the assumption that the assignment in question constituted an available act of bankruptcy,

Held, that the bank, on being tendered by the stockbroker and the official assignee payment in full of the amount due on the security, was compellable to deliver up the securities to them.

In re Lawford and Lawrence, [1902] 2 K. B. 445,

followed.—PONSFORD, BAKER, & CO. *v.* UNION BANK, *Ch.D. Buckley, J.*; 94 L. T. 812.

2. *Foreclosure—Proviso for redemption—Interest—Default in punctual payment.*—By an indenture, dated the 30th of January, 1900, certain freehold and leasehold premises were mortgaged to secure £10,000 together with interest at 5 per cent. The operative part of the deed was "the mortgagor doth hereby covenant with the mortgagee that he will on the 1st of January, 1914, pay to the mortgagee the sum of £10,000 with interest that may be then due for the same at the rate of £5 per centum per annum, and will hereafter from the date thereof, so long as the said sum of £10,000 or any part thereof shall remain unpaid, pay interest for the same at the rate aforesaid by equal half-yearly payments on the 1st of January and the 1st of July in every year." There was a proviso: "Provided always, and it is hereby agreed that if the mortgagor shall on every half-yearly day on which interest is hereinbefore made payable under this security until the 1st of January, 1914, or within twenty-one days of such days respectively, pay to the mortgagee interest at the rate aforesaid, the mortgagee shall not call in the sum of £10,000 before the 1st of January, 1914," and that the mortgagor should not be entitled to pay off the £10,000 before the 1st of January, 1914. "Provided always, and it is hereby agreed and declared that if the mortgagor pay the said sum of £10,000 with interest for the same in the meantime at the rate aforesaid that may be due and unpaid, the mortgagee shall at any time thereafter upon the request and at the cost of the mortgagor reconvey and reassign the premises to the mortgagor or as he shall direct."

Interest was paid on the 28th of July, 1905, instead of the 1st of July, 1905.

The mortgagee on the 26th of July, 1905, gave notice calling in the money. The money due on the 1st of January, 1906, had been paid.

The mortgagee applied for foreclosure, and submitted that the mortgagor was only entitled to redeem if punctual payment was made on every half-year until the 1st of January, 1914.

Held, that no condition was imported into the proviso for redemption having reference to the intermediate payments. No condition had been broken, and the right to foreclosure had not arisen. —WILLIAMS *v.* MORGAN, *Ch.D. Swinfen Eady, J.*; [1906] 1 Ch. 804; 75 L. J. Ch. 480; 94 L. T. 473.

3. *Lease by mortgagor in possession—Power to accept surrender—Concurrence of mortgagee—Action by mortgagee for recovery of rent—Conveyancing Act,* 1881 (44 & 45 *Vict. c.* 41), *s.* 18 (1).—A lease for twenty-one years, granted by a mortgagor in possession under the statutory power conferred upon him by section 18 (1) of the Conveyancing Act, 1881, cannot be effectively surrendered so as to affect the rights of the mortgagee under the lease without the concurrence of the latter.—ROBBINS *v.* WHYTE, *K.B.D.*, 105; [1906] 1 K. B. 125; 75 L. J. K. B. 38; 94 L. T. 287.

4. *Licensed premises—Compensation money for loss of licence—Licensing Act,* 1904 (4 *Ed.* 7, *c.* 23), *s.* 2. —A brewery company specifically mortgaged its freehold and leasehold property, including a leasehold beerhouse, the Running Horse, to trustees as security for certain debentures, which were not redeemable until 1920. The company also gave a floating charge on all its property not specifically mortgaged. The licensing authorities refused to renew the licence of the Running Horse, and compensation was awarded in respect thereof under the Licensing Act, 1904. The trustees thereupon claimed the money as coming within their mortgage, while the company claimed the money as being property over which they had granted the the floating charge.

Held, that the trustees were entitled to receive the money as being part of their mortgage security, but that they could not apply the money in reduction of the mortgage debt until the security became enforceable, and that until then the brewery company were entitled to the income derived from the investment of the money.—LAW GUARANTEE AND TRUST SOCIETY *v.* MITCHAM AND CHEAM BREWERY CO., *Ch.D. Kekewich, J.*, 551; [1906] 2 Ch. 98; 75 L. J. Ch. 556; 94 L. T. 809.

5. *Mortgagee in possession—Redemption—Rests—Accounts—Sale of part of the mortgaged property—Proviso for capitalization of interest—Right to compound interest.*—A mortgagor who enters into possession and receives the rent of the mortgaged property is not entitled to the benefit of a provision in the mortgage deed for the capitalization of interest in the event of its being in arrear, provided that at the date of the interest becoming due there is in the hands of the mortgagee rent sufficient, after making all proper deductions, for the payment of the interest, even though no appropriation of such rent to payment of interest has ever been made.

Dictum of Cotton, L.J., in *Cockburn* v. *Edwards*, 29 W. R. 136, approved, and preferred to that of Jessel, M.R., in the same case.

Judgment of Warrington, J. (53 W. R. 334, [1905] 1 Ch. 241), affirmed.—WRIGLEY *v.* GILL, *C.A.*, 274; [1906] 1 Ch. 165; 75 L. J. Ch. 210; 94 L. T. 179.

6. *Ship—Invalid mortgage—Registration of—Power of court to expunge from register.*—Where a transfer of an interest in a ship, void by reason of fraud or for any other cause, has been registered, the court has power, by virtue of its inherent jurisdiction, to rectify the register by ordering the entry of the void transfer to be expunged.—BROND *v.* BROOMHALL, *K.B.D.*; [1906] 1 K. B. 571; 75 L. J. K. B. 548.

7. *Valuation of property for mortgage—Liability of valuer to mortgagee—Contractual relation—Exercise of reasonable care and skill—Duty.*—C., a solicitor, was applied to by V., who was not his client, but who owned certain properties, to find someone who would advance money on the security of the same. C. knew that R., another solicitor, who represented the plaintiff under a power of attorney, had money to advance, and at an interview between C. and R. it was arranged that an advance, to be guaranteed by an insurance society, should be made to V., but no stipulation for an independent valuation of the properties was then made. C., with authority to conduct the mortgage on these lines, requested an insurance society to insure the mortgage, knowing that the society usually employed the defendant, a local valuer of repute. C. applied to the society for a copy of the defendant's valuation, and this application was ultimately acceded to by them, they saying that on future occasions when C. was acting for the mortgagee he should have a copy. The society repudiated responsibility for the defendant's fee, which was afterwards paid by V. through C. The society instructed the defendant to value the properties, and he reported to them by a valuation written on their printed form. C. relied, to the knowledge of the defendant, on his valuation in making the advance on mortgage to V.

Held, that no contractual relation of principal and agent between the plaintiff and the defendant

was established; that the defendant never agreed to value for the use of the plaintiff; and that therefore the plaintiff had not established any duty on the part of the defendant towards him to exercise reasonable care and skill in and about the valuation.

Decision of Kekewich, J. (92 L. T. Rep. 345), affirmed.—LOVE *v.* MACK, *C.A.*; 93 L. T. 352.

8. *Will—Exoneration—Locke-King's Acts* (17 & 18 *Vict. c.* 113; 30 & 31 *Vict. c.* 69; 40 & 41 *Vict. c.* 34)—*Real Estate Charges Act*, 1867 (30 & 31 *Vict. c.* 69).—A testator, by clause 9 of his will, devised the X estate to specific devisees. By clause 14 he devised the Y estate and all other real and personal estate not by will or codicil otherwise disposed of to trustees on trust for sale and conversion. By clause 15 he directed the trustees to pay out of moneys arising from sale and ready money his debts, except charges and mortgage debts (if any) on property specifically devised, which debts were to be paid primarily out of the property charged therewith. At the dates of the testator's will and death the only mortgage was on the Y estate.

Held, that, the Y estate not being specifically devised within clause 15 of the will, there was a "contrary intention" within the Real Estate Charges Act, 1867, and that the mortgage on the Y estate must be borne rateably by the mixed residuary fund.—VALPY, RE, VALPY *v.* VALPY, *Ch.D. Swinfen Eady, J.*, 401; [1906] 1 Ch. 531; 75 L. J. Ch. 301; 94 L. T. 472.

See also Bankruptcy, 16; Canada, Law of, 8; Company, 31; Corporation, 2; Land Transfer, 1; Settled Land, 5.

MOTOR-CAR :—

1. *Conviction for driving at a dangerous speed, "having regard to all the circumstances of the case"—Appeal to quarter sessions—Evidence of traffic reasonably expected to be on highway—Admissibility—Motor-car Act*, 1903 (3 *Ed.* 7, *c.* 36).—The appellant was convicted for driving a motor-car in a public highway at a speed which was dangerous to the public, having regard to all the circumstances of the case. On appeal to quarter sessions evidence was given on behalf of the respondent as to the traffic which might be reasonably expected to be on the highway.

Held, that the evidence was admissible.—ELWES *v.* HOPKINS, *K.B.D.*; [1906] 2 K. B. 1; 75 L. J. K. B. 450; 94 L. T. 547.

2. *Driver—Information for driving "in a manner dangerous to the public"—Evidence of excessive speed—Admissibity of evidence upon charge of driving "in a manner dangerous to the public"—Motor-car Act*, 1903 (3 *Ed.* 7, *c.* 36), *s.* 1, *sub-section* 1.—Upon the hearing of an information under section 1, sub-section 1, of the Motor-car Act, 1903, against the driver of a motor-car for having driven the motor-car on a public highway "in a manner which was dangerous to the public," evidence of the speed at which the motor-car was driven is admissible and may be taken into consideration by the justices, although the sub-section makes it a separate and distinct offence for a person to drive a motor-car on a public highway "at a speed which is dangerous to the public."—HARGREAVES *v.* BALDWIN, *K.B.D.*; 93 L. T. 311.

3. *Refusal by owner of driver's name and address—Conviction—Omission of averment that driver committed an offence—Motor-car Act*, 1903 (3 *Ed.* 7, *c.* 36), *ss.* 1, 60—*Motor-cars* (*Use and Construction*) *Order*, 1904, *art. IV.* (6).—A conviction of an owner of a motor-car under section 1, sub-section 3, of the Motor-car, 1903, stated that the defendant "being . . . the owner of a certain motor-car . . . which was then being driven upon the highway . . . did unlawfully . . . after due notice had been given to him, refuse to give the name and address of the person who was then and there driving the same, such name and address being required in order that proceedings might be taken against him under section 1 of the Motor-car Act, 1903, and Art. IV. (6) of the Motor-cars (Use and Construction) Order, 1904."

Held, that the conviction was bad, in that it did not sufficiently allege that the driver had committed an offence under the section.

Held, also, that it was not a condition precedent to the duty cast upon the owner of a motor-car by section 1 (3) to furnish the name and address of the driver of the car, that the driver should previously have been asked for and should have refused to give his name and address.—REX *v.* HANKEY, *K.B.D.*, 80; [1905] 2 K. B. 687; 74 L. J. K. B. 922; 93 L. T. 107.

4. *Speed—Speed exceeding twenty miles an hour—Evidence of rate of speed by constable as shown by stop-watch—Sufficiency—"Opinion of one witness" merely—Motor-car Act*, 1903 (3 *Ed.* 7, *c.* 36), *s.* 9.—Upon the hearing of an information under section 9 of the Motor-car Act, 1903, for driving a motor-car on a public highway at a speed exceeding twenty miles an hour, a police sergeant proved that he placed a police constable at a certain point on the road and stationed himself on the same road at a distance of a quarter of a mile from the constable; that, when the motor-car passed the constable, the constable signalled to him and he immediately started the second hand of his stop-watch and stopped the same when the car passed him; and that the time taken by the car between the two points as shown by his stop-watch was 31⅔ seconds, or at the rate of twenty-eight an hour.

The stop-watch was produced in court and not objected to.

The only evidence as to the rate of speed was that of the police sergeant, who gave evidence of the time as shown by his stop-watch.

The defendant having been convicted,

Held, that the evidence of the police sergeant was not evidence of his "opinion" merely, but was evidence of the fact recorded by his stop-watch as to the time taken in travelling over the distance, and that therefore the defendant was not convicted "merely on the opinion of one witness as to rate of speed" within the meaning of section 9, sub-section 1, of the Act.—PLANCQ *v.* MARKS, *K.B.D.*; 94 L. T. 577.

NATAL, LAW of :—

Roman-Dutch law—Power of attorney executed by lunatic—Validity—Knowledge of mortgagee.—By the Roman-Dutch law prevailing in Natal an insane person is not capable of binding himself by contract, and therefore a mortgage bond passed by virtue of a power of attorney executed by an insane person is not legally enforceable if the mortgagor derived no benefit from the bond even though the mortgagee had no knowledge of the insanity.

Judgment of the court below reversed.

The Roman-Dutch law allows a person who has in good faith expended money on behalf a lunatic to be repaid his expenditure.—MOLYNEUX *v.* NATAL LAND AND COLONIZATION CO., *P.C.*; [1905] A. C. 555; 74 L. J. P. C. 108; 93 L. T. 59.

NEGLIGENCE :—

1. *Construction of drain—Overflow on neighbouring land—Trespass—Municipal authorities liability—*

Statutory powers.—In 1889 the appellant corporation, under their statutory powers, took over the care and management of a watercourse and made it into a public drain. Later on there was an overflow over the respondent's land, which adjoins the drain, and this was occasioned by the then insufficiency of the drainage, though the works were large enough for the purpose in 1889.

Held, that the corporation had acted negligently, and were liable in damages for the injury caused to respondent's land owing to the overflow.—HAWTHORN CORPORATION *v.* KANNULUIK, *P.C.*, 285; [1905] A. C. 105; 75 L. J. P. C. 7; 93 L. T. 644.

2. *Landlord and tenant—Lodger—Boarding-house keeper—Duty to take care of guest's baggage.*—The plaintiffs, husband and wife, were received as guests into the defendant's boarding-house. Having valuable jewelry with them, and finding that there was only one key to their bedroom door, they asked for a second key; but they were informed by the manageress that only one key was supplied, and that it must not be taken away, and that they need be under no apprehension for the safety of their valuables, as every one living in the house was well known. They also complained of the absence of any key to the chest of drawers in their room, but no suce key was provided. The jewelry was stolen from the room by another guest, who was a thief known to the police, and who had been received by the defendant as a guest into the boarding-house without any reference.

Held, that the defendant was under some obligation to take reasonable care in the matter of the protection of the plaintiffs' goods which they had with them in the boarding-house; and that the facts raised a question for a jury whether there had not been a failure of reasonable care on the part of the defendant to which the loss of the plaintiffs' jewelry was attributable.

Per Collins, M.R., and Mathew, L.J.—A boarding-house keeper is under an obligation to take ordinary care of his guest's baggage.

Per Romer, L.J.—A boarding-house keeper is bound to carry on his business with reasonable care, having regard to the nature and normal conduct of the business as known to the guest, or as represented to the guest by him; and if by reason of a breach of that duty on his part the guest's baggage is lost, the boarding-house keeper is liable to the guest for the loss.

Dansey v. *Richardson*, 3 E. & B. 144, followed.

Holder v. *Soulby*, 8 W. R. 438, 8 C. B. N. S. 254, not followed.—SCARBOROUGH *v.* COSGROVE, *C.A.*, 100; [1905] 2 K. B. 805; 74 L. J. K. B. 892; 93 L. T. 530.

See also Company, 26; Crown, 1.

NEW SOUTH WALES, LAW of:—

1. *Acquisition of land for public purposes—Public Works Act*, 1900 (*No.* 26 *of* 1900), *s.* 131—*Right to take part of a house.*—The prohibition in the Public Works Act, 1900, against taking compulsorily part only of a house or other building for public purposes applies in the case where land is acquired by notification in the Gazette as well as in the case where it is acquired by notice to the parties interested.

Judgment of the court below affirmed.—WILLIAMS *v.* PERMANENT TRUSTEE CO., *P.C.*; [1906] A. C. 249; 75 L. J. P. C. 48; 94 L. T. 354.

2. *Contract—Interest—Person holding civic office—Sydney Corporation Act*, 1902 (2 *Ed.* 7, *No.* 35), *s.* 24.—By section 24 of the Sydney Corporation Act, 1902, "Any person who, while holding any civic office under this Act, continues to be or becomes directly or indirectly, by means of partnership with any other person or otherwise howsoever, knowingly engaged or interested in any contract, agreement, or employment with or on behalf of the council, except as a shareholder . . . shall be liable to a penalty . . . and shall be disqualified from holding any civic office."

While the respondent held a civic office under the Act, a firm in which he was a partner supplied timber to a firm of H. & Co., in accordance with quotations prievously given, to be used by them in carrying out a contract with the council. The respondent was aware of the purpose for which H. & Co. required the timber.

Held (affirming the judgment of the court below), that he was not interested in the contract within the section.—NORTON *v.* TAYLOR, *P.C.*; [1906] A. C. 378; 94 L. T. 591.

3. *Servants of Crown—Payment by Colonial or Imperial Government.* — A Colonial Government represents the Crown, and supplies granted by a Colonial Legislature are granted to the Crown, as much as supplies granted by the Imperial Legislature.

Therefore where a soldier contracted to serve in a colonial contingent at fixed rate of pay, and while he was on active service received pay from the Imperial Government,

Held (reversing the judgment of the court below), that the Colonial Government were entitled to deduct the pay already received by him from the Imperial Government from the amount due to him from the Colonial Government for his services.—WILLIAMS *v.* HOWARTH, *P.C.*; [1905] A. C. 551; 74 L. J. P. C. 115; 93 L. T. 115.

NUISANCE:—

1. *Noise — Crowded neighbourhood occupied by printing trade — Private resident — Injunction.* — A trade not carried on in the particular and established manner of a district devoted to that trade principally, and causing serious disturbance to a resident in that district by making noises in excess of those made by carrying on the trade in the particular and established manner of the trade of the district constitutes a private and actionable wrong which may be restrained by injunction. There can be no prescriptive right to commit a nuisance constituting a private and actionable wrong.—RUSHMER *v.* POLSUE & ALFIERI (LIMITED), *C.A.*, 161; [1906] 1 Ch. 234; 75 L. J. Ch. 79; 93 L. T. 823.

2. *Statutory powers—Liability of local authority—Public Health Act*, 1875 (38 *&* 39 *Vict. c.* 55), *ss.* 17, 27, 299—*Local Government Board's Provisional Orders Confirmation* (*No.* 9) *Act*, 1900 (63 *&* 64 *Vict. c. clxxviii.*)—*Dorchester Order*, 1900, *art.* 21.—A Local Government Order confirmed by statute enacted that it should be the duty of a corporation within a fixed time to proceed to carry out works for the disposal of sewage approved by the Local Government Board, and, in the event of the corporation not so proceeding, that they might be compelled to proceed in manner provided by section 299 of the Public Health Act, 1875, which section empowers the Local Government Board to enforce performance of duty by defaulting local authorities by writ of *mandamus*.

Section 27 of the Public Health Act, 1875, empowers local authorities to construct works for the disposal of sewage, "provided that no nuisance be created."

The corporation proceeded to construct sewage works approved by the Local Government Board.

Upon action brought for an injunction to restrain the corporation from creating a public and private nuisance by smell, and also from sending an effluent of improperly treated sewage from their works into a natural stream in breach of section 17 of the Public Health Act, 1875,

Held, that the corporation had created both a public and a private nuisance by their works, and that as their local order was merely a direction to them to exercise their powers under section 27 of the Public Health Act, 1875, an injunction must be granted.

Held, also, that the effluent was a breach of section 17 of the Public Heath Act, 1875, for which an action was maintainable by the Attorney-General, but, the breach having been remedied, no injunction was granted.

Attorney-General v. *Cockermouth Local Board*, L. R. 18 Eq. 172, followed.—ATTORNEY-GENERAL *v.* DORCHESTER CORPORATION, *C.A.*; 94 L. T. 682.

See also Electric Light, 2; Highway, 3, 4; Local Government, 10.

PARTNERSHIP:—

1. *Bill of exchange—Auctioneer—Trading firm.*—A firm of auctioneers is not a trading firm, so as to give one partner the implied power to bind the firm by accepting a bill of exchange.—WHEATLEY *v.* SMITHERS, *K.B.D.*, 537; [1906] 2 K. B. 321; 75 L. J. K. B. 627.

2. *Lien of executors of deceased partner on the assets of the partnership—Realization of assets—Deposit of deeds by surviving partner—Priorities—Partnership Act*, 1890 (53 & 54 *Vict. c.* 39), *s.* 39.—On the dissolution of a partnership by death, the surviving partner has both a right and a duty to realize the partnership assets for the purpose of winding up the partnership, and this right and duty extend alike to real and personal property of the partnership, the lien of the representatives of the deceased partner extending only to the surplus assets of the partnership, and not attaching to the specific assets so as to prevent the surviving partner giving a good title to a *bonâ fide* purchaser from him.

Decision of Farwell, J. (*ante*, p. 154, [1906] 1 Ch. 113), affirmed.—BOURNE, RE, BOURNE *v.* BOURNE, *C.A.*, 559.

3. *Receiver—Remuneration of receiver—Debt of receiver to partnership—Set-off.*—In an action for dissolution of partnership, one of the partners, who was indebted to the partnership, had been appointed receiver.

Held, that his remuneration as receiver could not be deducted from the debt due by him to the partnership.—DAVY *v.* SCARTH, *Ch.D. Farwell, J.*, 155; [1906] 1 Ch. 55; 75 L. J. Ch. 22.

See also Bankruptcy, 13.

PATENT:—

1. *Action to restrain threats of legal proceedings—Lapse of patent—Validity of patent—Infringement—Practice—R. S. C.*, 1883, *ord.* 25, *rr.* 4, 5—*Patents, Designs, and Trade-Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *s.* 32.—The defendants, L. F. Co., who were the owners of a patent which expired in 1903 for an improved boiler flue, brought an action for infringement against a firm, D. & Co., and finally obtained judgment in their favour in the House of Lords. L. F. Co. then threatened to take proceedings for infringement against the plaintiffs, who had purchased boiler flues from D. & Co., and commenced proceedings. L. F. Co. also brought an action against another firm, C. & Co., in which the defence was raised that the patent was invalid, and thereupon L. F. Co. gave an undertaking not to sue C. & Co., and stayed all proceedings. They also discontinued the action against the present plaintiffs, who thereupon asked for a similar undertaking to that given to C. & Co., which was refused. The plaintiffs thereupon brought the present action for a declaration that the patent was invalid, and that they had not infringed any rights of the defendants, also alleging that they had suffered damages by the threats of the defendants. The point as to whether the plaintiffs were entitled to relief, assuming that the patent was invalid, was ordered to be tried first.

Held, that the plaintiffs had no cause of action, as the mere threat to commence proceedings would not give rise to a right of action, and that the plaintiffs' proper remedy was a petition for the revocation of the patent under section 26 of the Patent Act, 1883, notwithstanding that the patent had expired.—NORTH-EASTERN MARINE ENGINEERING CO. *v.* LEEDS FORGE CO., *Ch D. Joyce, J.*, 370; [1904] 1 Ch. 324; 75 L. J. Ch. 178; 94 L. T. 56.

2. *Infringement—Repair—Specification—Approximate fit—Combination.*—The owners of a patent for a wheel rim of a particular shape, intended to hold a solid india-rubber tyre without pinching or cutting it, and without wires or bands to secure it in its place, claimed the wheel rim in combination with a tyre fitted into it, and brought an action against a firm of india-rubber manufacturers alleging they had infringed the rights of the patentee.

The specification said the tyre was to be made so as to "approximately fit" the rim, but it appeared that, while the base of the rim was flat, it was necessary that the tyre should be made convex where it fitted on the base of the rim, and that it should be made one-eighth larger than the corresponding area of the rim, and then it would require machinery to force it into the rim.

Held (affirming the decision of Swinfen Eady, J. (92 L. T. Rep. 564, [1905] 1 Ch. 451), that the specification did not particularly describe and ascertain the nature of the invention and the manner in which it was performed, and the patent was therefore bad.—SIRDAR RUBBER CO. *v.* WALLINGTON & CO., *C.A.*; [1906] 1 Ch. 252; 75 L. J. Ch. 233; 94 L. T. 183.

3. *Infringement—Sale of article by licensee—Rights of purchaser—Estoppel.*—The Statute of Monopolies (21 Jac. 1, c. 3) confers on a patentee the sole privilege by himself, his agents, or licensees, and no others, of making, using, exercising, and vending the invention. When a patentee sells the article patented to a purchaser, the purchaser, in the absence of conditions imposed by the patentee, receives an implied licence to use the article in any way the purchaser pleases.

If, however, a licensee of the patentee, in breach of the conditions of his licence, sells to a purchaser, it is immaterial whether the purchaser is ignorant or not of the conditions. He is in either event an infringer of the patent, and liable accordingly.

Observations on *Incandescent Gas Light Co.* v. *Cantello*, 12 R. P. C. 262.—BADISCHE ANILIN UND SODA FABRIK *v.* ISLER, *Ch.D. Buckley, J.*; [1906] 1 Ch. 605; 75 L. J. Ch. 411; 94 L. T. 367.

4. *Specification—Amendment—Disclaimer—Patents, Designs, and Trade-Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *s.* 19.—Where there is an application under section 19 of the Patents Act, 1883, for leave to apply to the Patent Office for leave to amend a specification by way of disclaimer, and the court is not satisfied that the amendment is not by way of disclaimer, leave should not be refused to apply to the Patent Office, which is the statutory tribunal

for the decision of the question.—ALSOP'S PATENT, RE, *C.A.*, 323; [1906] 1 Ch. 85; 75 L. J. Ch. 134; 94 L. T. 38.

5. "*Vend within the realm*"—*Contract made in England for the sale of patented articles manufactured abroad—Articles to be delivered abroad.*—A contract for sale within the realm of patented articles, which are to be delivered abroad, followed by a notification to the purchasers within the realm that the goods abroad are at their disposal, is not a "vending" within the realm of the patented articles so as to infringe the rights of the patentees.

Saccharin Corporation v. *Reitmeyer & Co.*, 49 W. R. 199, [1900] 2 Ch. 659, followed.—BADISCHE ANILIN UND SODA FABRIK *v.* HICKSON, *C.A.*, 174; [1905] 2 Ch. 495; 74 L. J. Ch. 669; 93 L. T. 350.

See also Practice, 6.

PERPETUITY:—

Appointment — Construction — Cross-remainders — Vested or contingent—Contingent remainders for life. —A lady having power under her marriage settlement to appoint the legal estates in certain real property to her children after her death, appointed by her will that the income and rents "shall be equally divided during their respective lives between my daughters A. and L. after my decease, and in the event of the death of either the survivor shall receive the whole income or rents," and after the death of the survivor she directed the property to be sold.

Held, that upon the construction of the instrument the remainders given on the death of either of the daughters to the survivor were contingent and not vested remainders, for that they could not be vested remainders because one of them must necessarily fail to fall into possession; and that consequently the gift of the entirety of the rents and profits upon the death of either daughter to the survivor was void for remoteness.—WHITBY *v.* LUEDECKE, *Ch.D. Buckley, J.*, 415; [1906] 1 Ch. 783; 75 L. J. Ch. 359; 94 L. T. 432.

See also Appointment, 2, 3; Will, 12.

PHARMACY ACTS:—

Poisons — Alleged illegal sale to a person then unknown to seller — Rankin's Ointment — Vermin killer—Resolution that article be deemed poison—Pharmacy Act, 1868 (31 & 32 *Vict. c.* 121), *ss.* 2, 17. —By resolution passed in pursuance of section 2 of the Pharmacy Act, 1868, the Pharmaceutical Society of Great Britain declared that "vermin killers" should be deemed to be poisons under Part II. of the schedule to the Act. The appellant was convicted of selling a vermin killer, which was a compound article containing a percentage of a poison included in Part I. of the schedule, "to a person then unknown to him, and who was not introduced to him by some person known to him," contrary to section 17 of the above Act.

Held, that the conviction was wrong, because the society had power to declare what articles should be deemed to be poisons under Parts I. and II. respectively of the schedule to the Act.—BROWN *v.* LEGGETT, *K.B.D.*, 362; [1906] 1 K. B. 330; 75 L. J. K. B. 193; 94 L. T. 200.

POLICE:—

Pension—"Approved service"—Continuous service —Diligent and faithful service—Police Act, 1890 (53 & 54 *Vict. c.* 45), *ss.* 1, 4, *sub-section* 12.—By section 1 of the Police Act, 1890, "every constable in a police force if he has completed not less than twenty-five years' approved service . . . shall . . . be entitled without a medical certificate to retire and receive a pension for life." By section 4, sub-section 1, "approved service" means "such . . . as may be certified by the police authority to have been diligent and faithful service"; and by sub-section 2 a certificate of the chief officer of the police force, as to the period of a constable's approved service, is to be sufficient evidence thereof.

Held, that the twenty-five years of service entitling to a pension might be made up of two or more distinct periods, that the chief officer's certificate was conclusive as to the duration of that service, but that the police authority had to certify as to the character and nature of the service, and might produce evidence to support their contentions.

Decision of the Court of Appeal (52 W. R. 678, [1904] 2 K. B. 514) reversed.—GARBUTT *v.* DURHAM JOINT COMMITTEE, *H.L.*, 596; [1906] A. C. 291; 75 L. J. K. B. 459; 94 L. T. 525.

POOR LAW:—

1. "*Deserted*" *wife — Misconduct of wife — Poor Removal Act*, 1861 (24 & 25 *Vict. c.* 55), *s.* 3—A wife while living with her husband in the parish of Lambeth, in the Lambeth Union, gave way to drinking habits, and in order to obtain drink she used to pawn her husband's goods, and she neglected the children of the marriage. On several occasions she spent, for purposes other than that for which it was intended, the money given to her by her husbnnd in order to pay the rent of the house, and she conducted herself in a manner which rendered it impossible for her husband to keep a respectable home for his children. He thereupon told her that they must part for a time, and that she must find another lodging, and he gave her sufficient furniture to furnish a room. Accordingly when she found another lodging she left his house, and he made her an allowance. Some months afterwards he discovered that she had committed adultery, and he thereupon stopped her allowance, and she went to live with a man in a parish in the Southwark Union, where she lived for such a time as would, if she were a widow, have rendered her exempt from removal. The wife having become chargeable to the City of London Union,

Held, that she had been "deserted" by her husband within the meaning of section 3 of the Poor Removal Act, 1861, and that therefore she was, by her residence in a parish in the Southwark Union, exempt from removal therefrom.

Reg v. *Maidstone Union*, 28 W. R. 183, 5 Q. B. D. 31, followed.—SOUTHWARK UNION *v.* LONDON UNION, *C.A.*, 547; [1906] 2 K. B. 112; 75 L. J. K. B. 559; 94 L. T. 763.

2. *Guardians—Liability for negligence of servant to pauper inmate — Common employment.* — The plaintiff, who was inmate of the union workhouse belonging to the defendants, was ordered by the labour master to assist in an enlargement of the electric light installation which was being carried out under the order of their engineer, who was a permanent official of the workhuse. In the course of the work the plaintiff went on to some staging which collapsed, owing to its improper construction, and the plaintiff was thrown to the ground and sustained severe injuries. It was admitted that the engineer was reponsible for the staging.

Held, that the plaintiff was not prevented by the doctrine of common employment from recovering, as he was bound to do the work, and had not voluntarily undertaken its risks.

Held, further, that the action was maintainable as the work was not being carried out by the defendants in the discharge of their administrative duties.—TOZELAND *v.* WEST HAM UNION, *K.B.D.*,

531; [1906] 1 K. B. 538; 75 L. J. K. B. 353; 94 L. T. 486.

3. *Lunatic pauper — Maintenance — Recovery of arrears—Payments on account—Statute of Limitations* (21 *Jac.* 1, *c.* 16).—A lunatic pauper was for many years before her death maintained at the expense of the Wandsworth Union. During this time the receiver in lunacy of her estate paid the whole of her income to the guardians in part payment of arrears of maintenance.

Held, that this was sufficient payment on account to enable the guardians to recover all such arrears from the lunatic's estate after her death.

In re Newbegin's Estate, 36 W. R. 69, 36 Ch. D. 477, and *In re Watson*, 47 W. R. 359, [1899] 1 Ch. 72, applied.—WANDSWORTH UNION *v.* WORTHINGTON, *Ch.D. Farwell, J.*, 422; [1906] 1 K. B. 420; 75 L. J. K. B. 285.

4. *Settlement—Removability—Residence—Receipt of relief—Effect of—Poor Removal Act*, 1846 (9 *&* 10 *Vict. c.* 66), *s.* 1.—The paupers were the lawful children of T. B. and E. B. his wife. By residence T. B. acquired a settlement in the W. H. Union. In February, 1901, T. B. and E. B. and the paupers left W. H. and went to reside in the P. Union, and resided there until the 16th of June, when T. B. died. E. B. continued to reside in the P. Union until the 8th of June, 1904, upon which date, having previously given notice to her landlady of her intention to quit, she left the P. Union for the purpose of looking for employment, and went to reside, while looking for employment, at a house in the W. H. Union. During her residence in the P. Union subsequently to the death of T. B., E. B. was was constantly in receipt of outdoor relief from the guardians of the P. Union, and on the 16th of March, 1903, one of the paupers was admitted to the parochial schools situate in the W. H. Union; and on the 23rd of August, 1903, the other pauper was admitted to the receiving home for children situate in P., and subsequently was removed to the above-mentioned parochial schools. The paupers were boarded and educated at the schools at the expense of the P. Union, and on the 8th of January, 1904, when E. B. left the P. Union, the paupers were living at the schools. They continued to live there and were boarded and educated therein up to the 7th of February, 1905, when an order of removal was made of the paupers from the P. Union to the W. H. Union, at which date E. B. was in the employment of the W. H. Union, and was residing in the W. H. Union.

Held, that at the date of the order of removal the paupers were irremovable from the P. Union.—WEST HAM UNION *v.* POPLAR UNION, *K.B.D.*; 94 L. T. 769.

5. *Settlement—Removal—Irremovability— Computation of time of residence—Break in residence—Absence of soldier on militarg service—Exclusions—Poor Removal Act*, 1846 (9 *&* 10 *Vict. c.* 66), *s.* 1.—*Divided Parishes and Poor Law Amendment Act*, 1876 (39 *&* 40 *Vict. c.* 61), *s.* 34.—The absence of a person on military service from the parish where he has been residing constitutes a break in the residence necessary for the purpose of acquiring a settlement in the parish under section 34 of the Divided Parishes and Poor Law Amendment Act, 1876, notwithstanding that his absence is compulsory and that during such absence his wife and children continue to live in the parish, and that he has the intention of returning and does return to the parish. In such case the two separate periods of residence, before his departure and after his return cannot be added together for the purpose of making up the three years' residence necessary to confer a settlement under that section, although the time during which a person is serving as a soldier is by section 1 of the Poor Removal Act, 1846, to be excluded from the computation of the time for the purposes of that section.

St. Olave's Union v. *Canterbury Union*, [1897] 1 Q. B. 682, followed.—NEWARK UNION *v.* MAIDSTONE UNION, *K.B.D.*; 93 L. T. 602.

6. *Settlement—Three years' residence—Illegitimate child — Residence under sixteen — Irremovability — Divided Parishes Act*, 1876 (39 *&* 40 *Vict. c.* 61), *ss.* 34, 35.—Under the Divided Parishes Act, 1876, ss. 34, 35, an illegitimate child may acquire a settlement for herself by three years' residence in a parish with her mother, although under the age of sixteen years.

E. N. (who was illegitimate), while under sixteen, resided with her mother for three years in the parish of West Ham under circumstances which rendered her irremovable from that parish and settled therein. After attaining sixteen she had acquired no new settlement.

Held, she had acquired a settlement for herself in West Ham.

Decision of the Court of Appeal (52 W. R. 513, [1904] 2 K. B. 121) affirmed.—WEST HAM UNION *v.* HOLBEACH UNION, *H.L.*, 137; [1905] A. C. 450; 74 L. J. K. B. 868; 93 L. T. 557.

7. *Settlement—Unemancipated children—Acquisition of settlement—Divided Parishes Act*, 1876 (39 *&* 40 *Vict. c.* 61), *ss.* 34 *and* 35.—A child under the age of sixteen cannot acquire an independent settlement, a legitimate child having the settlement of its parent and an illegitimate child the settlement of its mother.—WOOLWICH UNION *v.* FULHAM UNION, *K.B.D.*, 14; [1905] 2 K. B. 203; 74 L. J. K. B. 556; 92 L. T. 838. Reversed [1906] 2 K. B. 240.

See also Rating, 4-10; Metropolis, 12; Railway, 9.

POWER:—

1. *Appointment—Execution—Conflict of laws—Domiciled foreigner—Will and codicils valid according to the law of domicil, but invalid according to English law—Wills Act*, 1837 (1 *Vict. c.* 26), *ss.* 9, 10, 27.—A lady domiciled in France, on whom a power of appointment by will had been conferred by an English instrument, made a will, valid by the law of her domicil but not attested as required by the Wills Act, by which she appointed a universal legatee with a general bequest of personalty. The will contained no express reference to the power and no express direction that it was to be construed according to English law.

Held, that the power had not been exercised, as the will, though admitted to probate, was not, owing to noncompliance with the provisions of the Wills Act as to attestation, a will to which the rules of construction contained in section 27 of the Wills Act as to the execution of powers applied.

In re D'Este's Settlement Trusts, 51 W. R. 552, [1903] 1 Ch. 898, followed.—SCHOLEFIELD. RE, SCHOLEFIELD *v.* ST. JOHN, *Ch.D. Kekewich, J.*, 56; [1905] 2 Ch. 408; 74 L. J. Ch. 610; 93 L. T. 122.

2. *Power of attorney — Power coupled with an interest — Revocation — Manager — Evidence — Additional consideration to that expressed in document—Specific performance.*—Where a power of attorney was given by the owners of an estate to an agent to enter into possession and to manage the estate, to receive the rents and profits and to pay the debts of the owners, and possession was taken by the

agent, and some time afterwards the power of attorney revoked and possession demanded,

Held, that the power of attorney was revocable, although the agent had, with the consent of one of the owners, given a personal guarantee to the mortgagee of the estate to pay the mortgage debt on the day of redemption, and (even if the authority were irrevocable) the owners were entitled to recover possession of the property.—FRITH *v.* FRITH, *P.C.*, 618; [1906] A. C. 254; 75 L. J. P. C. 50; 94 L. T. 383.

See also Appointment, 1-3.

PRACTICE:—

1. *Administration—Costs—Liability of real estate—Land Transfer Act*, 1897 (60 & 61 *Vict. c.* 65), *s.* 2, *sub-section* 3—*R. S. C.*, 1883, *ord.* 65, *r.* 14 (d).—Where, in a probate action instituted in 1905, the court ordered the plaintiff's costs "to come out of the estate of the deceased," there being no personal estate, it was

Held, that, having regard to section 3 (2) of the Land Transfer Act, 1897, the order operated to charge the deceased's real estate with the payment of the costs.—VICKERSTAFF, RE, VICKERSTAFF *v.* CHADWICK, *Ch.D. Kekewich, J.*, 414; [1906] 1 Ch. 762; 75 L. J. Ch. 419; 94 L. T. 463.

2. *Appeal out of time—Delay—Neglect to bring matters before court.*—The Judicial Committee will not allow an appellant who is out of time for appealing against an order to make a fresh application for the same thing to the court below in order to bring himself within time for appealing against the second order.

Where there has been great delay on the part of an appellant in the assertion of his alleged rights, and he has neglected to bring all the facts known to him properly before the court below, the Judicial Committee will not extend the time for appealing. —GRIEVE *v.* TASKER, *P.C.*; [1906] A. C. 132; 75 L. J. P. C. 12; 94 L. T. 115.

3. *Costs—Claim for injunction and damages—Satisfaction of claim for injunction during progress of action—Judgment at trial for £10 damages—Plaintiff's right to costs—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 116.—In this action the plaintiff claimed damages for breach of a covenant contained in a lease not to make any alteration in the demised premises, and also an injunction restraining the breach. During the progress of the action the defendant restored the premises to their former condition. At the trial the plaintiff recovered £10 damages with costs to be taxed, but did not ask for an injunction as the defendant stated that he did not intend to interfere again with the premises.

Held (dismissing the appeal), that section 116 of the County Courts Act, 1888, did not apply, and that the plaintiff was entitled to costs upon the High Court scale.—DOHERTY *v.* THOMPSON, *C.A.*; 94 L. T. 626.

4. *Costs—Further security for costs—Application after trial—Summons for directions—Application by way of notice—Proper method by fresh summons—Ord.* 30, *rr.* 2, 5; *ord.* 65, *r.* 6.—After trial and judgment the proper method to proceed in an interlocutory matter is by a fresh summons, and not by notice under the summons for directions.

The plaintiff in an action brought for a declaration of partnership and for an account had been ordered to give security for costs. At the trial it was ordered that the accounts between the parties should be taken by the official referee. The defendants applied by notice under the summons for directions that the plaintiff should be ordered to give further security for the costs to be incurred in the inquiry before the official receiver.

Held, that the application must be refused, as the summons for directions, under which the notice was given, was put an end to by the trial and judgment.—BROWN *v.* HAIG, *Ch.D. Kekewich, J.*, 26; [1905] 2 Ch. 379; 74 L. J. Ch. 591; 93 L. T. 99.

5. *Costs—Plaintiffs and defendants both in part successful—Order as to costs of action—Discretion of judge—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 49—*Ord.* 65, *r.* 1—*Public Authorities Protection Act*, 1893 (56 & 57 *Vict. c.* 61), *s.* 1, *sub-section* (b).—Where both plaintiffs and defendants had in part succeeded in an action, yet, having regard to the importance to the plaintiffs of the issue in respect of which they were successful, the view taken by the learned judge at the trial was that they had substantially succeeded, and in the exercise of his discretion his lordship gave them the general costs of the action, disallowing them the costs of those issues in respect of which they had failed, it was held that the exercise of his lordship's discretion ought not, under the circumstances, to be interfered with by the Court of Appeal.

Civil Service Co-operative Society v. *General Steam Navigation Co.*, 89 L. T. Rep. 429, [1903] 2 K. B. 756, and *Frederick King & Co. (Limited)* v. *Gillard & Co. (Limited)*, 92 L. T. Rep. 605, [1905] 2 Ch. 7, distinguished.

Decision of Swinfen Eady, J., affirmed.—LECKHAMPTON QUARRIES *v.* BALLINGER, *C.A.*; 93 L. T. 93.

6. *Costs — Taxation — Patent — Infringement — Pleas of invalidity and non-infringement—Action dismissed with costs—Costs of issues—Patents, Designs, and Trade-Marks Act*, 1883, *s.* 29 (6)—*R. S. C.*, 1883, *ord.* 32, *r.* 4; *ord.* 65, *r.* 2.—Where in an action for infringement of a patent the defendant pleads both invalidity and non-infringement, and is successful upon the former plea but not upon the latter, in the case of a judgment dismissing the action with costs, it is the duty of the taxing-master to tax the defendant's costs as in an ordinary action, and to allow his costs not only with regard to the items in the particulars of objections certified by the judge under section 29 (6) of the Patents, Designs, and Trade-Marks Act, 1883, but also with regard to the plea of non-infringement and all the other costs incurred by the defendant, except such as relate to the particulars of objections as to which no certificate is given. — HASKELL GOLF BALL CO. *v.* HUTCHISON, *Ch.D. Warrington, J.*, 330; [1906] 1 Ch. 518; 75 L. J. Ch. 270; 94 L. T. 731.

7. *Costs—Writ of possession—Jurisdiction—Judicature Act*, 1890 (53 & 54 *Vict. c.* 44), *s.* 5.—The court has power, under section 5 of the Judicature Act, 1890, to allow the successful plaintiff in an action for the recovery of land the costs of and incidental to a writ of possession.—DARTFORD BREWERY CO. *v.* MOSELEY, *C.A.*, 333; [1906] 1 K. B. 462; 75 L. J. K. B. 279; 94 L. T. 263.

8. *Counterclaim — Plaintiff — Action brought in Chancery Division—Counterclaim for slander—Trial by jury—R. S. C.*, 1883, *ord.* 36, *rr.* 2, 7—*Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 100.—Where an action is properly brought in the Chancery Division a defendant who raises by counterclaim issues of slander, libel, false imprisonment, malicious prosecution, seduction, or breach of promise of marriage, is not entitled to have all the issues of fact in the action tried by a judge with a jury as of right under rule 2 of order 36, that rule not applying to the case of a counterclaiming defendant. But in

such a case the court will, in the exercise of the discretion given by rule 7 of the same order, direct the issues raised by the counterclaim, to which rule 2 would apply if the counterclaim were an original action, to be tried by a judge with a jury, the original action and any other issues raised by the counterclaim being tried in the Chancery Division in the ordinary way.—KINNAIRD *v.* FIELD (No. 2). *C.A.*, 85; [1905] 2 Ch. 361; 74 L. J. Ch. 692; 93 L. T. 190.

9. *Debenture-holders' action—Property in danger—Motion for judgment on admissions—R. S. C.*, 1883, *ord.* 51, *r.* 1b.—Where debenture-holders brought an action for the realization of their security, and moved for judgment on admissions, the judge, in the absence of some of the third debenture-holders, directed a sale with the approbation of the judge.—CRIGGLESTONE COAL CO., RE, *Ch.D. Swinfen Eady, J.*, 298; [1906] 1 Ch. 523; 75 L. J. Ch. 307; 94 L. T. 471.

10. *Discovery — Interrogatories — Libel — Action against proprietor of newspaper—Plea of fair comment—Information on which libel founded—Name of informant.*—Where in an action of libel against the proprietor of a newspaper the defendant pleads fair comment, the plaintiff is entitled to interrogate the defendant as to the information on which the alleged libel was founded, but not as to the name of the informant.—PLYMOUTH MUTUAL CO-OPERATIVE SOCIETY *v.* TRADERS' PUBLISHING ASSOCIATION, *C.A.*, 319; [1906] 1 K. B. 403; 75 L. J. K. B. 259; 94 L. T. 258.

11. *Discovery of documents—Conduct of action taken over by plaintiffs' underwriters—Document in possession of underwriters' solicitor—Plaintiff retaining substantial interest in action—Stay of action till discovery made.*—The plaintiffs, as owners of cargo, sued the defendants, as shipowners, for breach of a contract contained in a bill of lading. Underwriters, with whom the plaintiffs had effected a policy of insurance on the cargo to the extent of three-fourths of its value, paid on the policy, and then took over the conduct of the action. The defendants desired to have discovery of a document which was in the possession of the underwriters' solicitors, and applied for an order to stay the action until such discovery was given.

Held, that, as the plaintiffs were not mere nominal plaintiffs, but had a real and substantial interest in the action, the order could not be made.

Willis v. *Baddeley*, 40 W. R. 577, [1892] 2 Q. B. 324, distinguished.—NELSON & SONS *v.* NELSON LINE, *C.A.*, 546; [1906] 2 K. B. 217.

12. *Frivolous and vexatious applications—Interlocutory applications before judgment — Order to prevent.*—Where repeated frivolous and vexatious interlocutory applications have been made in an action before judgment, the court will make an order prohibiting any further application without leave of the court.—KINNAIRD (LORD) *v.* FIELD (No. 1). *C.A.*, 3; [1905] 2 Ch. 306; 74 L. J. Ch. 554; 93 L. T. 147.

13. *Judgment—Order that plaintiff do recover a sum of money—Four-day order—Enforcing order—R. S. C.* 1883, *ord.* 42, *r.* 3; *ord.* 41, *r.* 5.—Judgment in an action for a breach of trust was given in the form that the plaintiff do recover a sum of money. The plaintiff subsequently obtained a four-day order for payment of this sum.

Held, on appeal, that the four-day order must be discharged, the court having, under the old common law practice as it existed before the Judicature Act, no jurisdiction to supplement an order for the recovery of a sum of money by a four-day order, while rule 3 of order 42 did not apply, as a four-day order was not a mode of enforcing the original order but was an addition or supplement to it.—ODDY, RE, MAJOR *v.* HARNESS. *C.A.*, 291; [1906] 1 Ch. 93; 75 L. J. Ch. 141; 94 L. T. 146.

14. *Order for examination of husband—Time for attendance not stated in order—Subsequent appointment by registrar—Disobedience—Attachment—Contempt of court—Ord.* 41, *r.* 5.—The provision of ord. 41, r. 5—that every order requiring any person to do an act thereby ordered, shall state the time within which the act is to be done—is not sufficiently complied with if no time is stated in the order, but an appointment is subsequently made by the registrar and appears in an endorsement made on the order.

Where, therefore, an order made by the Divorce Division for the attendance of a husband before one of the registrars for the purpose of being examined as to his means contained the defect above referred to, it was held that a writ of attachment against him for contempt of court in failing to attend the appointment before the registrar was wrongly issued.

Decision of the President (Sir John Gorell Barnes) reversed.—TOWNEND *v.* TOWNEND, *C.A.*; 93 L. T. 680.

15. *Originating summons—R. S. C.*, 1883, *ord.* 54a, *rr.* 1, 4 — *Construction — Jurisdiction — Questions of fact.*—An executor handed over securities to a legatee by a deed of 1897 upon terms which included a guarantee by the executor that until the 31st of December, 1903, the securities should be of a certain value. The legatee mortgaged his interest in the estate by a deed which did not mention the guarantee. The mortgagees, by a deed which recited the guarantee, sold the mortgaged property to L., who brought an action in the King's Bench Division against the executor claiming the alleged difference between the amount realized and the guaranteed value of the securities. By agreement the action was dropped and another action was brought in the Chancery Division. A deed was then executed by the mortgagees conveying all the premises comprised in the mortgage by way of confirmation to L. L. then discontinued his action and took out an originating summons asking for a declaration that, according to the true construction of the deeds, the benefit of the guarantee had been assigned to and vested in him, and for an account.

Held, that inasmuch as questions both of fact and of construction were involved, and a decision of the questions of construction would not, in whichever way they were decided, necessarily put an end to the litigation, an originating summons under order 54a was not the proper mode of procedure.—LEWIS *v.* GREEN, *Ch.D. Warrington, J.*, 93; [1905] 2 Ch. 340; 74 L. J. Ch. 682; 93 L. T. 303.

16. *Parties—Bankruptcy of plaintiff suing for himself and all other creditors—Abatement—Application to dismiss action—Action in representative capacity—Ord.* 17, *r.* 1.—Where a receiving order followed by an adjudication in bankruptcy had been made against the plaintiff in an action in which the claim on behalf of himself and all other creditors was for an order setting aside an assignment of personal property by way of settlement made by the first defendant upon his wife, the second defendant, previously to his bankruptcy and the defendants applied for a stay of proceedings in the action:

Held, that the action must be dismissed unless the official receiver intervened within a specified

time, on the ground that, although the action was brought on behalf of all the creditors, the plaintiff could only sue as a creditor, and that, when he ceased to be such by the assignment by operation of law to his trustee in bankruptcy, he ceased to be a person capable of continuing the action; that he was not a trustee of the right of action, but suing as a creditor in his own right; and that a receiving order and injunction obtained in the action did not operate in the same manner as a judgment in a creditor's administration action, where the court undertakes to protect all the creditors.—WOOLF *v.* VAN BOOLEN, *Ch.D. Kekewich, J.*; 94 L. T. 502.

17. *Payment into court—Liability not denied—Death of defendant before trial—Jurisdiction to order payment out of money—Ord.* 22, *rr.* 1, 5.—The defendant in an action of libel without denying liability paid a sum of money into court as sufficient to satisfy the plaintiff's claim. The plaintiff proceeded with the action and did not take the money out of court. Before trial the defendant died, and his executors applied for an order that the money in court should be paid out to them.

Held, that, though the action had abated owing to the death of the defendant, the court had power, under its general jurisdiction over money in court, to order it to be paid out as it thought right, and that the plaintiff's right was superior to the executors', and the court would order it to be paid out to him.—BROWN *v.* FEENEY, *C.A.*, 445; [1905] 1 K. B. 563; 75 L. J. K. B. 494; 94 L. T. 460.

18. *Pleading—Embarrassing endorsement of writ—Abuse of process of court—Striking out—Married woman—Separate estate—Restraint on anticipation—Costs—Married Women's Property Act*, 1893 (56 & 57 *Vict. c.* 63), *s.* 2—Where a writ is embarrassing because the endorsements thereon state claims wilfully framed in a manner that cannot be supported, that are not made in good faith, and that are intentionally too general, it is the proper course to strike out the writ altogether with its endorsements, but with leave to issue a fresh writ in proper form.

A married woman, who is the real plaintiff in an action, may, when her action is dismissed with costs, be ordered, under section 2 of the Married Women's Property Act, 1893 (56 & 57 Vict. c. 63), to pay costs, when taxed, out of property settled for her separate use without power of anticipation, but it is not necessary to appoint a receiver.—HUNTLY *v.* GASKELL, *C.A.*, 164; [1905] 2 Ch. 656; 75 L. J. Ch. 66; 93 L. T. 785.

19. *Service out of the jurisdiction—Contract to be performed within the jurisdiction—Breach within the jurisdiction — Contract of agency for England—Wrongful termination of agency—R. S. C.*, 1883, *ord.* 11, *r.* 1 (e).—By a contract made abroad the defendants, a foreign insurance company, appointed the plaintiffs, a firm carrying on business in London, to be their agents for the United Kingdom and certain other countries for a period of five years. Before the expiration of the term the plaintiffs received a letter from a representative of the defendants, written in London, putting an end to the agency. The plaintiffs obtained leave under ord. 11, r. 1 (*e*), to serve on the defendants out of the jurisdiction a writ of summons in an action for breach of the contract of agency.

Held, that the order for service out of the jurisdiction was rightly made; for the breach alleged by the plaintiffs was a breach within the jurisdiction of a contract to be performed by the defendants within the jurisdiction.—MUTZENBECHER *v.* LA ASEGURADORA ESPANOLA, *C.A.*, 207; [1906] 1 K. B. 254; 75 L. J. K. B. 172; 94 L. T. 127.

20. *Service out of jurisdiction—Substituted service of same writ within jurisdiction—Ord.* 6, *rr.* 1, 2.—The plaintiffs obtained an order giving them leave to issue a concurrent writ and to serve the same out of the jurisdiction on the defendant, and also to serve the same by sending a copy thereof through the post addressed to the defendant at five different addresses, three of these addresses being in England and two in Belgium.

Held, that this order was regular within ord. 6, rr. 1, 2.—WESTERN SUBURBAN BUILDING SOCIETY *v.* RUCKLIDGE, *Ch.D. Swinfen Eady, J.*, 62; [1905] 2 Ch. 472; 74 L. J. Ch. 751; 93 L. T. 664.

21. *Stay of proceedings—Parties resident in Scotland—Cause of action arising in Scotland—Vexatious and oppressive and abuse of process of court to bring action in England.*—The plaintiff in an action to recover damages for misrepresentation was a person domiciled and resident in Scotland. The defendants were a bank incorporated in Scotland, the treasurer of the bank, who was domiciled and resident in Scotland, another person resident in Scotland, and a person resident in England. All the transactions which give rise to the alleged cause of action took place in Scotland, all the witnesses resided in Scotland, and all the documents relating to the matters in question were in Scotland. The defendant who resided in England was a merely nominal defendant, and did not enter an appearance to the action.

Held, that it was vexatious and oppressive and an abuse of the process of the court to bring the action in England rather than in Scotland, and that the action ought to be stayed.—LOGAN *v.* BANK OF SCOTLAND, *C.A.*, 270; [1906] 1 K. B. 141; 75 L. J. K. B. 218; 94 L. T. 153.

22. *Transfer of action from county court to High Court—County Court (Admiralty Jurisdiction) Act*, 1868 (31 & 32 *Vict. c.* 71), *s.* 6—*Admiralty Court Rules*, 1859, *rr.* 138-143—*Supreme Court of Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 39—*Rules of the Supreme Court*, 1883, *ord.* 54, *r.* 1.—A wages suit having been instituted in the county court of Lancashire, holden at Liverpool sitting in Admiralty, the defendants, in accordance with section 6 of the County Court (Admiralty Jurisdiction) Act, 1868 (31 & 32 Vict. c. 71), moved the High Court of Admiralty that the action should be transferred to the High Court.

The application to the High Court was made by motion in court.

Held, that the transfer would be made, but that the proper method of asking for a transfer from the county court to the High Court under section 6 of the County Court (Admiralty Jurisdiction) Act, 1868, was by way of summons in chambers.—"INDRA," THE, *P.D.*; 94 L. T. 110.

See also Appeal, 1, 2; Attachment, 1-3; Compromise, 1.

PRINCIPAL AND AGENT:—

1. *Commission agent—Determination of agency—Notice—Custom requiring notice.*—The defendants, who carried on business in the glove trade, made an agreement with the plaintiff, a commission agent, in these terms: "We will give the 2½ per cent. commission on all business you do for us in London. You let us know to whom you show our samples, and, if business results from the transaction, we will forward your commission quarterly. This refers to orders executed."

The defendants terminated this agreement without giving any notice, and the plaintiff brought this action to recover damages. At the trial the plaintiff tendered evidence of a custom in the glove

trade that six months' notice must be given to terminate the agency of a commission agent. The judge rejected that evidence, and directed a verdict and judgment for the defendants.

Held (dismissing the appeal), that evidence of the alleged custom, being inconsistent with the terms of the written agreement, was not admissible, and that the defendants were entitled to terminate the agency without notice.—JOYNSON *v.* HUNT, *C.A.*; 93 L. T. 470.

2. *Husband and wife—Goods supplied for household on order of wife—Judgment against wife for part of price—Alternative liability of husband—Election—Right to sue husband for balance.*—An action was brought against a husband and wife, who were living together, for the balance of an account for groceries supplied by the plaintiff to the defendants upon the order of the wife. Upon an application for judgment under order 14 against both defendants, the husband denied all liability, while the wife admitted indebtedness for the greater part of the claim, and in view of this admission by the wife the master gave judgment against the wife for a part of the sum claimed, with leave to her to defend as to the balance and with leave to the husband to defend the action.

Afterwards a jury found that there was not joint liability of husband and wife, and that the plaintiff had given credit to the husband only.

Judgment having been given against the husband for the balance of the amount,

Held (by Lord Alverstone, L.C.J., and Kennedy, J.; Jelf, J., dissenting), that the taking of the judgment against the wife for part of the claim was not such an election by the plaintiff to accept the liability of the wife for the whole amount as prevented the plaintiff from afterwards proceeding against the husband for the rest of the claim, when it was found that he was originally solely liable.

Morel Brothers & Co. v. *Earl of Westmorland*, [1904] A. C. 11, distinguished.—FRENCH *v.* HOWIE, *K.B.D.*; [1905] 2 K. B. 580; 74 L. J. K. B. 853; 93 L. T. 202.

3. *Money borrowed by agent on behalf of principal without authority—Application of money in discharge of principal's legal liabilities—Right of lender to recover from principal.*—An agent of the defendant firm borrowed money from the plaintiff on behalf of the firm, but without having any authority from them so to do, and applied the money so borrowed in discharging legal liabilities of the firm.

Held, that, by virtue of the equitable principle stated by Lord Selborne, L.C., in *Blackburn Building Society* v. *Cunliffe, Brooks, & Co.*, 31 W. R. 98, 22 Ch. D. 61, the plaintiff was entitled to recover from the defendants the money so borrowed and so applied.—BANNATYNE *v.* MACIVER, *C.A.*, 293; [1906] 1 K. B. 103; 75 L. J. K. B. 120; 94 L. T. 150.

4. *Undisclosed principal — Baptist minister — Appointed to the pastorate by a document signed by the deacons of the chapel—Fund insufficient to pay salary —Claim against deacons to make good deficiency.*—Held, that the defendants were not personally liable as agents for an undisclosed principal to make up arrears of salary due to the plaintiff, although they had invited him to become pastor of the Baptist chapel of which they were the deacons, and had signed the document under which he became pastor, because there was evidence on the face of the document that the salary of the pastor was to be payable out of the chapel fund, of which fund the plaintiff himself was treasurer, and from which he had paid himself salary as it became due, so long as the fund was sufficient to meet it.—MORLEY *v.* MAKIN, *K.B.D.*, 395.

PRIVY COUNCIL:—

Jurisdiction—Act of executive Government of a colony—Proclamation of martial law—Conviction by a court-martial.—The Judicial Committee will not interfere with an act of the executive government of a colony in a case in which no application has been made to the courts of justice in the colony to interpose in the matter.—MGOMINI, EX PARTE, *P.C.*; 94 L. T. 558.

PROBATE:—

1. *Administration—Bankruptcy—Grant to official receiver—Dispensing with sureties—Practice.*—Where a grant of letters of administration to the estate of a deceased person is made to an official receiver in bankruptcy, the Probate Court will dispense with sureties to the administration bond under the special circumstances of the case, since the official receiver has, as an official of the Board of Trade, already given security for the due performance of his duties.—CAUSTON, IN THE GOODS OF, *P.D.*; [1906] P. 124; 75 L. J. P. 42; 94 L. T. 613.

2. *Administration—Probate Act*, 1857, *s.* 73—*Divorce.*—The Court allowed a person entitled to administration in priority to the applicant to be passed over without citing him, it being (taken as) proved that his claim to administration was put an end to by a valid decree of divorce.—WALLAS, IN THE ESTATE OF, *P.D.*, 172; [1905] P. 326; 75 L. J. P. 8; 94 L. T. 102.

3. *Administration* pendente lite—*Concurrent suits —Chancery and probate actions—Creditors—Sureties.* —An action was commenced by creditors in the Chancery Division for the administration of the estate of a deceased person. In the Probate Division an action was instituted by the executors of a later will of the same deceased person to establish it against the executors of an earlier will. An order had been obtained by the creditors in the Chancery proceedings for the appointment of the plaintiffs in the probate proceedings as receivers of the estate. The court granted administration *pendente lite* in the proceedings in the Probate Division to the same persons who had been appointed on the application of the creditors in the Chancery proceedings, although they were in no wise parties to the probate proceedings. The same sureties as had been accepted by the Chancery Division were approved by the Probate Division.

Tichborne v. *Tichborne*, L. R. 1 P. & D. 730, followed.—CLEAVER, IN THE GOODS OF, *P.D.*; [1905] P. 319; 75 L. J. P. 164; 94 L. T. 99.

4. *Mutual will—Fresh will.*—A husband and wife entered into an "arrangement" to make wills in each other's favour, and did so. The wife predeceased her husband, and at her death it was found that she had, since the making of the will, made other wills unknown to her husband, which reduced the gifts originally made to him.

The Court held that the mutual will had not become irrevocable by death, for the testatrix had not stood by it, but had executed a later will, and the husband was not prejudiced, for he had notice from the death.—STONE *v.* HOSKINS, *P.D.*; 64 [1905] P. 194; 74 L. J. P. 110; 93 L. T. 441.

PUBLIC AUTHORITIES.—See Bailiff, 1; Highway, 6; Practice, 5.

PUBLIC HEALTH:—

1. *Agreement with local authority—Reservation of powers—Liability of frontagers—Private Street Works Act*, 1892 (55 & 56 *Vict. c.* 57).—Under an agree-

ment made in 1879 between a railway company, certain property owners, and the local authority, it was agreed that a road should be dedicated to the public and taken over by the local authority as a highway repairable by the inhabitants at large, but that the local authority should retain the same powers of requiring the respective owners and occupiers for the time being of land fronting, adjoining, or abutting on the road to sewer and make up, &c., all or such parts of the road, carriage-way, or footway as were not already sewered and made up, and their rights under the Public Health Act, 1875, and a local Act were also reserved to the local authority.

At the date of the agreement the road was properly made up, but the footway was not paved. The local authority having decided, under the powers conferred by the Private Street Works Act, 1892, to pave the footway, they served notices of apportionment on the frontagers.

Held, that the frontagers were not liable, as the road was a highway repairable by the inhabitants at large, and the powers which the local authority attempted to enforce did not apply to such a highway, and the local authority could not, under the agreement, make the frontagers liable.—FOLKESTONE CORPORATION *v.* MARSH, *K.B.D.*; 94 L. T. 511.

2. *Bye-law — Existing water-closets — Repairs — Notice not given to authority—Public Health (London) Act*, 1891 (54 *&* 55 *Vict. c.* 76), *s.* 39.—By a bye-law made in pursuance of section 39 of the Public Health (London) Act, 1891: "Every person who shall intend to construct any water-closet . . . or to fit or fix in or in connection with any water-closet . . . any apparatus or any trap or soil pipe, shall, before executing any such works, give notice in writing to the clerk of the sanitary authority."

Held, that this bye-law applied to a water-closet constructed before the making of the bye-law.—LONDON AND SOUTH-WESTERN RAILWAY *v.* HILLS, *K.B.D.*; [1906] 1 K. B. 512; 75 L. J. K. B. 340; 94 L. T. 517.

3. *Sewer—"Single private drain"—Single private drain running into sewer—Liability to abate nuisance in sewer—Notice of nuisance by inspector of local authority—Sufficiency—Public Health Act*, 1875 (38 *&* 39 *Vict. c.* 55) *s* 41—*Public Health Acts Amendment Act*, 1890 (53 *&* 54 *Vict. c.* 59), *s.* 19.—The respondent was the owner of six houses in a row of sixteen houses, the other houses belonging to different owners. All the houses in the row were drained in pairs, each pair being drained by a separate pipe into a pipe common to both houses, and each of such common pipes discharged into a line of pipes (called the alleged single private drain) laid in private ground behind the row of houses and parallel thereto, and the drainage of all the houses was thence conveyed to a public sewer. The drainage of the respondent's houses was conveyed (as in the case of all the houses) to the alleged single private drain, first by pipes which were not common, and then by pipes which were common, to each pair. Several of the other houses belonging to different owners, being at the upper end of the row of houses, were also drained into the alleged single private drain before it received the drainage of the respondent's houses. It was admitted that the pipes which were common to each pair of the respondent's houses were "sewers" within the meaning of the Public Health Acts. A nuisance existed in the alleged single private drain behind the respondent's houses, and the question was whether the respondent was liable to bear the cost of abating the same.

Held, that, inasmuch as the portion of the alleged single private drain behind the respondent's houses would, if it had received only the drainage of the respondent's houses, have been a sewer, to which section 19 of the Public Health Acts Amendment Act, 1890, would not have applied, it was not brought within the operation of section 19, and did not become a single private drain, to which that section was applicable, because in addition it also received the drainage of several of the other houses belonging to different owners, and that therefore the respondent was not liable to pay for abating the nuisance. — WOOD GREEN URBAN COUNCIL *v.* JOSEPH, *K.B.D.*; 74 L. J. K. B. 954; 93 L. T. 434.

See also Hospital, 1; Local Government, 4, 7, 9-11; Metropolis, 2, 7, 14, 15, 22, 23; Nuisance, 2.

RAILWAY:—

1. *Amalgamation of undertaking—Water supply—* Ultrà vires—*North-Eastern Railway (Hull Docks) Act*, 1893 (56 *&* 57 *Vict. c. cxcviii.*).—A railway company, its undertaking having been amalgamated with that of a dock company, supplied water to a dock, formerly the property of the dock company, from land acquired by the railway company in respect of its railway undertaking. The amalgamating Act provided that none of the powers relating exclusively to the dock company should apply to any part of the amalgamated undertaking other than the docks, and that none of the powers relating exclusively to the railway company should apply to the dock or to the company in respect thereof.

Held, that the company's action in so supplying water was *intrà vires.*—ATTORNEY-GENERAL *v.* NORTH-EASTERN RAILWAY CO., *Ch.D. Joyce. J.*, 212; [1906] 1 Ch. 310; 75 L. J. Ch. 166; 94 L. T. 13.

2. *Carriage of goods—Special contract—Liability of company—Railway and Canal Traffic Act*, 1854 (17 *&* 18 *Vict. c.* 31), *s.* 7.—Section 7 of the Railway and Canal Traffic Act, 1854, applies to goods carried by passenger train which in fact the railway company are not bound to carry by passenger train.

A railway company, therefore, having carried travellers' samples by passenger train, which they were under no obligation to do, under the condition that they were relieved from all liability for loss, damage, misdelivery, or delay, such condition was held not to be binding owing to such special contract not having been signed as provided in section 7.—WILKINSON *v.* LANCASHIRE AND YORKSHIRE RAILWAY, *K.B.D.*; 94 L. T. 820.

3. *Compensation for leaving coal unworked under railway—Basis of compensation—Railway Clauses Consolidation Act*, 1845 (8 *&* 9 *Vict. c.* 20), *s.* 78.—Where the lessee of coal mines lying under or adjacent to a line of railway is desirous of working such mines, and the railway company has, under section 78 of the Railway Clauses Act, 1845, notified him that they are willing to pay him compensation for not working such mines,

Held, that the measure of compensation payable by the railway company was the profit which would have been made on the reserved coal, and not the loss which the owner or lessee might suffer by reason of the interference of the railway company with the working of the mine.—JOICEY & CO. *v.* NORTH-EASTERN RAILWAY CO., *K.B.D.*, 332; [1906] 1 K. B. 195; 75 L. J. K. B. 57; 94 L. T. 143.

4. *Injury to passenger by spark from engine—Negligence.—Exit from station—Omission to take reasonable precautions to protect from sparks—Obligation of railway company.*—The plaintiff, a passenger, while leaving the defendants' station by a path belonging to the defendants which ran alongside the railway and was an authorized means of exit, was injured by a spark from an engine on the railway. There was evidence that the attention of the defendants had been called to the danger of injury from sparks to passengers using the path, and that they had declined to protect the path by a screen or cover on the ground of expense; and that the path could have been protected at a reasonable cost and without interfering with the business of the railway. The engine was properly constructed to prevent the emission of sparks according to the latest and most improved methods, and there was no negligence in working the engine.

In an action for damages for negligence, the jury found a verdict for the plaintiff.

Held (dismissing the appeal), that there was evidence upon which the jury could properly find that the defendants were negligent in not taking reasonable precautions to protect passengers using the path from injury by sparks.—ATHERTON *v.* LONDON AND NORTH-WESTERN RAILWAY, *C.A.*; 93 L. T. 464.

5. *Land acquired for statutory purposes—Power to dedicate to the public.*—A statutory body, such as a railway company, cannot alienate its rights in land (other than superfluous land) acquired for a statutory purpose, if such alienation may in the future prove incompatible with the use of the land for carrying out the company's statutory objects.

A railway company built and maintained a private accommodation bridge over its lines to connect the properties of a landowner that had been severed by the railway.

The bridge in course of time came to be much used by the public, and the acts done in connection with it by the railway company would, if they had been the acts of a private owner, have constituted a dedication of the roadway to the public.

Gas pipes were laid by the local authority in the roadway of the bridge on the footing that the bridge was a public road, and in exercise of the powers conferred by section 6 of the Gas Works Clauses Act, 1847 (10 Vict. c. 15).

The railway company wished to alter the bridge, in order to lay down more lines on land acquired for that purpose, and adjacent to their existing lines at the bridge, and requested the local authority to remove the gas pipes.

Held, that the bridge in question was not a public road so as to enable the local authority to exercise therein the powers conferred by the above-mentioned section.

Held, also, that this decision in the absence of the Attorney-General did not bind the public.

A mandatory injunction compelling the local authority to remove their gas pipes was refused on the ground that the local authority might be entitled to retain them by virtue of section 7 of the Gas Works Clauses Act, 1847.

Attorney-General v. *London and South-Western Railway Co.*, 21 L. T. Rep. 220, explained.—TAFF VALE RAILWAY *v.* PONTYPRIDD URBAN COUNCIL, *Ch.D. Buckley, J.*; 93 L. T. 126.

6. *Omnibus — Omnibus business — Passengers — Incidental powers*—Ultrà vires.—Railway companies, unless specially authorized to do so, have no power to carry on business as omnibus proprietors for the purpose of distributing and collecting their passengers. Such a business is not incidental to their undertaking.

London County Council v. *Attorney-General*, [1902] A. C. 165, applied. — ATTORNEY-GENERAL *v.* MERSEY RAILWAY CO., *Ch.D. Warrington, J.*; [1906] 1 Ch. 811; 75 L. J. Ch. 385.

7. *Private Act—Stipulations for the protection of a landowner—Contract with another person contrary to stipulation—Refusal of landowner to waive stipulation—Contract* ultrà vires—*Specific performance—Damages.*—A private Act of Parliament granting certain powers to a railway company contained a section "for the protection of Sir H. B.," a local landowner, "his heirs and assigns." It was provided *inter alia* in this section that the company should maintain a station in a certain place "for both passengers and goods, with all proper and sufficient works and accommodation and access to and from the estate of the owner." Neither the owner nor his successors in title had waived these provisions, but the railway company, overlooking them, entered into a contract with C. to remove the station and build another nearer land belonging to C.

The company having refused to fulfil their contract, C. brought an action against them for specific performance or damages. The company in their defence submitted that the contract was *ultrà vires* on their part, and therefore absolutely void.

Held (Romer, L.J., dissenting), that the section was a statutory enactment and it was not competent to the company to take the land and then do that which the statute prohibited; and the fact that the prohibition was not in the interest of the general public, but for the protection of a private owner made no difference; and therefore the agreement with the plaintiff was *ultrà vires*, and he was not entitled to an order either for specific performance of the agreement or damages.

Decision of Farwell, J. ([1905] 2 Ch. 280), reversed. — CORBETT *v.* SOUTH-EASTERN AND CHATHAM RAILWAY, *C.A.*; [1906] 2 Ch. 12; 75 L. J. Ch. 489; 94 L. T. 748.

8. *Rates—Inequality of charge—Railways Clauses Act*, 1845 (8 & 9 *Vict. c.* 20), *s.* 90.—*Money paid to agent under mistake of fact—When recoverable back.*—The plaintiff contracted with the Metropolitan Railway Co. for the carriage of coke breeze from a station on the Metropolitan Railway to a station on the defendants' railway, at a certain specified through rate per ton. The goods having been delivered, the plaintiff paid for the carriage at the agreed rate to the defendants as the collecting agents of the Metropolitan Railway Co. The plaintiff subsequently discovered that the Metropolitan Railway Co. had in their published book of rates a through rate between the same stations charging a less sum per ton for coke breeze if used for fuel purposes. The coke breeze carried for the plaintiff was intended to be used for other than fuel purposes. The plaintiff sought to recover from the defendants the difference between the two rates, upon the ground that differential charges for the carriage of the same article according to the purposes for which it was used was a breach of the provisions of section 90 of the Railway Clauses Act, 1845, which requires "that all such tolls be at all times charged equally to all persons and after the same rate . . . in respect of all . . . goods . . . of the same description conveyed . . . over the same portion of the line of railway under the same circumstances. There was no evidence that the Metropolitan Railway Co. had in fact ever

carried coke breeze for fuel purposes at the lower rate for any particular persons, but the lower rate had been in existence as a published rate for several years, including the whole period covered by the transactions with the plaintiff. The payments by the plaintiff to the defendants had been made voluntarily and without compulsion. Before any notice to the defendants of any claim by the plaintiff that he had been overcharged they had settled in account with the Metropolitan Co. in in respect of the payments so received by them on the Metropolitan Co.'s behalf.

Held, (1) that, assuming section 90 to apply to the case of carriage at a through rate over more than one railway, as to which the court expressed no opinion, it was necessary, in order to establish an inequality of rates under that section, to show that some persons had in fact been charged at the lower rate, and of that the existence of the lower rate upon the rate book was no evidence.

(2) That, even if there was a breach of that section, the money could not be recovered back from the defendants, who had received it as innocent agents and settled for it with their principals before any notice of the overcharge; and that this applied equally to that portion of the money received by them, which, in the ordinary course under their traffic arrangement with the Metropolitan Co., they would be entitled to retain to their own use as representing their share of the through rate for the portion of the transit over their railway, the money having been paid by the plaintiff as a lump payment under a contract to which the defendants were not parties.—TAYLOR *v.* METROPOLITAN RAILWAY CO., *K.B.D.*; [1906] 2 K. B. 55.

9. *Rating—Poor rate—Assessing portion of line in parish—Principle of assessment—Parochial method—Contributive value—Cost of construction of line—Case stated by quarter sessions—Omission in order as to statement of case.*—A line of railway was to be constructed by a railway company under the powers of an Act passed in 1845, and for the purpose of that construction the company, who were to construct the line, were to receive from another company incorporated under the Act a certain sum, which was the estimated expense of making the line, and were to pay 4 per cent. interest on that sum as a "rent" to the company which advanced the capital. That sum having all been spent, and having proved insufficient to complete the line, the company spent a further and larger sum in completing the line, and the line became vested in the appellants. There were three competing railway companies connecting with the line, but it was proved that none of these companies would pay any higher sum by way of rent than was represented by the parochial method, nor would they work the on a fixed proportion of gross earnings. In rating to poor rate a portion of this line that passed through a certain parish,

Held, that the rateable value of the portion of the line within the parish ought to be ascertained upon the parochial principle—that is, by taking the profits resulting from the receipts and expenses in that particular parish and making the usual allowances and deductions therefrom, and that neither the contributive value accruing from the occupation of the line in that parish in securing traffic and earning profits on other parts of the system, nor the original cost of the construction of the line ought to be taken into consideration.

Where a court of quarter sessions consent to state a case for the opinion of the High Court the order of the quarter sessions sent up with the case to the High Court ought to state the fact that a case has been stated by them, to give the High Court jurisdiction.—LONDON AND NORTH-WESTERN RAILWAY *v.* AMPTHILL UNION, *K.B.D.*; 94 L. T. 314.

10. *Rating—Railway lines—Rating of lines passing through station—Lines to goods station—Relief lines or waiting station where through traffic is detained—Signals and signal boxes—Principle of rating—Lines directly and indirectly productive.*—A difference arose and an arbitration took place with regard to the rating of certain lines of the Great Northern Railway Co., which passed from end to end through the parish of Hornsey, as to which of these lines should be regarded as directly productive and which as indirectly productive and rateable locally in the parish. The difference arose as to (1) certain lines which ran to the goods stations in the parish, and which constituted the only approach to the goods stations, warehouses, and goods yards, and as to which the arbitrator found as a fact that they were used entirely or primarily for the delivery of goods inwards to Hornsey from places outside, and for the taking of goods outwards from Hornsey—that is, to carry traffic into and from the goods stations; (2) as to certain other lines where through traffic was detained on its journey from places north of Hornsey to London and places south of Hornsey, not from local circumstances arising in Hornsey, but by reason of the proximity of the station to London and of the large passenger traffic there, in consequence of which the trains were kept on those lines at a standstill, not for purposes of sorting, marshalling, &c., but merely in waiting until the lines south should be cleared and opened to receive them, and on some of these lines some shunting was done; and (3) as to certain signals and signal boxes, which the arbitrator held to be indirectly productive, in acccordance with the ruling in *Midland Railway Co.* v. *Pontefract Union*, 84 L. T. Rep. 536, [1901] 2 K. B. 189, and as to these no further judgment was given.

Upon a special case stated by the arbitrator,

Held, by Channell, J., (1) that, as to the lines into the goods stations, the finding of the arbitrator ought to be affirmed upon this part of the case; and (2) that, as to the "relief" or waiting lines, the arbitrator was right in treating as indirectly productive that portion of those lines which would be required if only shunting and sorting and no waiting were done upon them.—GREAT NORTHERN RAILWAY AND EDMONTON UNION, RE, *K.B.D.*; 93 L. T. 479.

11. *Rating—Short distance—Merchandize "conveyed" by the company partly on its own railway and partly on another railway.*—By clause 11 of the schedule to the London and North-Western Railway Co. (Rates and Charges) Order Confirmation Act, 1891 (54 & 55 Vict. c. ccxxi.), where merchandize is conveyed for an entire distance which does not exceed a certain specified distance (varying according as station terminals are chargeable at one end or at both ends of the transit, or at neither), the company may make the charges for conveyance authorized by the schedule as for the specified distance: "Provided that where merchandize is conveyed by the company partly on the railway and partly on the railway of any other company, the railway and the railway of such other company shall for the purpose of reckoning such short distance be considered as one railway.

Held, that the expression "conveyed" in the proviso refers, not to the contract of carriage, but to the physical haulage, and that if during the portion

of the transit which takes place on the railway of the other company the goods are hauled by the engines of that other company, the proviso does not apply, notwithstanding that the goods were delivered to the London and North-Western Railway Co. to be carried to their destination at a through rate.—LANCASHIRE AND CHESHIRE COAL ASSOCIATION *v.* LONDON AND NORTH-WESTERN RAILWAY CO. AND LANCASHIRE AND YORKSHIRE RAILWAY CO., *K.B.D.*; [1906] 1 K. B. 577; 75 L. J. K. B. 454.

12. *Smoke—Company's default—Railway Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 20), *s.* 114—*Regulation of Railways Act*, 1868 (31 & 32 *Vict. c.* 119), *s.* 19.—Section 114 of the Railway Clauses Consolidation Act, 1845, provides: "Every locomotive steam engine to be used on the railway shall, if it use coal or other similar fuel emitting smoke, be constructed on the principle of consuming and so as to consume its own smoke; and if any engine be not so constructed the company or party using such engine shall forfeit five pounds for every day during which such engine shall be used on the railway."

Section 19 of the Regulation of Railways Act, 1868, provides: "Where proceedings are taken against a company using a locomotive steam engine on a railway on account of the same not consuming its own smoke, then, if it appears to the justices before whom the complaint is heard that the engine is constructed on the principle of consuming its own smoke, but that it failed to consume its own smoke, as far as practicable, at the time charged in the complaint through the default of the company or of any servant in the employment of the company, such company shall be deemed guilty of an offence under the Railway Clauses Consolidation Act, 1845, s. 114."

Held, that it was not a default on behalf of the company merely because the company did not supply the coal which was the best that could be obtained regarded from the point of view of its smokelessness.—LONDON COUNTY COUNCIL *v.* GREAT EASTERN RAILWAY, *K.B.D.*, 537; [1906] 2 K. B 312; 75 L. J. K. B. 490; 94 L. T. 586.

See also Metropolis, 1.

RATING:—

1. *County rate—Appeal to "next quarter sessions after such cause of appeal shall have arisen"—Alteration of basis—Retrospective alteration—County Rate Act*, 1852 (15 & 16 *Vict. c.* 81), *ss.* 17, 22.—The parish of M., in the West Riding of the county of Y., comprised certain property of the G. N. Railway Co. In July, 1904, the county council revised the county rate basis, and by such basis so revised the total assessable value for the county rate for the parish of M. was fixed at £13,419, and the property of the railway company was fixed, both in the basis and valuation list, at £3,100. In October, 1904, the county council made a half-yearly poor rate, and in January, 1905, the railway company successfully appealed to quarter sessions on the ground that their assessment to the poor rate in respect of their property in the parish of M. was at too high a figure. Thereupon the M. parish council appealed to quarter sessions against the county rate basis, and also against the county rate made upon that basis. The appeal was not to the next quarter sessions after the rate had been made, nor to the next quarter sessions after the result of the G. N. Railway Co.'s appeal, but was to the next quarter sessions—namely, those held in June, 1905—after the result of the appeal became known to the parish council. The quarter sessions allowed the appeal against the basis, and ordered the reduction to take effect for the whole period covered by the rate of October, 1904.

Held, that, so far as the appeal was against the county rate, the parish council were out of time as they had not appealed to the "next quarter sessions after such cause of appeal shall have arisen" within section 22 of the County Rates Act, 1852.

Held, also, that under that statute the quarter sessions had no power to order a retrospective alteration of the county rate basis.—WEST RIDING COUNTY COUNCIL *v.* MIDDLETON, *K.B.D.*; [1906] 2 K. B. 157; 75 L. J. K. B. 485; 94 L. T. 785.

2. *Exemption—Statutory exemption "from the payment of all and all manner of rates and assessments"—Liability for rate imposed by subsequent statute.*—In a case in which the Crown had assumed a statutory liability for the payment of a commutation in lieu of rates upon property in the City of London in the hands of the Crown, and the statute provided that such property "shall be and shall be deemed and considered to be to all intents and purposes free and exempt from the payment of all and all manner of rates and assessments, although the same . . . may become private property by the sale or assignment thereof to individuals, any law, usage, or custom to the contrary notwithstanding."

Held (affirming the judgment of the court below), that the property, after it had passed into private hands, was exempt from a "consolidated rate" imposed by a subsequent statute.

Sion College v. *Corporation of London*, [1901] 1 K. B. 617, distinguished.—LONDON CORPORATION *v.* NETHERLANDS STEAMBOAT CO., *H.L.*; 93 L. T. 566.

3. *Occupation—Docks—Harbour—Statutory power to levy harbour dues—Dues connected with occupation of land—Swansea Harbour Act*, 1854 (17 & 18 *Vict. c. cxxvi.*), *ss.* 125, 126, 127.—The Swansea Harbour Trustees were appointed and incorporated by a private Act of Parliament as conservators of the harbour and river at Swansea within certain defined limits.

Besides piers and other works which the trustees had constructed on lands purchased by them within the limits of the harbour, they had also constructed under their statutory powers a floating dock and basin which occupied part of what had been the bed of the river.

The soil of the harbour and river underneath this floating dock and basin was not purchased by the trustees, but remained, as it had always been, the property of the lord of the manor.

By various private Acts the trustees were authorized to take certain dues in respect of ships using the harbour.

Held, by the Divisional Court, (1) that the trustees were in rateable occupation of the floating dock and basin, and (2) that the harbour dues were to be taken into consideration in estimating the rateable value of the lands within the harbour limits in occupation of the trustees.

Upon an appeal by the trustees against the latter part of the judgment of the Divisional Court,

Held, reversing the decision of the Divisional Court, that the harbour dues were not so connected with the occupation of land by the trustees that they should be taken into consideration in estimating the rateable value of the lands.

Reg. v. *Hull Dock Co.*, 7 Q. B. 2, establishes no general principle of law, but depends entirely on an inference of fact drawn by the court.—SWANSEA HARBOUR *v.* SWANSEA UNION, *C.A.*; 94 L. T. 627.

4. *Poor law—Railway—Rateable value—Interest on cost of construction — Competitive value.* — The appellants (the Great Central Railway Co.) constructed a railway about eight miles in length connecting their line with the Great Western Railway Co. in pursuance of an arrangement entered into with that company. The cost of constructing the line was £280,000, and that sum was advanced to the appellants by the Great Western Railway Co. at 3 per cent. interest per annum. There were no stations or sidings on the line, nor does the line itself originate any traffic. The whole traffic on the line consists of through traffic passing from the appellants' line to that of the Great Western Railway Co., and it was admitted that persons other than the two above-mentioned railway companies could not be found to acquire the line.

Held, that, in ascertaining the rateable value, interest on the cost of construction was not an element which could be taken into account.—GREAT CENTRAL RAILWAY *v.* BANBURY UNION, *K.B.D.*, 470; [1906] 1 K. B. 597; 75 L. J. K. B. 165; 94 L. T. 310.

5. *Poor rate—Buildings with machinery not part of the freehold—Tenant's machinery.*—Buildings occupied as engineering works contained machines which formed no part of the freehold, but were placed there for the purpose of making, and did in fact make, the buildings fit for the purpose for which they were used. The machines were not affixed to the freehold, and were admitted to be "tenant's machinery."

On an appeal to quarter sessions by the tenant against a poor rate the court held that the correct basis of assessment was to ascertain what was the rent which a hypothetical tenant would give for the works as a combination of land, buildings, and machinery, on a demise, which included the machinery, so that he would get, as part of the consideration for the rent the right to use the machines upon the premises during his tenancy, and that on that footing the machines would be properly taken into account as enhancing the rental and the rateable value of the buildings.

Held (affirming the judgment of the court below), that this was the correct basis of assessment.—KIRBY *v.* HUNSLET UNION, *H.L.*; [1906] A. C. 43; 75 L. J. K. B. 129; 94 L. T. 36.

6. *Poor rate—Demand of whole rate—Occupier going out of possession during currency of rate—Apportionment of rate—Necessity of fresh demand for apportioned part — Jurisdiction to issue distress warrant without fresh demand.*—Where the whole poor rate at which the rated occupier of premises is assessed has been duly demanded from him and not paid, and he subsequently goes out of possession of the premises during the period for which the rate is made, and thereby becomes entitled to an apportionment of the rate, a fresh demand for his proportion of the rate is not necessary, but, upon a summons for payment of the rate, the justices have jurisdiction to apportion the rate and ascertain the amount for which the occupier is liable, and to issue a distress warrant for that amount, notwithstanding that there has been no fresh demand for the precise amount of the rate so found to be due.—MANSEL *v.* ITCHEN OVERSEERS, *K.B.D.*, 456; [1906] 1 K. B. 221; 75 L. J. K. B. 232; 94 L. T. 320.

7. *Poor rate—Exemption—Society instituted for the purposes of fine arts exclusively—Scientific Societies Act*, 1843 (6 & 7 *Vict. c.* 36), *s.* 1.—The appellants were an institution established for the purposes of the fine arts and of encouraging, advancing, and disseminating the same exclusively. The expenses of maintenance were defrayed by fees paid by the students and grants from the Middlesex County Council and the Board of Education, and a certificate had been given by the Registrar of Friendly Societies that the institution was entitled to the benefit of 6 & 7 Vict. c. 36.

Held, that the institution was exempt from poor rates under section 1 of the Scientific Societies Act, 1843.—HORNSEY SCHOOL OF ART *v.* EDMONTON UNION, *K.B.D.*; 94 L. T. 203.

8. *Poor rate—Rateable value—Deduction—Expense necessary to maintain premises in a state to command rent—Parochial Assessment Act*, 1836 (6 & 7 *Will.* 4, *c.* 96), *s.* 1.—An expense to be allowed as a deduction under the Parochial Assessment Act, 1836, in arriving at the rateable value of a hereditament must be one which is necessary to maintain that particular hereditament in a state to command the rent at which it might reasonably be expected to let from year to year to a hypothetical tenant.—NEWPORT UNION *v.* STEAD, *K.B.D.*; [1906] 2 K. B. 147; 75 L. J. K. B. 586.

9. *Poor rate — Water main — Occupation.* — The appellants, who were the owners of a reservoir and of an aqueduct, were empowered by statutory powers to supply water to any sanitary authority within twenty miles of the aqueduct, and to execute works necessary for such supply.

By agreement with the W. Urban District Council, the council took the steps necessary under the Public Health Act, 1875, to enable the work to be done, and the appellants laid a main from their aqueduct to supply the council with water, and under the agreement the main was to remain the property of the appellants, and they retained the entire management and control of the same, and the water was measured by a meter where the water entered the pipes of the council.

Held, that the appellants were liable to be rated as the occupiers of the main.—LIVERPOOL CORPORATION *v.* BIRKENHEAD UNION, *K.B.D.*; 94 L.T. 509.

10. *Rector's rates—Metropolis—"House"—12 Car.* 2, *c.* 37—51 *Geo.* 3, *c.* 150.—By the 51 Geo. 3, c. 150, the houses of the parish of St. Paul's, Covent-garden, were charged with a certain rate.

Held, that a house which by internal alterations had been made into a warehouse, and was still capable of reconversion into an ordinary dwelling-house, though not actually used as such at the present time, was liable to be charged under the above Act.

Decision of the Court of Appeal (53 W. R. 406, [1905] 1 K. B. 669), reversed.

Dicta in *Surman* v. *Darley*, 14 M. & W. 181, not approved.—LEWIN *v.* END, *H.L.*, 606; [1906] A. C. 299; 75 L. J. K. B. 473; 94 L. T. 649.

11. *Sewerage board—Value of sewage farm as means of discharging statutory duties.*—A sewerage board let a sewage farm to a tenant at a fair rent including an additional sum for the manurial value of the sewage.

Held, that the sum paid by the tenant was the true basis of assessment, and the rating authority was not entitled to take into account in their assessment the annual value of the advantages and facilities accruing to the sewerage board by the user of the farm for the performance of their statutory duties. — DAVIES *v.* SEISDON UNION, *K.B.D.*, 455; [1906] 1 K. B. 214; 75 L. J. K. B. 237; 94 L. T. 282.

12. *Special exemption—Education rate—Liability*

to pay.—In 1894 an urban district with certain portions of a rural district was created by charter a municipal borough. By a scheme made in the same year under the Municipal Corporations Act, 1882, it was provided that the portions of harbour property which were situated in the rural district "shall not in the future pay to the borough, or be assessable for any rates or charges (not being the water rate hereinafter mentioned) at a higher rate of assessment in the pound than at present—that is to say, 3d. in the pound per annum (exclusive of the rate for the relief of the poor and the other charges at present collected with the poor rate within the urban district)—so long as the said harbour shall out of its own revenues pay, as at present, for its own lighting, cleansing, and repairing of public roads, ways, and places in the said harbour." Before the grant of the charter the harbour property in the rural district contributed through the poor rate to the expenses of the school attendance committee, and since the charter they continued to be assessed to rates for the relief of the poor, but the amount claimed for the poor rate did not include anything for expenses incurred in respect of elementary education in the borough.

Held, that these portions of the harbour property were not exempt from paying a rate for the expenses of the Education Act, 1902, levied by the corporation of Whitehaven as local education authority, although such rate was 5d. in the pound.—WHITEHAVEN HARBOUR COMMISSIONERS *v.* WHITEHAVEN UNION, *K.B.D.*; 94 L. T. 504.

See also Railway, 8-11; Tramway, 4.

RECEIVER:—

Practice—Equitable execution—Judgment debtor a foreigner resident abroad—Debts due to judgment debtor within jurisdiction—Special circumstances—Rules of Supreme Court, ord. 45, *r.* 1; *Appendix B., Form* 25—*Judicature Act,* 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-section* 8.—The plaintiff recovered judgment for a sum of money against the defendants, who were a foreign company incorporated and resident abroad. The plaintiff applied for a receiving order of the debts due and accruing due to the defendants by customers in England, whose names were set out in an affidavit made by the plaintiff. In that affidavit the plaintiff stated that the defendants had no place of business in this country, and no assets or property here which could be taken by any ordinary process of execution; that the only assets here were the debts due or becoming due to them from their customers in this country; and that he was informed by some of the customers that the defendants had, since the judgment, taken steps to obtain payment of their debts, and that he believed that the defendants intended to collect all the moneys due to them in England and thus to defeat the judgment. The plaintiff stated that he could not apply for a garnishee order to attach the debts due to the defendants, because he did not know which customers owed money nor the amount of their debts, if any.

Held, that there were special circumstances in the case which enabled the court to appoint a receiver. — GOLDSCHMIDT *v.* OBERRHEINISCHE METALLWERKE, *C.A.*, 255; [1906] 1 K. B. 373; 75 L. J. K. B. 300; 94 L. T. 303.

See also Company, 9, 20; Injunction, 1; Partnership, 3.

RESTRAINT OF TRADE:—

Infancy—Agreement not to carry on business of employer—Restriction as to time—Space—Overlapping circles — Severance of agreement — Reasonableness—Injunction.—An agreement by an infant to enter the employment of a firm as clerk, renewed after his coming of age at increased wages as traveller, he being employed in the B. District, is not void as regards the restriction as to time by containing a stipulation that he will not during a period of fourteen years after the termination of his employment with the firm "at any place within a radius of thirty miles from either the town-hall at B. or the bar-gate at S."—points about thirty miles distant from each other so that the circles overlapped—carry on any business of a like character to that carried on by the firm. Such an agreement is severable as regards the specified trades the carying on of which by the defendant is restrained, and the limit of fourteen years is not excessive, but the agreement is not severable as regards the area sought to be covered, which, being one and indivisible, will be held to be wider than necessary for the plaintiff's protection.—HOOPER *v.* WILLIS, *Ch.D. Kekewich, J.*; 93 L. T. 236.

See also Covenant, 1.

RIVER:—

1. *Diversion of water — Diminishing the flow of water — Unreasonable use of water — Pollution of stream—Rights of riparian owners.*—The owner and occupiers of lands abutting on a natural stream complained that the occupiers of dye works immediately above their lands were diverting the water so as substantially to diminish the flow of water, and were also polluting the stream, and brought an action to restrain them.

The defendants claimed a right to use the water of the stream for the purposes of their works, and denied that they were substantially diminishing the flow of water or polluting the stream except occasionally and accidently.

Held, on the evidence, that the defendants were dealing unreasonably with the water of the stream, so as visibly and materially to diminish the quantity of water coming down and also polluting the water; and that the plaintiffs were therefore entitled to succeed, even without proof of actual damage, on the general principles of law as to the rights of riparian owners laid down in *Sampson* v. *Hoddinott*, 1 C. B. N. S. 590, 3 C. B. N. S. 596, and *Wood* v. *Waud*, 3 Ex. 748.—SHARP *v.* WILSON, ROTHERAY, & Co., *Ch.D. Joyce, J.*; 93 L. T. 155.

2. *Riparian proprietor — Mill-dam — Right to abstract water.*—A Crown Charter granting a mill with such dams, rights, and other privileges as appertained to it held not to support a claim to abstract all the water in the river for the use of the mill to the injury of other riparian proprietors, but only to justify the abstraction of an amount of water to which the claimants could show a prescriptive right.

Bealey v. *Shaw*, 6 East 208, 8 R. R. 466, approved.

Judgment of the court below reversed.

Semble, that the right claimed by the respondents to the exclusive use of all the water of a river cannot exist in law.

Held, further, that the rights of the parties were not affected by the fact that the dam of the respondents' mill was in fact formed by a natural obstruction in the river which had been artificially heightened.—WHITE & SONS *v.* WHITE, *H.L.*; [1906] A. C. 72; 75 L. J. P. C. 14; 94 L. T. 65.

3. *Riparian proprietors—Right to water—Legitimate purposes—Percolation—Prescription Act—Right of way.*—A riparian proprietor abstracted water from a stream by pipes and syphons to supply his fish ponds, and thereby interfered with the flow of water to the lower riparian proprietor's mill.

The higher riparian proprietor made a claim that, prior to his use of the pipes and syphons to convey water from the stream to his fish ponds, he had obtained the same amount of water by percolation through the banks of the stream, and therefore he had a right to such water under the Prescription Act.

The lower riparian proprietor claimed a right of way by prescription to repair the bank of the stream where it ran through the higher riparian proprietor's property. The gate by which he entered the higher riparian proprietor's property had always been kept locked and the key kept by the higher riparian proprietor or his servants; but this key had always been asked for as a matter of right when it was required, and had never been refused.

Held, the lower riparian proprietor had such a right as mentioned in *Beeston* v. *Weate*, 5 El. & Bl. 986, to keep the bank in repair on the higher riparian proprietor's property, and for that purpose to have access to his premises. Such a right was from time immemorial, and the fact of the gate being kept locked did not affect such right.

Held, also, the higher riparian proprietor could not justify abstracting water by pipes and syphons on the ground that if the bank had not been made watertight he would have been entitled to the same amount of water by percolation. Such a claim was not sustainable under the Prescription Act as a watercourse or otherwise.

Held, an injunction must be granted to restrain the abstraction of water from the stream by such pipes and syphons, and that they must be taken up and removed; but the order must state that a riparian proprietor was not entitled to restrain absolutely another riparian proprietor from taking any water from the stream for legitimate purposes. —ROBERTS *v.* FELLOWES, *Ch.D. Joyce, J.*; 94 L. T. 279.

SALE OF GOODS:—

Feeding stuff—Sale—Causing or permitting invoice to be given false in material particular—Guilty knowledge—Fertilizers and Feeding Stuffs Act, 1893 (56 & 57 *Vict. c.* 56), *s.* 3, *sub-section* 1 (b).—It is not necessary that there should be guilty knowledge in order to constitute an offence under section 3, sub-section 1 (*b*), of the Fetilizers and Feeding Stuffs Act, 1893.

Korten v. *West Sussex County Council*, 72 L. J. K. B. 515, 51 W. R. Dig. 173, followed.—LAIRD *v.* DOBELL, *K.B.D.*, 506; [1906] 1 K. B. 131; 75 L. J. K. B. 163; 93 L. T. 842.

SATISFACTION:—

Covenant—Will—Gift of residue—Covenant to settle after-acquired property.—A testator, on the marriage of his daughter M., settled £4,000 upon her, and covenanted on the death of the survivor of himself and his wife to pay to the trustees of the settlement such a sum as, with the sum then settled, would make up £10,000. M. covenanted to settle after-acquired property. The testator made a will in 1905 in which he directed his daughter M. to bring into hotchpot a sum of £3,000 he had advanced to her, and left his residue, amounting to £80,000, to be divided between his son C., his daughter M., and another daughter.

£5,539 14s. 5d. was required to make M.'s fortune up to £10,000. The question was whether the gift of residue satisfied the covenant. Under the settlement the ultimate trust, failing issue of the marriage, was for the testator. The ultimate trust of the property settled under the covenant to settle after-acquired property was, failing issue of the marriage, the next-of-kin of M. as if she had died unmarried.

Held, that, so far as M.'s life estate was concerned, the bequest of residue was a satisfaction of the covenant. But as the other *cestuis que trust* were not mentioned in the will and took no interest under it, there was no satisfaction in their case.—BLUNDELL, RE, BLUNDELL *v.* BLUNDELL, *Ch.D. Swinfen Eady, J.*; [1906] 2 Ch. 222; 75 L. J. Ch. 561; 94 L. T. 818.

See also Will, 16.

SCHOOL:—

Bye-laws as to attendance—Exemption—Effect of certificate of attendance—Employment of child in factory—Factory and Workshop Act, 1901 (1 *Ed.* 7, *c.* 22), *ss.* 68, 71. — Where bye-laws made by a school authority apply to children between thirteen and fourteen, and make no provision for total exemption upon a child obtaining a certificate of previous attendance, a child of thirteen who has obtained such a certificate cannot be employed full time in a factory or workshop.

A child of the age of twelve who has obtained a certificate of previous attendance may, by virtue of section 68, lawfully be employed as a half-timer in a factory or workshop, although the bye-laws make no provision for the partial exemption of children from the obligation to attend school.—STEVENSON *v.* GOLDSTRAW, *K.B.D.*; [1906] 2 K. B. 298; 75 L. J. K. B. 565.

SCOTLAND, LAW of:—

1. *Divorce — Wife's costs.* — Where the wife is successful in her defence to an action of divorce, the rule of the law of Scotland is to give the wife her costs as between agent and client.—GRANT *v.* GRANT, *H.L.*; [1905] A. C. 466.

2. *Heritage—Right in security—Messenger-at-arms —Heritable Securities (Scotland) Act*, 1894 (57 & 58 *Vict. c.* 41), *ss.* 8, 10—*Scottish law.*—By the Heritable Securities (Scotland) Act, 1894, s. 8, any creditor who has exposed for sale under his security the lands held in security . . . may apply to the sheriff for decree in the terms of Schedule D thereto annexed, and the sheriff may "after service on the proprietor and on the other creditors, if any, and after such intimation and inquiry as he may think fit, grant such application and issue decree in the said terms. On such decree being pronounced and an extract thereof in which the said lands shall be described at length or by reference recorded in the appropriate register of sasine, the right of redemption reserved to the debtor shall be extinguished, and the creditor shall have right to the lands disponed in security in the same manner and to the same effect as if the disposition in security had been an irredeemable disposition as from the date of such decree." By section 10 "no purchaser from the creditor or other successor in title in the lands shall be under any duty to inquire into the regularity of the proceedings under which creditor has acquired right to the lands held under his security by virtue of the provisions contained herein, or be affected by any irregularity therein, without prejudice to any competent claim of damages against such creditor."

In 1895 certain creditors presented a petition under section 8 of the above Act. The appellant, the proprietor of the lands, did not appear. The sheriff granted decree. Thereafter the creditors sold the lands and granted dispositions in favour of the purchasers.

In 1901 the original proprietor brought an action against the creditors and purchasers for reduction of the citation and execution of service upon him of

the petition in the sheriff court, alleging that the service had been executed by a messenger-at-arms, who was not an officer of the sheriff court; and he pleaded that such service, with all that had followed thereon, including the disposition to the purchasers, was null and ineffectual.

Held, affirming the decision of the Second Division of the Court of Session, [1902] 4 F. 957, that, assuming the service to be as stated, the error was an "irregularity in the proceedings" within the meaning of section 10 of the Heritable Securities (Scotland) Act, 1894, and consequently that the right of the purchasers was not affected thereby.—SUTHERLAND *v.* THOMSON (MANAGER OF STANDARD LIFE ASSURANCE CO.) (Second Appeal), *H.L.*; [1906] A. C. 51.

3. *Poor law—Settlement—Poor Law (Scotland) Act,* 1898 (61 & 62 *Vict. c.* 21), *s.* 1.—By the Poor Law Scotland Act, 1898, s. 1, "No person shall be held to have acquired a settlement in any parish in Scotland by residence therein unless such person shall . . . have resided for three years continuously in such parish, and shall have maintained himself without having recourse to common begging either by himself or his family, and without having received or applied for parochial relief."

Held (affirming the judgment of the court below), that if a person had in fact resided for three years in a parish without living on the public rates or begging, it was immaterial whether he had derived his maintenance from his own property or labour, or from the charity of an individual or of a charitable organization; and therefore that a person who had resided for three years in a parish as an inmate of a charitable institution had acquired a settlement in such parish.—KILMALCOLM PARISH COUNCIL *v.* GLASGOW PARISH COUNCIL, *H.L.*; [1906] A. C. 344; 94 L. T. 826.

4. *Public health—Assessment — Special drainage district—Expenses of forming special district.*—Where a special drainage district has been formed in a county, the local authority is entitled to levy an assessment within the special district to meet the expenses, including legal expenses properly incurred prior to the formation of the district.—INVERARITY *v.* FORFARSHIRE COUNTY COUNCIL, *H.L.*; [1906] A. C. 354.

See also Practice, 21.

SEASHORE:—

Taking shingle from—Prohibition by Board of Trade—Encroachment of sea—Erection of sea-wall—Owner removing shingle from below high-water mark from land which formerly belonged to him—Claim of right—Board of Trade Order—Harbours Act, 1814 (54 *Geo.* 3, *c.* 159), *s.* 14—*Harbours Transfer Act,* 1862 (25 & 26 *Vict. c.* 69), *s.* 16.—Under the powers given by section 14 of the Harbours Act, 1814, the Board of Trade, for the protection of a certain port, made an order prohibiting the taking or removing of any shingle from the shores or banks of the sea between certain points. The appellant, acting with the authority of the owner of land adjoining the seashore, removed shingle from the foreshore below the then ordinary high-water mark and within the limits prohibited by the order, to another part of the foreshore above high-water mark belonging to the same owner, where it was used to formed concrete for the building of a sea-wall to protect the owner's adjoining property from the encroachment of the sea. The point from which the shingle was taken had a few years before been the property of the owner, but owing to the encroachment of the sea, the sea now ebbed and flowed over the land at the point in question. The shingle was removed solely for the construction of the sea-wall, and to prevent any further encroachment of the sea over the owner's property. Upon an information against the appellant for removing the shingle from the foreshore, in contravention of the order,

Held, that an offence had been committed against the order, and the appellant was properly convicted, notwithstanding that the land from which the shingle was taken was before the encroachment the property of the owner, and that the owner was acting under a *bonâ fide* claim of right to take the shingle from one part of his property for the protection of another part of his property.—ANDERSON *v.* JACOBS, *K.B.D.*; 93 L. T. 17.

SETTLED LAND:—

1. *Capital moneys in the hands of trustees—Direction as to investment by tenant for life—Control of court—Settled Land Act,* 1882 (45 & 46 *Vict. c.* 38), *ss.* 21, 22, *sub-section* 2; *s.* 53.—A tenant for life directed the trustees to invest £2,650, part of moneys derived from the sale of settled property, in the purchase of eight leasehold houses. These houses were held for terms, of which more than sixty years were unexpired, but they were proved to be not worth more than £1,400. The trustees took out a summons for the direction of the court under section 44 of the Settled Land Act, 1882, asking whether they were bound to carry out the purchase as directed by the tenant for life.

Held, that the trustees were not bound to make such purchase.—HUNT'S SETTLED ESTATES, RE, *C.A.*; [1906] 2 Ch. 11; 75 L. J. Ch. 496; 94 L. T. 747.

2. *Fire insurance—Tenant for life—Premiums paid by trustees out of income—Policy moneys, who entitled to—Gift to trustees of fund.*—A tenant for life, under no liability by the settlement to insure and not impeachable for waste, by whose directions a policy of insurance has been kept up on the mansion-house, and the premiums thereon paid out of his income, is entitled as against the trustees of the settlement to money paid by the insurance office in respect of damage to the mansion-house by fire. As regards the reasoning to be applied to such cases, those given by Kindersley, V.C., in *Seymour* v. *Vernon,* 16 Jur. 189, and Chitty, J., in *Warwicker* v. *Bretnell,* 23 Ch. D. 188, which were cases of tenants in tail, are precisely applicable, and those cases accordingly followed.

The fact that, pending a decision by the tenant for life as to whether he will expend the insurance fund in rebuilding the premises, the money had been invested in the names of the trustees of the settlement during a period of fourteen years,

Held, not, under the circumstances, to amount to an abandonment of the life tenant's right to the fund or a gift of it by him to the trustees for the benefit of the corpus of the settlement fund.—GAUSSEN *v.* WHATMAN, *Ch.D. Kekewich, J.*; 93 L. T. 101.

3. "*Improvements*"—*Application of capital money—Improvements to silk and cotton mill erected on settled land—*"*Additions to or alterations in buildings*"—*Sanction of court—Settled Land Act,* 1882 (45 & 46 *Vict. c.* 38), *s.* 25, *sub-section (xii.)—Settled Land Act,* 1890 (53 & 54 *Vict. c.* 69), *s.* 13, *sub-section (ii.)*.—The words "other mills" in section 25, sub-section (xii.), of the Settled Land Act, 1882, means mills for the purpose of developing the agricultural produce of the settled land, and not for commercial purposes; and, therefore, the sub-section does not authorize the expenditure of capital money arising under the Act upon the erection of, or any addition to, or reconstruction of, a silk and cotton mill, the

same being for the development of produce imported on to the settled land.

Decision of Joyce, J., affirmed.—HARRINGTON'S SETTLED ESTATES, RE, *C.A.*; 75 L. J. Ch. 460; 94 L. T. 623.

4. *Improvements—Approval of trustees—Discretion of trustees—Power of tenant for life—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *ss.* 25, 26.—A settlement of real estate expressly added certain works for purposes of improvements to those mentioned in section 25 of the Settled Land Act, 1882, for which capital money might be used, and expressly authorized capital money to be raised for improvements as well as for the other purposes mentioned in section 18. The trustees having already approved of schemes submitted to them by the tenant for life under section 26, which had involved outlay of money, and would involve in the future further outlay, and having been asked by the tenant for life to approve of a further scheme, applied by summons to the court for directions whether, before deciding to approve or withhold their approval from such schemes, they might properly have regard to (*a*) the number of previous schemes and the amount of capital already expended or liable to be called for thereunder; (*b*) the general connection between the improvements mentioned in the scheme proposed for their approval with improvements contained in schemes already sanctioned, or the general policy which is being pursued by the tenant for life in improving the property; (*c*) the proportion between the probable cost of the improvements mentioned in the proposed scheme and the probable increased annual value of the estate; (*d*) the amount of capital moneys in their hands and the relation between such amount and the value of the estate.

Held, that the general policy of the improvement was a matter for the tenant for life and not for the trustees to decide on; and that, there being no difficulty in obtaining capital money, having regard to the power in the settlement, the trustee might properly approve of any scheme where they were satisfied (1) that the improvement was within section 25, and (2) that the tenant for life was acting *bonâ fide*; and that they were not bound to take into consideration the various matters mentioned in the summons.—EGMONT, RE, LEFROY *v.* EGMONT, *Ch.D. Warrington, J.*, 504; [1906] 2 Ch. 151.

5. *Leaseholds—Enfranchisement—Purchase of freehold reversion—Mortgage of settled land—Capital moneys—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *ss.* 18, 21 (6).—The word "enfranchisement" in section 18 of the Settled Land Act, 1882, is applicable to the conversion of leasehold land into freehold by the purchase of the freehold reversion.

Where, therefore, settled land consists of a leasehold term, the tenant for life (or in the case of an infant absolutely entitled, the trustees of the settlement) can, by virtue of section 18, raise money by mortgage of the settled leasehold land in order to purchase with the money so raised the freehold under section 27, sub-section 6, of the Act of 1882.—BRUCE, RE, HALSEY *v.* BRUCE, *Ch.D. Kekewich, J.*, 60; [1905] 2 Ch. 372; 74 L. J. Ch. 578; 93 L. T. 119.

6. *Minerals required for support of reservoir—Compensation moneys—Capital or income.*—The corporation of D. in 1903 received notice of intention to work coal under their reservoir. The corporation gave a counter-notice, and compensation was ascertained at £2,956 10s., reduced by discount to £2,620. The discount was arrived at by the consideration that the twelve acres under the reservoir would have been worked out in the ordinary course by December, 1908. The money was paid into court. The lessees of the colliery paid a minimum rent of £2,500, with a provision enabling them in any subsequent year of the term to make up short work. The lessees held under a lease made in 1894, but a new lease was granted them in 1905, when an arrangement was made between the lessor, the tenant for life of a settled estate, and the lessees, that credit should be given for £2,956 10s., and that the sum in court should belong to the lessees. The amount due for short work, after crediting the compensation, was upwards of £8,000. The lessees petitioned for payment out of the £2,620.

Held, that the true principle (apart from the short work) was that the tenant for life was entitled to one-fifth of the compensation for each year from 1903 to 1908. The remainderman was bound by the agreement as to short work, but there was a difficulty in paying the whole sum to the lessees, as the lessor might be entitled to re-enter. The petitioners were entitled to instalments already due and to future instalments on making an affidavit on each occasion that they were in possession of the colliery. The tenant for life was entitled to the interest of the fund.—FULLERTON'S WILL, RE, *Ch.D., Swinfen Eady J.*; [1906] 2 Ch. 138; 75 L. J. Ch. 552; 94 L. T. 667.

7. *Tenant for life—Devise to widow until remarriage for maintenance of widow and children—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *ss.* 2, 58.—A testator gave real estate to trustees upon trust for his wife during widowhood for the benefit and maintenance of herself and her children.

Held, that the widow had the powers of a tenant for life under the Settled Land Act, 1882, s. 58.

In re Theaker's Settled Estates, quoted in Wolstenholme's Conveyancing and Settled Land Acts (9th ed.), p. 332, followed.—POLLOCK, RE, POLLOCK *v.* POLLOCK, *Ch.D. Swinfen Eady, J.*, 267; [1906] 1 Ch. 146; 75 L. J. Ch. 120; 94 L. T. 92.

8. *Tenant for life—Lease—Principal mansion-house—Consent of trustees—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 53—*Settled Land Act*, 1890 (53 & 54 *Vict. c.* 69), *s.* 10.—A tenant for life of settled land, in exercise of the powers conferred by the Settled Land Acts, granted a non-repairing lease of a messuage and lands, part of the settled estate, to his wife for a term of twenty-one years. The trustees of the settlement for the purposes of the Settled Land Acts assented to such lease, but did not express such assent either to the lessor or the lessee, orally or otherwise.

Held, that the lease was good as against a remainderman, and not made in contravention of section 53 of the Settled Land Act, 1882; and, further, assuming that the demised messuage was the principal mansion-house within the meaning of section 10 of the Settled Land Act, 1890, that a sufficient consent had been given by the trustees under that section.—GILBEY *v.* RUSH, *Ch.D. Kekewich, J.*, 71; [1906] 1 Ch. 11; 75 L. J. Ch. 32; 93 L. T. 616.

9. *Tenant for life—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 2 (1) (5).—Freeholds were settled by plaintiff on his marriage, to the use of himself for life, remainder to the use of his wife to receive a jointure during her life, remainder to trustees during a term to raise portions for children, remainder to the plaintiff in fee,

Held, that plaintiff was tenant for life within the meaning of the Settled Land Acts.

In re Mundy and Roper's Contract, 47 W. R. 226, [1899] 2 Ch. 175, followed.

Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 2, sub-sections 1 and 5, discussed.—MARSHALL'S SETTLEMENT, RE, MARSHALL *v.* MARSHALL, *Ch.D. Swinfen Eady, J.*, 75; [1905] 2 Ch. 325; 74 L. J. Ch. 588; 93 L. T. 246.

10. *Trustees—Power of sale—Property not originally comprised in the settlement—Trustees for purposes of Settled Land Acts*, 1882 *to* 1890—*Settled Land Act*, 1890 (53 & 54 *Vict. c.* 69), *s.* 16 (i).—A testator gave to the trustees of his will a power of sale in respect of part of certain lands devised by him. He also bequeathed his personal residue on trust to sell and convert the same and invest the proceeds in land, which was to be subject to the aforesaid power of sale. No trustees for the purposes of the Settled Land Acts, 1882 to 1890, had been expressly appointed. Upon the tenant for life contracting to sell the mansion-house and the land, as to which no power of sale had been given,

Held, that the land purchased with the proceeds of the residuary personalty was land comprised in the settlement within the meaning of section 16 (*i*) of the Settled Land Act, 1890, and that the trustees of the will were trustees for the purposes of the Settled Land Acts, 1882 to 1890, of such mansion-house and land by virtue thereof.—MOORE, RE, MOORE *v.* BIGG, *Ch.D. Swinfen Eady, J.*, 434; [1906] 1 Ch. 789; 75 L. J. Ch. 342.

See also Lunatic, 2.

SETTLEMENT:—

1. *Construction—Survivors—Stirpital survivorship.*—Real estate settled by deed upon trust for seven tenants in common for life with remainder to his or her children attaining twenty-one or marrying—proviso that if any one or more of the tenants for life should die without issue or leaving issue which should die under twenty-one or unmarried, the share of such tenant for life should be divided between "the survivors and survivor of them and their issue in all respects as the original shares."

Held, that the same principles apply in the construction of a deed and of a will.

Held, that "survivors and survivor" must be construed "others and other," and that children of tenants for life who had attained twenty-one and died took accrued shares, although they did not survive the tenants for life whose shares had accrued to them.

Cole v. *Sewell*, 2 H. L C. 186, followed.

Waite v. *Littlewood*, 21 W. R. 131, 8 Ch. 70, and *Lucena* v. *Lucena*, 26 W. R. 254, 7 Ch. D. 255, discussed and distinguished.—FRIEND'S SETTLEMENT, RE, COLE *v.* ALLCOT, *Ch.D. Farwell, J.*, 295; [1906] 1 Ch. 47; 75 L. J. Ch. 14; 93 L. T. 739.

2. *Marriage settlement—Covenant to pay if marriage "solemnized"—Nullity—Impotence.*—By an *ante*-nuptial settlement the father of the wife covenanted to pay a sum of money, to be held upon the trusts of the settlement, if the marriage were "solemnized." A legal marriage ceremony was gone through, but on the petition of the wife a decree of nullity of marriage was made on the ground of the impotence of the husband.

Held, that the marriage having been declared null *ab initio* was never "solemnized" within the meaning of the condition in the settlement.—GARNETT, RE, RICHARDSON *v.* GREENEP, *Ch.D. Kekewich, J.*; 93 L. T. 117.

3. *Marriage settlement—Covenant to settle after-acquired property—Real and personal property of which wife should "become seised or possessed of or entitled to"—Estate tail in possession.*—A marriage settlement, dated in 1877, contained a covenant by the husband and wife with the trustees thereof that if the intended marriage should be solemnized and if the wife then was or if during the intended coverture she or the husband in her right should become seised or possessed of or entitled to any real or personal property, with certain specified exceptions, for any estate or interest in possession, remainder, or expectancy, then and in every such case the husband and wife and all other necessary parties should convey, assign, settle, and assure such real and personal estate unto or otherwise cause the same to be vested in the trustees to be held upon the trusts therein mentioned.

Under the will of a testatrix the wife became entitled in possession as tenant in tail in certain estates.

Held, that the wife was not compelled to convey the property devised to her by the will to the trustees of the marriage settlement in fee, or to execute to the trustees such a conveyance of the property as would by being enrolled have given to them an estate in fee simple in the property.

Hilbers v. *Parkinson*, 35 Ch. D. 200, approved and followed.

Decision of Kekewich, J., affirmed.—DUNSANY, RE, NOTT *v.* DUNSANY, *C.A.*; [1906] 1 Ch. 578; 75 L. J. Ch. 356; 94 L. T. 361.

SHIP:—

1. *Bill of lading—Goods shipped in apparent damaged condition—Misstatement—"Shipped in good order and condition"—"Quality and measure unknown"—Estoppel—Harter Act*, 1893 (*U.S.*).—A master of a vessel signed bills of lading in reference to goods shipped on his vessel as "shipped in good order and condition" and "quality and measure unknown." The charter-party provided a form of the bill of lading to be used, in which was inserted both these terms. The goods were in apparent damaged condition when shipped, and were delivered in a damaged condition. The indorsees of the bills of lading, to whom the property passed, acting on the statement in the bills of lading, acted to their prejudice by taking the bills of lading as a good delivery under their contract with the shippers. The indorsees, in an arbitration with the shippers—a foreign firm, who were not insolvent—obtained an award, but had not sued upon it. Owing to damaged condition of the goods, expense and delay were incurred in allotting the parcels to the indorsees.

Held, that the master by so signing the bills of lading bound his owners; that it was the duty of the master to notice the apparent condition of the goods; that "condition" referred to external and apparent condition; and "quality" referred to that which was not usually apparent, at all events to an unskilled person; that the words "quality and measure unknown" did not strike out the words "good order and condition"; that the master was not bound by the charter-party to make an untrue statement; that the words "shipped in good order and condition" could not be sued on directly as a breach of contract, they were words not of promise but in the nature of an affirmation of fact; that the owners were estopped from denying the condition of the goods as stated; and that the indorsees were not bound to sue upon their award against the shippers before suing the owners of the ship.—COMPANIA NAVIERA VASCONGADA *v.* CHURCHILL & SIM, *K.B.D.*, 406; [1906] 1 K. B. 237; 75 L. J. K. B. 94; 94 L. T. 59.

2. *Charter-party—Bill of lading—Incorporation of*

terms of charter-party—Arbitration clause—Cesser clause—Dispute "in the loading"—Demurrage.—By a charter-party the plaintiffs' steamer was to load a cargo at Bahia Blanca for a port in the United Kingdom at a certain rate per day, and all time on demurrage over and above the lay days to be paid for according to a certain rate; the charterers' liability to cease upon shipment of the cargo, and the vessel to have a lien on the cargo for the recovery of all bill of lading freight, dead freight, demurrage, and all other charges whatsoever. By clause 39, if the cargo could not be loaded from certain specified causes, the time lost was not to be counted as part of the lay days, and "should any dispute arise under this clause in the loading of the steamer, same to be settled in the Argentine Republic by" arbitration. The cargo was shipped under a bill of lading which made it deliverable to the charterers, they paying freight against delivery at the charter-party rate of freight "all the terms and exceptions in which charter-party . . . are herewith incorporated and form part hereof," the shipowners to have an absolute lien upon the cargo for the freight, demurrage, and all other charges whatsoever. A delay occurred in the loading, and on the completion of the loading the master of the ship claimed demurrage, but the charterers denied liability upon the ground that the delay was due to one of the causes specified in clause 39 of the charter-party. The charterers requested that the dispute should be referred to arbitration under that clause. The master refused, and the vessel sailed. On arrival at the port of discharge the shipowners claimed a lien for demurrage due at the port of loading, and brought an action to recover the amount. The charterers applied, under section 4 of the Arbitration Act, 1889, to stay the proceedings in the action with a view to having the dispute settled by arbitration in accordance with clause 39.

Held, that, notwithstanding the cesser clause in the charter-party, inasmuch as the charterers were also the holders of the bill of lading the arbitration clause was incorporated in the bill of lading, and the court had jurisdiction to stay the proceedings in the action; and that in the circumstances, in the exercise of its discretion, it would do so.

Held, also, that a dispute arises "in the loading" within the meaning of clause 39 if the loading is claimed by one party and denied by the other to have been delayed by one of the causes named in the clause, and none the less because the extent of the delay cannot be ascertained until the loading has been completed.

Runciman & Co. v. *Smyth & Co.*, 20 Times L. R. 625, overruled.—TEMPERLEY STEAM SHIPPING CO. *v.* SMYTH & CO., *C.A.*, 150; [1905] 2 K. B. 791; 74 L. J. K. B. 876; 93 L. T. 471.

3. *Charter-party—Charter of ship for voyage—Implied condition that shipowner will not use ship in manner prejudicial to the charterer—Carriage of bunker coal intended for use on future voyage.*—The plaintiffs chartered the defendants' ship to load "a full and complete cargo . . . not exceeding what she can reasonably stow and carry over her tackle, apparel, provisions and furniture," and proceeded therewith to two or three ports of discharge. On arrival of the ship at her first port of discharge the defendants took on board a large quantity of bunker coal intended for use, not upon the existing voyage, but upon some prospective voyage to be commenced after her final discharge. In consequence of the loading of the coal, the ship, on arriving at her next port of discharge, had to be lightened before she could get over the bar, whereby the plaintiffs were put to considerable expense. But for the loading of the coal she would have been able to enter the port without lightening.

Held, that under such a charter-party the shipowner is not entitled to load, to the disadvantage of the charterer, more bunker coal than is reasonably necessary for the seaworthiness of the ship upon the chartered voyage and for the due performance of that voyage; that there is an implied term in the contract that the ship shall, except as aforesaid, be used only for the purpose of the charterers; and that the defendants had consequently committed a breach of their contract and were bound to recoup the plaintiffs the expense to which they had been put.—DARLING *v.* RAEBURN, *K.B.D.*; [1906] 1 K. B. 572; 75 L. J. K. B. 415.

4. *Charter-party — Demurrage — Discharging in customary manner—Discharging subject to lien—Time when such discharge can take place—Barry Port—Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *ss.* 493, 494.—A charter-party provided for the discharge of a vessel to be "in the manner and at the rate customary at each port during the customary working hours, and if the ship be further detained through the fault of the charterers, ten days on demurrage over and above the said laying days at twenty pounds per day." Until it is clear that the ship cannot be discharged within the time allowed, the shipowner cannot insist on landing the cargo, under the Merchant Shipping Act, 1894, subject to a lien.—SMAILES *v.* HANS DESSEN, *K.B.D.*, 471; 94 L. T. 492.

5. *Charter-party—Liability of charterer to provide cargo—Delay.*—The charterer is under an absolute obligation to furnish the stipulated cargo, and is liable for delay caused by the cargo not being ready, in the absence of some qualification of the obligation.

A ship was under charter "to proceed to such loading berth as the freighters may name" at M., and there "load in the usual and customary manner a full and complete cargo of coals as ordered by the charterers, which they bind themselves to ship." The charterers had ordered coals from a particular collier which was not able to provide a cargo at the time of the arrival of the ship, and she was therefore unable to obtain a loading berth for some time. If the cargo had been ready she could have got a loading berth at once.

Held (reversing the judgment of the court below), that the charterers were liable for the delay so occasioned.

Little v. *Stevenson*, [1896] A. C. 108, distinguished.—ARDAN STEAMSHIP CO. *v.* WEIR & CO., *H.L.*; [1905] A. C. 501; 74 L. J. P. C. 143; 93 L. T. 559.

6. *Collision— Compulsory pilotage — Southampton Water—57 & 58 Vict. c.* 60, *s.* 605—"*District*," *meaning of.*—For the purposes of compulsory pilotage, the waterway between Southampton and the sea by way of the Solent is one "district" only within the meaning of section 605 of the Merchant Shipping Act, 1894.—"ASSAYE," THE, *P.D.*, 203; [1905] P. 289; 74 L. J. P. 145; 94 L. T. 102.

7. *Collision—Fog—Moderate speed—Fog signal forward of the beam—Duty of vessel hearing it to stop—Ascertained position—Right of vessel to proceed—Regulations for Preventing Collisions at Sea*, 1897, *art.* 16.—The steamship *O.*, while on a voyage from Liverpool to Monte Video, was off Lobos Island, River Plate, proceeding at ten knots on a course of W. ½ N. The weather was fine with passing banks of fog, and shortly after entering the fog *The O.* came into collision with *The N.*, a steamship which had been heard on the starboard bow of *The O.*

after that vessel had entered the fog. *The N.* was on a course of E. by S. magnetic, and, having first seen *The O.* on the port bow about three miles off in a position to pass all clear port to port, watched her broaden on the port bow, and saw her hidden by the fog which came on. Shortly afterwards those on *The N.* heard a short blast sounded on the whistle of *The O.* *The N.* answered it with a short blast, her helm was ported, and, as the fog was beginning to envelop *The N.*, her engines were put to slow, and, on further signals being heard from *The O.*, were put full speed astern, and shortly afterwards the collision occurred.

Held, that *The O.* was to blame for not going at a moderate speed in the fog; and that *The N.* was not to blame for not stopping her engines on hearing the whistle of *The O.*, as under the circumstances the position of *The O.* was ascertained—"ORAVIA," THE, *P.D.*; 93 L. T. 278.

8. *Collision—Limitation of liability—Right of charterer by demise to limit—"Owners"—Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *ss.* 503, 504.—Sir J. J. (Limited) hired from the owners the steam *Hopper No.* 66 for eighteen months upon terms which amounted to a demise of the hopper to Sir J. J. (Limited).

While the hopper was still on hire, and while being navigated by the servants of Sir J. J. (Limited), she collided with and sank the steamship *B.* The owners of *The B.* and her master and crew then brought an action *in personam* against Sir J. J. (Limited) to recover damages caused by negligence, and in that action recovered judgment, the *Hopper No.* 66 being held alone to blame.

The charterers of the *Hopper No.* 66 (Sir J. J. (Limited)) then instituted proceedings as "owners" of the *Hopper No.* 66 claiming to limit their liability under sections 503 and 504 of the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60).

Held, that charterers by demise are not "owners" within the meaning of section 503 of the Merchant Shipping Act, 1894, and therefore have not the right to limit their liability in respect of loss or damage caused by the improper navigation of the chartered ship by their servants.—THE HOPPER No. 66, *P.D.*; [1906] P. 34; 94 L. T. 344.

9. *Collision—Steam trawler—Lights—Trawler's duty to sailing vessel—Regulations for Preventing Collisions at Sea*, 1897, *arts.* 2, 9, 20, 26.—The steam trawler *U. C.*, a vessel of upwards of twenty tons gross register, fishing in the Bristol Channel, exhibited the lights prescribed by article 9 of the Collision Regulations. After getting in her trawl *The U. C.* went full speed ahead, still exhibiting the lights prescribed by article 9 of the Collision Regulations, and very shortly afterwards ran into the sailing vessel *R.* Those on *The R.* had seen the lights of *The U. C.* for about half an hour before the collision, and after getting them on the starboard bow had kept their course.

Held, that the steam trawler *The U. C.* was alone to blame for the collision, for at the time of the collision it was her duty to keep out of the way of the sailing vessel, and as she was a steam vessel under command she should have exhibited the usual under way lights for such a vessel prescribed by article 2 of the Collision Regulations, and should have hoisted them before going ahead.—"UPTON CASTLE," THE, *P.D.*; 93 L. T. 814.

10. *Collision—Steam vessel lying-to—Crossing rule—Duty of steam vessel when lying-to to keep out of the way—Regulations for the Prevention of Collisions at Sea*, 1897, *art.* 19.—*The L.*, a steam trawler, was lying-to heading to the N. with engines stopped, waiting for the tide, when she was run into and damaged by the steamship *B.*, which was proceeding on a course of W. ½ S. magnetic. Those on *The B.* saw the masthead and green lights on their port bow, and kept their course and speed until just before the collision, when they slowed, stopped, and reversed their engines. Those on *The L.* did nothing.

Held, that article 19 of the Collision Regulations applied, and that *The L.* alone was to blame for the collision.—"BROOMFIELD," THE, *P.D.*; 94 L. T. 109.

11. *Collision—Steam vessels meeting end on—Absence of whistle signals—Impossibility for contributing to the collision—Regulations for Preventing Collisions at Sea*, 1897, *art.* 28.—Two steamships, *The A.* and *The C.*, when two miles apart, were meeting each other end on in the Para Estuary, River Amazon. Those on *The A.* ported their helm, but did not sound a port helm signal on their whistle until they saw *The C.* was starboarding. Thereupon those on *The A.* sounded a port helm signal, and shortly afterwards *The C.* sounded a long blast and continued to starboard, the engines of *The A.* were stopped and reversed, but a three-blast signal was not sounded on her whistle.

Held, that *The C.* was to blame for starboarding when the vessels were approaching each other end on, and that *The A.* was not to blame for not sounding a port helm signal when she first ported, for those on *The C.* could have seen *The A.* was porting, and the absence of signals could not by any possibility have contributed to the collision.—"ANSELM," THE, *P.D.*; 94 L. T. 853.

12. *Collision—Suez Canal—Lights—Duty of vessel proceeding to the southward to tie up—Duty of vessel proceeding to the northward to approach with caution—Rules for the Navigation of the Suez Canal, arts.* 3, 7, 8, *sub-sections* 3, 4, 7, 8, 10, *and signal* 11.—The steamship *C.* was proceeding through the Suez Canal from Port Said to Suez. When in the neighbourhood of the seventh mile-post, those on *The C.* sighted the navigation lights of a vessel approaching from the southward. It was admittedly the practice in that part of the canal for steamships navigating to the southward to tie up to permit vessels proceeding to the northward to pass them, and *The C.* therefore drew into the bank. Those on *The C.* extinguished their navigating lights and exhibited the lights required by signal No. 11 of the Suez Canal Rules on the free side of the channel. *The C.* was being tied up when she was run into and damaged by *The C. C.*, a steamship proceeding from the southward to the northward from Suez to Port Said. Those on *The C. C.* alleged that they had the right of way, and that *The C.* had kept on too long and had proceeded too fast.

Held, that though the north-going steamer, *The C. C.*, had the right of way, yet there was a duty on her to keep herself under such command that, in the event of her coming up to a steamship which had to tie up for her sooner than was expected, she could, by stopping or going astern, avoid running into the steamship which had to give way, and that as *The C.* was stopped at the time of the collision, she was not to blame.—"CLAN CUMMING," THE, *P.D.*; 94 L. T. 174.

13. *Collision—Tug and tow—Fog—Duty of tug to stop on hearing a fog signal forward of her beam—Article* 16 *of the Regulations for Preventing Collisions at Sea*, 1897.—The tug *C* was towing the barque *Duc d' Ain* a dense fog in the English Channel, near the Royal Sovereign Lightship, on a course of W.S.W., when the fog signal of the steamship *C*,

which was on a course of E. ½ N., was heard on the starboard bows of the tug and tow. The tug did not stop her engines on hearing the first fog signal, but on hearing a second fog signal, and seeing the loom of the steamship *C.*, she stopped them. The steamship *C* stopped her engines on first hearing the fog signal of the tug and tow.

Held, that as the tug could have stopped her engines on first hearing the fog signal of the steamship without encountering difficulty with her tow, she was to blame for not doing so, and that the tug and tow were to blame for not stopping in accordance with article 16 of the collision regulations.

The judgment of Gorell Barnes, J., confirmed. —"CHALLENGE" AND "DUC D'AUMALE," THE, *C.A.*; [1905] P. 198; 74 L. J. P. 55; 93 L. T. 390.

14. *Collision — Vessel not used for profit — Demurrage—Measure of damages.*—The damages to be awarded to a dock board, charged with the duty of maintaining a harbour but not entitled to distribute profits, in respect of delay in their work, which they have suffered by reason of damage done to one of their dredgers in a collision caused by the negligence of the defendants' servants, may rightly be taken to be the equivalent to the cost of the work to the owners had that work been done.

Judgment of Barnes, P. (*ante*, p. 314, [1906] P. 14), affirmed.—"MARPESSA," THE, *C.A.*, 339; [1906] P. 95; 75 L. J. P. 1; 94 L. T. 428.

15. *Compulsory pilotage—Exemption in favour of "coasting vessel"—Vessel sailing under foreign-going articles—Vessel taking cargo at port in United Kingdom to be discharged at another port in United Kingdom—Compulsory pilot—Bristol Wharfage Act*, 1807 (47 *Geo.* 3, *sess.* 2, *c. xxxiii.*), *s.* 9—*Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *s.* 603, *sub-section* 2.—A ship sailing under foreign-going articles left Swansea and went to various ports within and without the United Kingdom. She went from Dieppe to Hull in ballast, and at Hull she took in a cargo to be discharged at Bristol, and went from Hull with such cargo to Bristol, where she discharged her cargo, still sailing under the same articles. When on the voyage from Hull to Bristol, the ship was proceeding up the Bristol Channel, and was within the limits of the port of Bristol, within which, by section 9 of the Bristol Wharfage Act, 1807, pilotage by a Bristol pilot is compulsory for all vessels except "coasting vessels and Irish traders." The master refused to take a compulsory pilot on board, on the ground that the ship during the voyage from Hull to Bristol was a "coasting vessel" within the meaning of the exemption by reason of her having taken in cargo at Hull destined to be discharged at Bristol, both ports being within the United Kingdom.

Held, that the ship was not a "coasting vessel" at the time in question, and the fact that she took in cargo at Hull, a port in the United Kingdom, which she was going to discharge at Bristol, another port in the United Kingdom, did not make her a "coasting vessel" on the voyage from Hull to Bristol, and that the master was properly convicted, under section 603, sub-section 2, of the Merchant Shipping Act, 1894, for having, within a district where pilotage was compulsory, refused to take a pilot on board.—PHILLIPS *v.* BORN, *K.B.D.*; 93 L. T. 634.

16. *Dock—Unpaid dock dues—Statutory right of dock board to detain ship until dues paid—Mersey Dock Acts Consolidation Act*, 1858 (21 & 22 *Vict. c.* 42), *s.* 253.—The Mersey Docks and Harbour Board have statutory power, while any dock or harbour rates remain unpaid in respect of any vessel, to "cause such vessel to be detained until all such rates have been paid."

A vessel in the Mersey Docks, in respect of which dock rates were unpaid, was sold under an order of an Admiralty Court in an action by the master and crew for wages. The board having refused to allow the vessel to leave the dock until the rates were paid, an order was made that the vessel should "be delivered to the purchaser free from all claims and demands against her upon payment of the purchase-money into court," and that "any right of the board to payment of their charges in priority to other claimants" should be preserved as against the fund in court.

Held (allowing the appeal), that the right of the dock board to detain the vessel until all rates were paid was absolute, and that no order could be made for the delivery of the vessel from the dock until all the dock rates were paid.—"EMILIE MILLON," THE, *C.A.*; 75 L. J. K. B. 31; 93 L. T. 692.

17. *Equitable ownership—Contribution to expenses of voyage—Foreigner equitable owner of a share in a British ship—Unregistered bill of sale.*—A person who has a contract with the registered owner of a ship under which the latter is a mere nominee bound to act as the former directs, bound to pay him the profits, bound to transfer upon demand, is an equitable owner. A person who has a bill of sale, and has only to register it, is an equitable owner.

A person is an equitable owner where a specific share is held by the registered owner as security for a sum of money, but otherwise on his behalf.

It does not matter whether the equitable owner has obtained his bill of sale from the legal owner or whether he has not advanced so far. Any declaration of trust by the legal owner, any state of facts acquiesced in by both parties which establishes the relation of trustee and *cestui que* trust as to a specific share or shares makes the *cestui que* trust equitable owner, and as such part owner liable to contribute to the expenses of a voyage.

If the so-called trustee merely has a duty to find a share when the agreed conditions are complied with, or where there is a mere contractual relation as to profits, or where the trustee has active duties to perform, while behind him there are persons who have various beneficial interests in the profits, there is no equitable ownership, and the so-called trustee is the owner.

A foreigner who was paid in full for a share in a British ship, and has received but not registered a bill of sale, is an equitable owner, and as part owner liable to contribution for the expenses of a voyage.—VON FREEDEN *v.* HULL, BLYTH, & Co., *K.B.D.*; 94 L. T. 849.

18. *King's ship—Pilotage dues—Liability of master —Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 66), *ss.* 501, 741—*Bristol Channel Pilotage Act*, 1861 (24 & 25 *Vict. c. clxxxvi.*), *s.* 35.—A collier owned by his Majesty's Government was exclusively engaged in going backwards and forwards carrying coal for the Navy. She appeared in the Navy List under the heading "List of small steam vessels, tugs, &c., employed on harbour service." Her master was not an officer of the Royal Navy. On divers occasions the master of the collier employed a licensed pilot for the port of Cardiff, and the pilot took proceedings under section 591 of the Merchant Shipping Act against the master to recover pilotage dues according to the scale imposed by bye-laws made in pursuance of the Merchant Shipping Act, 1894, and

a local Act (in which the Crown were not mentioned) under which the pilots were licensed.

Held, that the collier was a king's ship, and therefore came within the exemption conferred by section 741 of the Merchant Shipping Act, and that the master of the King's ship was not liable to pay pilotage dues on the scale contemplated by the bye-laws.—SYMONS *v.* BAKER, *K.B.D.*, 159; [1905] 2 K. B. 723; 74 L. J. K. B. 965; 93 L. T. 548.

19. *Mercantile law—Naval court—Jurisdiction—Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *ss.* 225, 480-486.—A naval court summoned in accordance with sections 480-486 of the Merchant Shipping Act, 1894, is a court of record, and its orders cannot be impeached providing they are "duly" made—*i.e.*, providing the proceedings are regular and the matter is one within the jurisdiction of the court. The powers given to a naval court by section 483 of the said Act may be exercised in respect to offences under section 225. Hence the court has power to "discharge a seaman from his ship" for an offence under section 225, which provides that the seaman for such offence "shall be liable to be punished" summarily.—HUTTON *v.* RAS STEAMSHIP CO., *K.B.D.*, 182; 94 L. T. 645.

20. *Limitation of liability—Title of suit—Description of plaintiffs—Life claims—Bail in lieu of payment into court.*—Where the owners of a vessel seek to limit their liability in respect of a collision under the provisions of the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), ss. 503, 504, it is not sufficient to describe the plaintiffs on the writ as "The owners of the ship or vessel," for, the action being one for personal relief, the names of the owners of the vessel at the time of the collision should be set out on the face of the writ.

Where the owners of the vessel at fault institute a suit for the purpose of limiting their liability in respect of a collision which has caused loss of life, and in respect of which loss of life the claims made do not amount to the total limit of the owners' statutory liability, the court may grant a decree on their giving bail for an amount to be fixed by the court and an undertaking to give bail if required for the balance of their statutory liability instead of requiring them to pay into court the total amount of their statutory liability in respect of the life claims.—"INVENTOR," THE, *P.D.*; 93 L.T. 189.

21. *Necessaries—Insurance premiums—Payment by brokers—Right of broker and underwriter to recover by action* in rem—*Admiralty Court Act*, 1840 (3 & 4 *Vict. c.* 65), *s.* 6.—Sums paid by a broker as insurance premiums for the purpose of effecting insurances on the hull and safe arrival of a vessel or sums due to underwriters as premiums cannot be recovered by the broker or by the underwriters as necessaries within the meaning of section 6 of the Admiralty Court Act, 1840; and, as such sums are not necessaries, the broker and underwriters have no right to proceed against the ship *in rem*.—"ANDRE THEODORE," THE, *P.D.*; 93 L. T. 184.

22. *Pilotage—Decision of pilotage authority—Appeal—Extension of time—Pilotage—Appeal Rules* (*Stipendiary and Metropolitan Police Magistrates*), 1890, *r.* 1.—A magistrate has power under rule 1 of the Pilotage Appeal Rules (Stipendiary and Metropolitan Police Magistrates), 1890, r. 1, to extend the time for appealing although the prescribed time has expired before the date of the application for the extension.—REX *v.* LEWIS, *K.B.D.*; [1906] 2 K. B. 307; 75 L. J. K. B. 508.

23. *Salvage—Action by default—Derelict vessel—Amount of award.*—*The L.*, a derelict schooner on fire in the North Sea, was taken in tow by the tug *D.* The tug beached her, and, with the assistance of another tug, extinguished the fire.

The owners of *The D.* instituted proceedings to recover salvage, and arrested *The L.* No appearance was entered on behalf of the owners of *The L.*, and the action proceeded by default. Before the trial of the action *The L.* was appraised and sold by the marshal and realized £255. The marshal's expenses amounted to £108 14s. 6d., and the net proceeds, £146 5s. 6d., were paid into court. The salvors had paid £88 18s. 6d. for assistance rendered to them in salving the vessel, and were liable for harbour dues amounting to £21 17s. 9d.

Held, that under the circumstances the salvors were entitled to the balance of the fund as salvage.—"LOUISA," THE, *P.D.*; [1906] P. 145; 75 L. J. P. 76; 94 L. T. 558.

24. *Salvage—Award—Apportionment—Navigation and engineer officers' ratings—Separate representation of some members of crew—Costs.*—The tank steamship *L.* fell in with the disabled twin-screw steamship *B.* in the North Atlantic and towed her into Halifax, a distance of about 280 miles. *The B.'s* boat was employed in passing the hawsers and making the vessels fast. No member of the crew of *The L.* performed any special service.

On the 1st of December, 1905, the solicitors acting for the owners of *The L.*, without any direct authority from the crew, who numbered thirty-six, issued a writ on behalf of the owners, master, and crew of *The L.*, claiming salvage for services rendered to *The B.*, her cargo and freight, and on the 12th of December, 1905, delivered a statement of claim on behalf of the owners, master, and crew of *The L.*, to which on the 27th of December the owners of *The B.* delivered a defence.

On the 18th of December twelve of the crew of *The L.*—four able seamen and eight firemen—gave notice to the defendants' solicitors of a change of solicitors, and on the 5th of January, 1906, a further statement of claim was delivered on behalf of the twelve, and on the 10th of January the owners of *The B.* delivered a defence to that claim.

On the hearing of the salvage suits the owners, master, and twenty-four of the crew were represented by two counsel, and the remaining twelve of the crew were also separately represented by two counsel. Counsel for the owners, master, and twenty-four of the crew, when asking for an apportionment, stated that if the usual practice was followed of apportioning the salvage among the crew according to their rating, the effect would be that the engineer officers would receive more than the navigating officers, who probably had had harder work in consequence of the salvage than the engineer officers had had.

Held, that, as the navigating officers had not taken any extraordinary part in the salvage service, they were not entitled to an increased share in the award, which would be apportioned amongst the crew according to their rating.

Held, that the twelve seamen were not entitled to costs, but that they were not to be condemned in costs.—"BREMEN," THE, *P.D.*; 94 L. T. 380.

25. *Salvage—Co-salvors—Consolidated suits—Separate representation—Counsel—Costs.*—*The P.*, a four-masted steel barque of 2,138 tons register, while on a voyage from Belfast to Antwerp in tow of the tug *H.*, which was under contract to tow her to Flushing, met with heavy weather, and, while

running for shelter, broke adrift from *The H.*, but managed to bring up near Pladda Island with a full scope of chain on both her anchors. When *The H.* came up to *The P.* it was found that the anchor chains of the latter were foul, that the anchors could not be raised, and that they would have to be slipped. The master of *The P.* then sent *The H.* for further assistance, and *The H.* brought back the tug *F. S.* *The H.* and *F. S.* then took *The P.* to Greenock, where she was safely moored. The owners, masters, and crews of both tugs instituted proceedings for salvage, the owners of *The H.* claiming that the towage contract had been superseded by the events which had happened. The salvage suits were consolidated, the conduct of the action being given to the owners of *The F. S.* At the trial of the action *The H.* was represented by a leading and junior counsel. *The F. S.* was also represented by two counsel. The court awarded each salvor £300. Counsel for *The H.* asked for a certificate for the separate representation of *The H.* by two counsel.

Held, that as the defendants had alleged that *The H.* was not entitled to salvage, but was only fulfilling her agreement, the owners of *The H.* were entitled to be separately represented by two counsel.—"POLTALLOCH," THE, *P.D*, 94 L. T. 556.

26. *Seamen—Repatriation of seamen—Payment by consul—Norwegian law.*—By the Norwegian Maritime Code, if a ship is "lost," the expenses of sending home the master and crew are defrayed by the State, and, therefore, as such expenses do not ultimately fall upon the owners of the ship which is lost, they are not recoverable by them from the owners of the wrong-doing ship which caused the loss.—"CRAFTSMAN," THE, *P.D.*; [1906] P. 153.

27. *Seaman — Wages — Agreement for ordinary voyage—Discovery by crew that cargo is contraband of war for belligerent port—Refusal to proceed on voyage —Termination of service—Claim for wages—Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *ss.* 134, 158.—A seaman signed articles to serve on board a British ship for a voyage not exceeding two years to ports in the East, proceeding to Hong-kong and thereafter trading to ports in any rotation and ending at a port in the United Kingdom. War then existed between Russia and Japan, and coal had been declared contraband of war. The vessel left with a cargo of coal to Hong-kong or Shanghai as might be ordered at Singapore. On the voyage to Singapore the cargo was sold for Nagasaki in Japan, and on the arrival of the ship at Singapore the master received orders from the owner to go to Nagasaki instead of Hong-kong. At Singapore it first came to the knowledge of the crew that the ship was to go to Nagasaki instead of Hong-kong. They refused to proceed to Nagasaki on account of the increased risk and danger in going to a belligerent port with contraband of war. It was then arranged by the master that the crew should remain at Singapore and that he would call for them on his way back. He took another crew on board, went to Nagasaki, delivered the coal, and left that port, but on her way back the ship was driven ashore, was got off, and was taken to Hong-kong. It was not proved that she became a wreck. The seaman was sent home with the rest of the crew and arrived in London. He claimed his wages up to the date of his arrival in London, upon the ground that the agreement was broken by the owner when the ship was ordered to Nagasaki. When he made the agreement he had no knowledge that he would be required to sail with contraband of war to a belligerent port.

Held, that, there having been no wreck or loss of the ship which would terminate the service under section 158 of the Merchant Shipping Act, 1894, and there having been no termination by the discharge of the seaman under the terms of the contract or under the provisions of the Act, either at home or abroad, the seaman was entitled to his wages up to the date of his arrival in London.—LLOYD *v.* SHEEN, *K.B.D.*; 93 L. T. 174.

28. *Seaman—Wages—Contraband of war—Non-disclosure that cargo for belligerent port—Refusal by seaman to proceed.*—The respondent (a seaman) signed articles at Glasgow for a voyage on the British steamship G. of "not exceeding three years' duration to any ports or places within the limits of 75 degrees north and 60 degrees south latitude commencing at Glasgow, proceeding thence to Hong-kong, *viâ* the Bristol Channel, thereafter trading to ports in any rotation, and to end at such port in the United Kingdom or continent of Europe (within home trade limits) as may be required by the master."

The vessel proceeded to Cardiff, where she was loaded with a cargo of coal. At the time the articles were signed a state of war existed between Russia and Japan, and both Powers had declared coal to be contraband of war.

The appellant knew at the time of the loading of the vessel at Cardiff that the cargo was destined for the Japanese port of Sasebo, but did not disclose this information to the respondent and the rest of crew. Sasebo is within the limits prescribed in the articles.

Upon arrival at Hong-kong the respondent discovered the port of destination, and refused to proceed in the vessel. He remained at Hong-kong until she returned, when he rejoined her and returned to Cardiff.

Held, that the respondent was entitled to wages and maintenance while he was waiting at Hong-kong.—SIBERY *v.* CONNELLY, *K.B.D.*; 94 L. T. 198.

29. *Seaman—Wages—End of voyage—Agreement —Port within home trading limits as required by master—Port where cargo is discharged—Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *ss.* 113, 114 (2) (a), 115 (5), 116.—A seaman shipped at Cardiff under an agreement for "a voyage not exceeding one year's duration to any ports or places within the limits of seventy-five degrees north latitude and sixty degrees south latitude, commencing at Cardiff, proceeding thence to Malta, thereafter trading to ports in any rotation, and to end at such port in the United Kingdom or Continent of Europe within home trading limits as may be required by the master." The vessel sailed from Cardiff for Malta and then to a Black Sea port, where she loaded a cargo for Southampton. On arrival at Southampton she discharged the whole of her cargo, and the seaman demanded his wages and his discharge upon the ground that the voyage was at an end. The master refused, stating that the voyage was not at an end until the ship got back to Cardiff, and that the seaman would have to go on with the ship to that port.

Held, that the master had, by the agreement, the power of fixing at what port within home trading limits the voyage was to end, and that the voyage did not necessarily end at the port within home trading limits where the cargo was finally discharged.—"SCARSDALE," THE, *C.A.*, 335; [1906] P. 103; 75 L. J. P. 31; 94 L. T. 528.

30. *Seaman—Wages—Termination of service by loss—Capture—Destruction—Merchant Shipping Act,*

1894 (57 & 58 *Vict. c.* 60), *s.* 158.—Section 158 of the Merchant Shipping Act, 1894, provides that where the service of a seaman terminates before the date contemplated in the agreement by reason of the wreck or loss of the ship, the seaman shall be entitled to wages up to the time of such termination, but not for any longer period.

Held, by Lord Alverstone, L.C.J., and Ridley, J., that a "loss" of the ship occurs when the ship ceases to exist as a ship; by Darling, J., that a "loss" occurs when the vessel is captured and the owner deprived of her, and that the fact that the vessel was subsequently destroyed was immaterial in considering whether the capture of the vessel was a "loss" within the meaning of the above section or not.

A seaman signed articles for a voyage to places including ports in Japan, Manchuria, and Siberia. Russia was then at war with Japan, and the ship was captured by a Russian man-of-war, and a few days later was destroyed by the Russians. There was no evidence that she was carrying contraband of war or that her capture was justified. The seamen were sent to England as distressed seamen, and claimed wages up to the time of their arrival in England.

Held, *per* Lord Alverstone, L.C.J., and Ridley, J., that the ship was "lost" at the time when the ship was destroyed, and, therefore, that the seamen were only entitled to wages up to that time; *per* Darling, J., that wages ceased when the ship was captured.

Austin Friars Steam Shipping Co. v. *Strack*, 53 W. R. 661, [1905] 2 K. B. 315, distinguished.—SIVEWRIGHT *v.* ALLEN, *K.B.D.*, 604; [1906] 2 K. B. 81; 75 L. J. K. B. 476; 94 L. T. 778.

See also Harbour, 1, 2; Mortgage, 6.

SLANDER:—

Privilege—Magistrate sitting at sessions—Withdrawal of criminal charge—Words spoken in course of judicial proceedings.—A justice of the peace sitting at sessions to dispose of a criminal case which comes before him is acting judicially, and observations made by him on giving leave to withdraw such a charge are made by him in the course of a judicial proceeding, and are therefore privileged and not actionable, even if made maliciously and without reasonable cause.

Allardice v. *Robertson*, 1 Dow. & Clark 495, not followed.—LAW *v.* LLEWELLYN, *C.A.*, 368; [1906] 1 K. B. 487; 75 L. J. K. B. 320; 94 L. T. 359.

See also Practice, 8.

SOLICITOR:—

1. *Carrying on business of bookmaker—No certificate taken out while carrying on business.*—The respondent, a solicitor, who had ceased to practise in 1898 and had not since taken out a certificate, carried on the business of a bookmaker, and in the course of his business had sent circulars to a minor, a married woman, and a bank manager.

Held, that the respondent had been guilty of conduct unworthy of a member of the profession, and must be struck off the rolls, but that it would be open to him if he *bonâ fide* abandoned the business to apply to the Master of the Rolls for reinstatement.—SOLICITOR. A, RE, THE LAW SOCIETY, EX PARTE, *K.B.D.*; 93 L. T. 838.

2. *Costs—Amendment—Alterations—Omissions—After verdict—Taxation—Reference—Solicitors Act*, 1843 (6 & 7 *Vict. c.* 73), *s.* 37.—A., a solicitor, delivered to his client B. a bill of costs which he subsequently amended by a second bill of costs increased by certain items omitted from the first bill. Subsequently A. brought an action upon the second bill of costs against B., who pleaded (1) no retainer, (2) no right of action upon an amended bill of costs. It was agreed by the parties at the trial of the action that only the question of liability should go to the jury. Upon this question the jury gave their verdict in favour of the plaintiff.

Held, that the bill sued upon—*i.e.*, the second bill—could not after verdict be sent by the judge to a taxing-master to be taxed under section 37 of the Solicitors Act, 1843, but could only be sent as a reference under the general jurisdiction of the court to order a reference as to *quantum*. Upon such reference it would be open to the defendants to put forward the first bill of costs as evidence of what the proper charges should be.

Semble (*per* Vaughan Williams, L.J.), that, although the taxing-master, acting as a referee, would bring to bear upon the question the principles of taxation, yet all the principles applicable to taxation of a bill of costs would not necessarily apply, *e.g.*, the rule that the solicitor must pay the costs of taxation if one-sixth part of the bill be taxed off.

Per Moulton, L.J.—A solicitor may amend *bonâ fide* his bill of costs at any time before an order of taxation has been obtained or taxation has been threatened by the client.—LUMSDEN *v.* SHIPCOTE LAND PROPERTY CO., *C.A.*, 461.

3. *Costs—Debenture-holder action—Plaintiff's solicitors' costs, charges, and expenses—Property recovered or preserved—Charging order—Solicitors Act*, 1860 (23 & 24 *Vict. c.* 127), *s.* 28.—The plaintiff brought an action on behalf of himself and the other debenture-holders to realize their security.

Held, that the solicitor was entitled to a charging order for the difference between the plaintiff's party and party and solicitor and client costs of the action, on the fund belonging to the debenture-holders, because the plaintiff was unable to pay such difference.—HOARE & SONS (LIMITED), RE, *Ch.D. Farwell, J.*, 278; [1906] 1 Ch. 271; 75 L. J. Ch. 206.

4. *Costs—Taxation—Disbursement—Stamp duty on share capital of company—Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *s.* 112—*Finance Act*, 1899 (62 & 63 *Vict. c.* 9), *s.* 7—*Solicitors Act*, 1843 (6 & 7 *Vict. c.* 73), *s.* 37.—A payment made by a solicitor on behalf of the promoter of a company in respect of the *ad valorem* stamp duty payable on the nominal share capital of the company under section 112 of the Stamp Act, 1891, as extended by section 7 of the Finance Act, 1899, is not a "disbursement" within the meaning of section 37 of the Solicitors Act, 1843, and ought not to be included in his bill of costs.—BLAIR & GIRLING, RE, *C.A.*, 549; [1906] 2 K. B. 131; 75 L. J. K. B. 624; 94 L. T. 873.

5. *Costs—Taxation—Taxing-master's certificate—Alteration by substitution of item—Correction of arithmetical error—Inclusion in bill of costs of deposit under Bankruptcy Rules*, r. 147—*Solicitors Act*, 1843 (6 & 7 *Vict. c.* 73).—On a review of taxation of bills of costs,

Held, that the taxing-master may not allow an improper item in a bill to stand in place of a proper item omitted, but that he may correct an arithmetical error, because he and his client are equally able to check the result in the latter case. A deposit paid under rule 147 of the Bankruptcy Rules, on presentation of a bankruptcy petition, is properly included in a bill of costs.

In re Carven, 8 Beav. 436; *In re Walters*, 9 Beav. 299; *In re Thompson*, 34 W. R. 112, 30 Ch. D. 441, followed.—GRANT, BULCRAIG, & CO., RE, *Ch.D. Farwell, J.*, 165; [1906] 1 Ch. 124; 75 L. J. Ch, 106; 93 L. T. 760.

6. *Lien—Country solicitor and town agent—Trustee in bankruptcy—Right to production of documents in order to vouch bill of costs—Waiver of lien.*—This was an appeal from Joyce, J. (reported 53 W. R. 444), but no order was made upon the appeal except that the appellant should pay the costs of the appeal.—JONES & ROBERTS, RE, *C.A.*, 22; 74 L. J. Ch. 458.

7. *Taxation of costs—Solicitor and client costs—Inclusion of taxed party and party costs—Method of calculation of one-sixth part—Disbursements—Professional charges—Existing practice in taxing office—Taxation of liquidator's bill of costs—Ord.* 65, *r.* 27 (38b).—In a bill of costs of a retiring liquidator to be taxed as between solicitor and client, costs which have been already taxed and paid as between party and party are properly included, and in determining whether one-sixth part of the bill has been disallowed, these party and party costs must be treated as part of the bill, and in determining the same question the professional charges are alone to be considered, and disbursements should be disregarded. These principles apply both to bills taxed under the Solicitors Acts and to others. The existing practice of the Taxing Office upon this question is not in accordance with the rules, and is incorrect.—MERCANTILE LIGHTERAGE CO., RE, *Ch.D. Warrington J.*, 389; [1906] 1 Ch. 491; 75 L. J. Ch. 171; 94 L. T. 405.

See also Bankruptcy 5; Limitations, Statute of, 4.

STAMPS.—See Inland Revenue, 19-21.

SUCCESSION DUTY.—See Inland Revenue, 23.

SUNDAY:—

Observance Act—Exercising calling on Sunday—Exemption of cook-shop . . . for such as cannot otherwise be provided for—Sunday Observance Act, 1677 (29 *Car.* 2, *c.* 7), *ss.* 1, 3.—The premises of a chipped potato dealer who in the course of his business cut up and cooked potatoes, sometimes alone and sometimes with fish, and sold them to the working classes,

Held, to be a cook-shop within the meaning of section 3 of the Sunday Observance Act, 1677, and that he was not, therefore, liable to the penalties in section 1 as carrying on his ordinary calling.—BULLEN *v.* WARD, *K.B.D.* 411; 74 L. J. K. B. 916; 93 L. T. 439.

SUPPORT:—

Mines and minerals — Subsidence — Lateral and vertical support—Construction of Waterworks Clauses Act, 1847 (10 *&* 11 *Vict. c.* 17).—Undertakers cannot claim under conveyances made in pursuance of Acts incorporating the Railway Clauses Consolidation and Waterworks Clauses Acts—whether such conveyances be of surface alone or of surface and minerals—any right to support from land belonging to any person to whom they have not paid, or are not ready and willing to pay, compensation under the Act.

Pountney v. *Clayton*, 31 W. R. 664, 11 Q. B. D. 820, followed.—MANCHESTER CORPORATION *v.* NEW MOSS COLLIERY, *Ch.D. Farwell, J.*, 240; [1906] 1 Ch. 278; 75 L. J. Ch. 145; 93 L. T. 762.

See also Mines, 2.

TELEPHONE:—

Rival systems in same exchange area—Intercommunication—Proper facilities—Telegraph Act, 1899 (62 *&* 63 *Vict. c.* 38), *s.* 3, *sub-sections* 1, 4, 5.—A telephone company had before September, 1902, established a system of public telephonic communication in a certain area. Under the Telegraph Act, 1899, the Postmaster-General granted a licence to a municipal corporation over the same area, and extended the then existing licence of the company for such a period as to call section 3, sub-section 5, into operation. The corporation established and opened their system, and made a request for intercommunication within section 3, sub-section 5, having at that time the number of subscribers required to satisfy article 1 of the Telegraph (Intercommunication) Order, 1899. The company refused to allow the corporation to connect with their system unless they provided junction circuits directly to connect their exchange both with its central exchange and also with each of its subsidiary exchanges within the area.

It was decided by Buckley, J. (92 L. T. Rep. 799), that proper facilities within the meaning of section 3, sub-section 5, of the Telegraph Act, 1899, were facilities for using all the several component parts of the system, and that the object of the Act was that the customer of each company should use the trunk line of the other company; also, that the defendants had improperly refused to give such proper facilities.

The defendants appealed.

The Court of Appeal, being of opinion that Buckley, J., had taken a view which was unduly favourable to the plaintiffs, submitted certain questions to a scientific referee for inquiry and report.

Held, that, having regard to the replies contained in that report, while under section 3, sub-section 5, of the Act of 1899 and the Order of 1899 made pursuant thereto, and in the events which had happened, the plaintiffs were entitled to be afforded by the defendants all proper facilities for restricted intercommunication within the meaning of that order between persons using the telephonic system of the defendants and the telephonic system of the plaintiffs, yet certain specified junction circuits ought to be provided in order to afford such proper facilities.

Order of Buckley, J., varied.—SWANSEA CORPORATION *v.* NATIONAL TELEPHONE CO., *C.A.*; 94 L. T. 565.

TRADE-MARK:—

False trade description—Merchandize Marks Act, 1887 (50 *&* 51 *Vict. c.* 28), *ss.* 2, 3.—The appellant sold in the ordinary course of business a hundredweight of soda, which was described in the invoices as "soda crystals." The mixture, when analyzed, was found to contain crystallized carbonate of soda mixed with Glauber salts, or crystallized sulphate of soda, varying in the different samples from 18 to 64 per cent. The evidence showed that the term "soda crystals" meant ordinary washing soda, and that that article consisted of crystallized carbonate of soda containing not more than 2 per cent. of sulphate of soda or Glauber salts. He was charged on an information with having applied to the goods a false trade description.

Held (Darling, J., dissenting), that the description of the mixture sold as "soda crystals" was a false trade description within the meaning of section 3 of the Merchandize Marks Act, 1887, and that the appellant was properly convicted.—FOWLER *v.* CRIPPS, *K.B.D.*, 299; [1906] 1 K. B. 16; 75 L. J. K. B. 72; 93 L. T. 808.

TRADE UNION:—

1. *Sick benefit—Member becoming insane—Alteration of rules—Action to enforce payment of benefits.*—Where in accordance with a rule in that behalf a rule of a trade union is altered during the insanity of a member who joined the society while of sound

mind the alteration of the rule is valid as against that member, although he is prejudiced thereby.

Quære, whether an action will lie against a trade union to enforce payment of benefit to members.—BURKE *v.* AMALGAMATED SOCIETY OF DYERS, *K.B.D.*; 75 L. J. K. B. 533.

2. *Wilfully withhold—Criminal mind—Branch union—Trade Union Act*, 1871 (34 & 35 *Vict. c.* 31), *s.* 12.—Section 12 of the Trade Union Act, 1871, provides: "If any officer, member, or other person being or representing himself to be a member of a trade union, registered under this Act . . . by false representation or imposition obtain possession of any moneys, securities, books, papers, or other effects of such trades union, or having the same in his possession, wilfully withhold or fraudulently misapply the same, or wilfully apply any part of the same to purposes other than those expressed or directed in the rules of such trade union, or any part thereof, the court of summary jurisdiction for the place in which the registered office of the trade union is situate, upon a complaint made by any person on behalf of such trade union may, by summary order, order such officer . . . Provided that nothing herein contained shall prevent the said trade union . . . from proceeding by indictment against such party. . . ."

Held, that no order can be made under this section against any of the persons therein named for "wilfully withholding" unless it be proved that there was fraud or criminality in the wilfully withholding.

Barrett v. *Markham*, L. R. 7 C. P. 405, followed. —MADDEN *v.* RHODES, *K.B.D.*, 373; [1906] 1 K. B. 534; 75 L. J. K. B. 329; 94 L. T. 741.

TRAMWAY:—

1. *Carriage of passengers—Right of passenger to break journey.*—A passenger on a tramcar took and paid for a ticket for a certain distance. He alighted at an intermediate stopping place, walked a quarter of a mile, and got into another tramcar which was going the same journey. He refused to pay the fare demanded of him on the second tramcar.

Held, that the contract of carriage had been determined by the passenger's act, and that he was liable to be convicted for travelling on the second car without paying his fare.—BASTAPLE *v.* METCALFE, *K.B.D.*; [1906] 2 K. B. 288.

2. *Difference—Arbitration—Dispute under special Act—Paving of street—Jurisdiction of court—Tramways Act*, 1870 (33 & 34 *Vict. c.* 78), *s.* 33—*Norwich Electric Tramways Act*, 1897 (60 & 61 *Vict. c. cclix.*), *s.* 57, *sub-section* 5.—By section 57 of the Norwich Electric Tramways Act, 1897, if the tramway company fail to maintain and keep in good condition, to the satisfaction of the corporation (sub-section 5), the junction of the paving laid and maintained by the company with the surface laid and maintained by the corporation, the corporation might, if they thought fit, themselves at any time, after seven days' notice to the company, do the work necessary for the repair and maintenance of the road, and the expense reasonably incurred by the corporation in so doing shall be repaid to them by the company.

The corporation repaired the road at the junction of the paving laid by the tramway company, and claimed to recover the expense thereof from the company under the above section. The company denied their liability to pay it, and the corporation brought an action to recover the amount.

Held, that the difference between the corporation and the company must be referred to arbitration under section 33 of the Tramways Act, 1870, and that the court had no jurisdiction to entertain the action; and that, as the jurisdiction of the court was ousted, the objection to the jurisdiction might be taken for the first time in the Court of Appeal.—NORWICH CORPORATION *v.* NORWICH ELECTRIC TRAMWAYS CO., *C.A.*, 572; [1906] 2 K. B. 119; 75 L. J. K. B. 636.

3. *Purchase by local authority — Depôt outside district of local authority—"Suitable to and used . . . for the purposes of" the undertaking—Liability to purchase—Tramways Act*, 1870 (33 & 34 *Vict. c.* 78), *s.* 43.—By section 43 of the Tramways Act, 1870, it is provided that "Where the promoters of a tramway in a district are not the local authority, the local authority . . . may . . . by notice in writing require such promoters to sell, and thereupon such promoters shall sell to them their undertaking, or so much of the same as is within such district . . . and all lands, buildings, works, materials, and plant of the promoters suitable to and used by them for the purposes of their undertaking within such district."

A local authority gave notice to a tramway company that they were required under the above section to sell to them so much of their works and undertaking as was within the district of the local authority.

The company were also the owners of a large depôt situated outside the boundary of the district, which was found by an arbitrator to be "used with and suitable to" the undertaking within the district.

Held (reversing the judgment of the court below), that the local authority could be compelled to purchase the depôt.

The words "within such district" qualify the word "undertaking," and not the words "lands, buildings, works, materials, and plant of the promoters."—MANCHESTER CARRIAGE AND TRAMWAYS CO. *v.* SWINTON URBAN COUNCIL, *H.L.*; [1906] A. C. 277; 93 L. T. 821.

4. *Rating—General district rate—Land occupied by tramroad—Exemption as to three-fourths of net annual value—"Land used only as a railway"—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 211, *sub-section* 1 (*b*)—*Blackpool and Fleetwood Tramroad Acts*, 1896 *and* 1898 (59 & 60 *Vict. c. cxlvii.*; 61 & 62 *Vict. c. cl.*).—By the Public Health Act, 1875, s. 211, sub-section 1 (*b*), "the occupier of any land used only as a railway constructed under the powers of any Act of Parliament, for public conveyance, shall be assessed"—to general district rates—"in respect of the same in the proportion of one-fourth part only of the net annual value thereof."

A company, incorporated by Act of Parliament for the purpose of making and working a tramroad and tramway, under the powers of their Act, constructed a tramway through the streets of a town, and at the end of this tramway and connected therewith they constructed a tramroad across country on land which was their own property, having been acquired by them for that purpose under their statutory powers. The tramroad at the other end joined on to another tramway through a town, which was leased and worked by the company. The whole line—tramways and tramroad—was worked as one continuous route by the overhead electric system, and carriages could pass and passengers be conveyed from one end to the other without break. Certain provisions of the Railway Acts were incorporated and made applicable to the tramroad, which for those special purposes was "to be deemed to be a railway."

Held, that the tramroad was not a "railway," that the land occupied by the tramroad was not

"used only as a railway" within the meaning of the section, and that the company were not entitled to be assessed to a general district rate at one-fourth part only of the net annual value.—BLACKPOOL AND FLEETWOOD TRAMROAD CO. *v.* THORNTON URBAN COUNCIL, *K.B.D.*; 94 L. T. 254.

See also Corporation, 3.

TRANSVAAL, LAW of:—

Lease—Condition—Forfeiture—Lease exclusively for agricultural purposes—Sub-division for building purposes.—The respondents let land to the appellants' predecessors in title for ninety-nine years, and by the lease it was provided that the land was to be used exclusively for agricultural purposes, and was not to be sub-divided "in order to sell or lease such portion as stands for building purposes." In the event of the breach of any of the conditions the lease was to be null and void, and the lessors were to have the right to resume possession.

The appellants advertised the land for sale in eighty-five one-acre lots in accordance with a plan.

Held (affirming the judgment of the court below), that the lessors were entitled to treat the lease as forfeited, although the land had not in fact been sub-divided and conveyed to separate purchasers, and that their remedy was by ejectment and not by interdict.—SHORT *v.* TURFFONTEIN ESTATE, *P.C.*; [1905] A. C. 584; 74 L. J. P. C. 148; 93 L. T. 57.

TRESPASS:—

Injunction—Alleged highway—Existing user—Coast—Foreshore.—Although there may be failure to prove any public right of way recognized by law over the foreshore or the rough cliff paths leading to the sea, it does not follow that in an action for trespass by by the owner of the *locus in quo*, even where the defendants trespassed and broke down obstructions in assertion of their supposed rights, the court is bound or will, in the absence of good reason, grant an injunction.

The plaintiff owned part of the coast where there were paths leading to the sea, which had been for many years used by fishermen and others. Such user did no damage to the plaintiff, or interfere with any plans for building or development of the property. The plaintiff put obstructions upon these paths, which the defendants, in assertion of their supposed right of highway, broke down. The plaintiff brought an action claiming an injunction. The Attorney-General was not a party. The defendants failed to prove any public rights of way.

Held, that the plaintiff was not entitled to have an injunction, and that it was sufficient to give him nominal damages.

Llandudno Urban Council v. *Wood*, 48 W. R. 43, [1899] 2 Ch. 705, followed.—BEHRENS *v.* RICHARDS, *Ch.D. Buckley, J.*, 141; [1905] 2 Ch. 614; 74 L. J. Ch. 615; 93 L. T. 623.

TRUSTEE:—

1. *Appointment of new trustees—Personal representative of last surviving trustee appointing himself—Appointment invalid—Trustee Act.* 1893 (56 & 57 *Vict. c.* 53), *s.* 10, *sub-section* 1.—The testator appointed his wife and three sons to be the executors and trustees of his will. The last surviving trustee died in 1905, and the executors whom he appointed having renounced probate, his eldest son took out letters of administration to his father's estate and then appointed himself and his brother to be the trustees of the testator's estate under the powers conferred by section 10, sub-section 1, of the Trustee Act, 1893. There was no power to appoint new trustees under the original will.

Held, that the appointment was invalid, as the words of the section, "another person or other persons," meant some person other than the person appointing.—SAMPSON, RE, SAMPSON *v.* SAMPSON, *Ch.D. Kekewich, J.*, 342; [1906] 1 Ch. 435; 75 L. J. Ch. 302; 94 L. T. 241.

2. *Breach of trust—Acting* bonâ fide *under legal advice—Trustee company—Victorian Trusts Act*, 1901—*Judicial Trustees Acts*, 1896 (59 & 60 *Vict. c.* 35), *s.* 3—A joint stock company, acting as trustees for reward, paid over under legal advice part of a trust fund to the wrong parties.

Held, even assuming they acted honestly and reasonably, that they were therefore not exempt from making good the breach of trust, and that the Victorian Trusts Act, 1901 (similar to the English Act 59 & 60 Vict. c. 35, s. 3), which gave the court a judicial discretion in such cases, made no difference under the above circumstances. A trustee company receiving remuneration for its services is in a different position to a private trustee.—NATIONAL TRUSTEES, &c., CO. *v.* GENERAL FINANCE, &c., CO., *P.C.*, 1; [1905] A. C. 373; 74 L. J. P. C. 73; 92 L. T. 736.

3. *Income tax—Duty of trustee to deduct income tax—Trustee and* cestui que trust—*Annuity—Liability to replace amounts paid in excess by not deducting the tax.*—S. by will gave his real and personal estate to trustees upon trust to convert and invest, to pay certain annuities out of the income and accumulate the residue of the income until the capital became divisible (or for twenty-one years) and subject thereto to hold capital and income in trust for his grandchildren in equal shares. The trustees invested the funds in such a manner that the income tax was always deducted before the income was paid to them. The successive trustees for over twenty years paid all the annuities in full without deducting income tax. Some of the trustees were also annuitants.

Held, that the trustees were liable to make good to the trust estate the amounts of income tax so over-paid to the annuitants.

Held, also, that section 8 of the Trustee Act, 1888, applied, and the liability of the trustees was limited to payments made within six years, except in the case of sums retained for their own annuities.—SHARP, IN RE, RICKETT *v.* RICKETT, *Swinfen Eady, J.*; [1906] 1 Ch. 793; 75 L. J. Ch. 458.

4. *Investments—Nominal debentures under Local Loans Act*, 1875 (38 & 39 *Vict. c.* 83)—*Trustee Act*, 1893 (56 & 57 *Vict. c.* 53), *s.* 1 (g); *s.* 5, *sub-section* 3; *s.* 50.—Trust funds were invested on a mortgage of rates executed by a corporation. The mortgage was a nominal debenture. The trustees under the will had not any express powers of investing in nominal debentures, but they were not expressly forbidden to do so by the instrument creating the trust.

Held, that section 5 (3) of the Trustee Act, 1893, extends only to trustees having express power in the instrument authorizing the investment, and is an enlargement of the express power, and not a further enlargement of the general powers conferred by section 1.

The nominal debenture was not an authorized investment.—TATTERSALL, RE, TOPHAM *v.* ARMITAGE, *Ch.D. Swinfen Eady, J.*, 603.

5. *Maintenance of* cestuis que trust *by trustee—Verbal arrangement—Onus of proof.*—In 1875 the defendant married a widow with four children, two sons and two daughters. She was possessed of property producing an income of between £2,000

and £3,000 per annum. She died in 1888, having by her will appointed the defendant sole executor and trustee, and bequeathed the residue of her estate upon trust in equal fourth shares, one being for each of the three younger children of her first marriage (namely, E. and W., the daughters, and C., one of the sons), and the other fourth for the defendant for life, with remainder to the only child of the marriage of the defendant with the testatrix. At the time of the death of the testatrix, her daughters E. and W. were of the ages of twenty-six and twenty-four respectively. The testatrix contemplated that they would, after her death, continue to reside with the defendant, which, in fact, they did—E. until her marriage in July, 1899, and W. until the defendant himself married again in May, 1901.

E. and W. brought an action against the defendant claiming an account of the income to which they were entitled under the will of the testatrix from the date of the testatrix's death. The defendant stated that shortly after the testatrix's death he made a verbal arrangement with E. and W. that in consideration of their contributing or permitting him to retain the whole of the income of their shares of the trust estate, he should bear the cost of their maintenance as members of his household, and pay or provide the money for the payment of their personal expenditure, including any cash that they might require.

Held, that the onus lay upon the defendant to make out that he brought home to the minds of the daughters that they were to pay for their maintenance; and that he had failed to discharge it.

In re Cottrell's Estate, Joyce v. *Cottrell*, L. R. 12 Eq. 566, considered and applied.

Decision of Joyce, J. (93 L. T. Rep. 72), reversed. —MOULTON, RE, GRAHAME *v.* MOULTON, *C.A.*; 94 L. T. 454.

See also Company, 32; Lunatic, 4.

VENDOR and PURCHASER:—

1. *Building scheme—Roadway—Power to vary plans—Dedication*—Cul-de-sac.—The plaintiff purchased a plot of land subject to a building scheme. On the plan attached to the conveyance a roadway, leading up to a railway and adjoining the plaintiff's land, was shown as a vacant space. This road was used by the public. One of the conditions embodied in the building scheme was that the vendors reserved power to allow variations in the plans and conditions.

Held, first, that in these circumstances the plan alone did not amount to a representation that the road should always remain a road, and that a purchaser could not be restrained from building thereon; and, secondly, that, in absence of active dedication, mere user by the public was not sufficient evidence of dedication.

Attorney-General v. *Antrobus*, [1905] 2 Ch. 206, 53 W. R. Dig. 174, followed.—WHITEHOUSE *v.* HUGH, *Ch.D. Kekewich, J.*, 294; [1906] 1 Ch. 253; 75 L. J. Ch. 154; 94 L. T. 333.

2. *Condition of sale—Condition as to requisitions—Unwillingness to comply with requisition—Vendor's right to rescind.*—A condition of sale empowering the vendor to rescind the contract in the event of his being unable to remove or comply with any objection or requisition made by the purchaser will not justify the vendor in exercising such power of rescission arbitrarily or without reasonable cause, and, in the event of the vendor purporting so to exercise it, the purchaser can enforce the contract. —QUINION *v.* HORNE, *Ch.D. Farwell, J.*, 344; [1906] 1 Ch. 596; 75 L. J. Ch. 293.

3. *Condition of sale—Rescission—Misdescription—Right of compensation.*—An arbitrary power to rescind a contract of sale is not given by a condition that gives a right to rescind in the event of the purchaser insisting on an objection or requisition as to title, with which the vendor is unable or unwilling to comply on the ground of expense. There must be a reasonable ground for the exercise of the power. So where a condition of sale provided that the sale shall not be annulled by reason of any error, misstatement, or omission in the particulars, but that they shall form the subject of compensation, the purchaser will be entitled to compensation should the particulars give a description of the land that would include the minerals and mines under it, the fact that the mines and minerals are excepted being well known to the vendor.

Bowman v. *Hyland*, (1878) 26 W. R. 877, 8 Ch. D. 588, explained.

Decision of Buckley, J. (53 W. R. 428, [1905] 1 Ch. 603), affirmed.—JACKSON AND HADEN'S CONTRACT, RE, *C.A.*, 434; [1906] 1 Ch. 412; 75 L. J. Ch. 226; 94 L. T. 418.

4. *Conditions of sale—Trust for sale—Leaseholds—Sale in lots—Sale by way of underlease—Trustee Act*, 1893 (56 & 57 *Vict. c.* 53), *s.* 13.—Trustees for sale of leasehold properties comprised in one lease may sell the same by lots, and may, in the event of only one lot being sold, carry out the sale by granting an underlease for the residue of the term less one day at an apportioned rent.

In re Walker and Oakshott's Contract, 50 W. R. 41, [1901] 2 Ch. 383, overruled on this point.—JUDD AND POLAND AND SKELCHER'S CONTRACT, RE, *C.A.*, 513; [1906] 1 Ch. 684; 75 L. J. Ch. 403; 94 L. T. 595.

5. *Misdescription of purchaser—Partnership—Name—Legal estate—Evidence of identity.*—A business was carried on by William Wray under his own name at Laurel House, North-hill, Highgate, in partnership with his two sons and another person. When he died in 1885 his widow was admitted to the partnership, the business being carried on under the same style as before. In 1890 the firm purchased a house out of the partnership assets. The conveyance was made between the vendor of the one part, and "William Wray, of Laurel House, Highgate," of the other part, and the property was conveyed to William Wray in fee simple.

Held, that the legal estate passed by the conveyance to the four partners as joint tenants in fee simple.

Maugham v. *Sharpe*, 12 W. R. 1057, 17 C. B. N. S. 443, followed.—WRAY *v.* WRAY, *Ch.D. Warrington, J.*, 136; [1905] 2 Ch. 349; 74 L. J. Ch. 687; 93 L. T. 304.

6. *Notice—Contract for sale of freeholds—Undisclosed easement—Underground gait or watercourse—Constructive notice—Rescission of contract—Vendor and Purchaser Act*, 1874 (37 & 38 *Vict. c.* 78).—Where a contract for the sale of freehold land contains a provision that the land is sold subject to the conditions contained in or referred to by a specified deed, and reference to that deed would have disclosed the fact that the land was subject to certain restrictions contained in a second deed, a purchaser, who before executing the contract has not inspected either the first or the second deed, will not be granted relief on the ground that he

had no notice, at the time when he entered into the contract, of the restrictions contained in the second deed.—CHILDE AND HODGSON'S CONTRACT, RE, *Ch.D. Warrington, J.*, 234.

7. *Particulars of sale—Misrepresentation—Conditions of sale—Title—Enlargement of long term into freehold—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 65 (1).—A vendor of property, where he has reasonable grounds for so stating, is entitled to describe in the particulars of sale the property as being held on a particular tenure, and in the conditions of sale to limit the proof of title which the purchaser might otherwise require.

Torrance v. *Bolton*, 21 W. R. 134, L. R. 14 Eq. 124, 8 Ch. 118, distinguished. — BLAIBERG *v.* KEEVES, *Ch.D. Warrington, J.*, 451; [1906] 2 Ch. 175; 75 L. J. Ch. 464.

8. *Party-wall notice and award—Material facts—Non-disclosure of by vendor — Title — Deposit — Expenses of investigating title—Return of—London Building Act*, 1894 (57 & 58 *Vict. c. ccxiii.*), *s.* 90.—A party-wall notice and award under the London Building Act, 1894, are material facts, and the non-disclosure of them by the vendor entitles the purchaser to the return of the deposit with interest, and also the expenses of investigating the title, together with the costs of the action.

Stevens v. *Adamson*, 2 Stark. 422, followed.—CARLISH *v.* SALT, *Ch.D. Joyce, J.*, 244; [1906] 1 Ch. 335; 75 L. J. Ch. 175; 94 L. T. 58.

9. *Right of way—Reservation in deed of grant—Deed not executed by grantee—"Rights of way hitherto exercised"—Unity of title.*—Where, in a contract for the sale of freehold land, the sale was expressed to be subject to a reservation in favour of the vendor and others, the owners and occupiers of certain adjoining lands, of certain rights of way "hitherto exercised" over the land sold, and the conveyance contained words reserving such rights, but was not executed by the purchaser,

Held, that the purchaser could be compelled in an action for specific performance to carry out the terms of the contract by executing the conveyance.

Held, also, that the purchaser, or a person deriving title under him with notice of the terms of the deed of conveyance, is bound in equity to give effect to the rights intended to be reserved, and may be restrained by injunction from interfering with their exercise by the persons in whose favour the reservation was agreed to be made. This is so, notwithstanding that such rights at the date of the deed of conveyance were merely rights *de facto*, and that, by reason of the unity of title to the dominant and servient tenements being in the vendor at the date of the conveyance, the rights had no existence in law.

The principle of *Kay* v. *Oxley*, L. R. 10 Q. B. 360, applied.—MAY *v.* BELLVILLE, *Ch.D. Buckley, J.*, 12; [1905] 2 Ch. 605; 74 L. J. Ch. 678; 93 L. T. 241.

10. *Sale by order of the court—Conditions of sale—Power to rescind—Particulars—Misrepresentation—Costs of bidding at sale and investigating title—Rescission.*—A sale was made by order of the court of certain land which was described as valuable freehold land . . . immediately ripe for development as a building estate . . . which can be utilized for the erecting of numerous small class residences. It was sold subject to a condition that "if any purchaser shall take any objection or make any requisition which the vendors are advised not to remove or comply with . . . the vendors . . . shall be at liberty . . . to rescind the contract for sale upon such terms as the judge shall approve, and the purchaser . . . shall thereupon be entitled to receive back his deposit, and shall receive the same in discharge of all claims for costs or otherwise." The abstract when delivered disclosed a deed under which the vendors' predecessor in title had covenanted to erect almshouses, and also had covenanted that the land and the buildings to be erected thereon should not be used for any purpose whatsoever other than as almshouses.

Held, that the purchaser was entitled to be discharged from his contract and to a return of his deposit by reason of misrepresentation, and that he was entitled to be paid his costs, charges, and expenses, including the costs occasioned by his bidding at the sale, notwithstanding the provisions of the condition.

Powell v. *Powell*, 23 W. R. 482, 19 Eq. 422, and *Perkins* v. *Ede*, 16 Beav. 268, followed.—HOLLIWELL *v.* SEACOMBE, *Ch.D. Kekewich, J.*, 355; [1906] 1 Ch. 426; 75 L. J. Ch. 289; 94 L. T. 186.

11. *Specific performance—Forfeiture of deposit—Practice — Costs — Form of order.*—A defaulting purchaser failed to comply with a decree of specific performance, and further failed to pay the purchase-money and costs certified to be due from him to the vendors on the day fixed for payment thereof by the court on a motion of the vendors. The vendors, by a further motion, asked for a declaration that the deposit money was forfeited, and that they were at liberty to proceed to another sale, and for an order that the defaulting purchaser should pay the certified costs and also the costs of the previous motion.

The Court declined to make any order as to the costs of the previous motion, but otherwise made the order as asked.—GRIFFITHS *v.* VESEY, *Ch.D. Swinfen Eady, J.*, 490; [1906] 1 Ch. 796; 75 L. J. Ch. 462; 94 L. T. 574.

12. *Specific performance—Title—Possessory title—Restrictive covenant—Notice—Purchaser for value—Real Property Limitation Act*, 1833 (3 & 4 *Will.* 4, *c.* 27), *s.* 34.—A restrictive covenant is in the nature of an equitable easement over land, and is binding on the land into whoever's hands it comes, except in the case of a purchaser for value without notice. A trespasser, therefore, who acquires a title to land by virtue of the Statute of Limitations is bound by any restrictive covenant affecting such land, both before and after the expiration of the statutory period, and a purchaser from him is affected with constructive notice of the covenant if he accepts less than a forty years' title, being content to make no inquiry as to title before the date when his vendor's possession began.

Judgment of Farwell, J. (53 W. R. 297, [1905] 1 Ch. 391), affirmed. — NESBITT AND POTTS' CONTRACT, *C.A.*, 286; [1906] 1 Ch. 386; 75 L. J. Ch. 238; 94 L. T. 297.

13. *Title—Recital twenty years old—Vendor and Purchaser Act*, 1874 (37 & 38 *Vict. c.* 78), *ss.* 1, 2.—In 1906 a vendor made an open contract to sell a freehold house. The abstract commenced with a conveyance dated June, 1882, which recited a mortgage dated May, 1878, and contained an acknowledgment of the right to production of deeds set out in a schedule. The first deed was dated the 31st of August, 1877.

Held, that the purchaser was entitled to a forty years' title.

Bolton v. *London School Board*, 26 W. R. 519, con-

sidered.—WALLIS AND GROUT'S CONTRACT, RE, *Ch.D. Swinfen Eady, J.*, 534; [1906] 2 Ch. 206; 75 L. J. Ch. 519; 94 L. T. 814.

14. *Vendor's lien—Assignment of personalty—Unpaid purchase-money—Reversionary interest—Interest—Statute of Limitations.*—A vendor's lien for unpaid purchase-money extends to personalty and is not limited to real estate, and extends not only to principal money but to interest from the time that the equitable lien comes into existence; and as regards personalty there is no Statute of Limitations which applies to such a claim for interest.

Davies v. *Thomas*, 49 W. R. 68, [1900] 2 Ch. 462, and *Mellersh* v. *Brown*, 38 W. R. 732, 45 Ch. D. 225, followed.—STUCLEY, RE, STUCLEY *v.* KEKEWICH, *C.A.*, 256; [1906] 1 Ch. 67; 75 L. J. Ch. 58; 93 L. T. 718.

VICTORIA, LAW of:—

Metropolitan Board of Works Act, 1897—*Rating of gas mains—Sewered or unsewered property.*—By the Metropolitan Board of Works Act, 1897, the Melbourne Board of Works was authorized to levy rates upon the property in each municipal district on a higher scale if the property rated was "sewered" property than if it was "unsewered."

The respondents' gas mains were comprised in and separately valued in the valuations in force in the municipalities within which they were severed.

Held (affirming the judgment of the court below), that, though the gas mains were necessarily connected with the gas works of respondents, which were "sewered" property, they could not themselves deemed to be "sewered" property and rated as such.

But (reversing the judgment of the court below), that, though they were in their nature incapable of being "sewered," they must be deemed to be "unsewered" property within the meaning of the Act, and could not be placed in a category by themselves and relieved of rates altogether.—MELBOURNE BOARD OF WORKS *v.* METROPOLITAN GAS CO., *P.C.*; [1905] A. C. 595; 74 L. J. P. C. 120; 93 L. T. 114.

WATER:—

Easement—Supply of house from reservoir—Reservoir held on yearly tenancy—House demised—General words in demise—Right to water.—By a lease made in 1880 the lessors demised to the lessee a dwelling-house, together with "all waters and watercourses, liberties, privileges, easements, and appurtenances thereto belonging or in anywise appertaining, or usually held and occupied therewith, or reputed to belong or be appurtenant thereto . . . " for the residue of a term of ninety-nine years from 1840 (except the last ten days of the term). At the date of the lease, and for eighteen years previously, the dwelling-house had received a water supply from iron pipes which conducted water from a reservoir held by the same lessors as lessees on a yearly tenancy. In 1885 the representatives of the lessors, who then held the yearly tenancy of the reservoir, became undertakers for the supply of water in the district under statutory powers, and in 1902, by another statute the undertaking, including the yearly tenancy of the reservoir, was transferred to the defendants, who threatened to cut off the supply of water if the plaintiff did not pay for the supply.

Held, that under the lease of 1880 a right to water flowing through the pipes passed to the lessee, and the fact that the lessors were only yearly tenants of the reservoir made no difference, and that the successors of the lessors in the water undertaking were bound so long as they continued to be yearly tenants of the reservoir.

Watts v. *Kelson*, L. R. 6 Ch. 166, followed.

Burrows v. *Lang*, [1901] 2 Ch. 502, distinguished.—KEY *v.* NEATH RURAL COUNCIL, *K.B.D.*; 93 L. T. 507.

WATERWORKS:—

Pumping—Abstraction of silt—Injury to adjoining owner—Interest on sum awarded.—Under statutory powers the defendants acquired a piece of land and had sunk a well or borehole on that land distant about 150 yards from the plaintiff's dwelling-house, and, prior to November, 1904, had been pumping large quantities of water from the well or borehole. The plaintiff alleged that by means of the pumping large quantities of silt had been extracted from under his house, and a settlement had been caused owing to the support being withdrawn, and great damage had been done to the house. In consequence of this, in November, 1904, he made a claim against the defendants for injurious affection, desiring that the amount of compensation should be decided by arbitration. The umpire found that the corporation had by their authorized working caused damage to the property of the plaintiff; that such damage was not occasioned by the abstraction of water only, but by the abstraction of water which carried with it silt from under the plaintiff's premises; that the weight of the buildings on the land had not caused the damage; and that the amount of the damage done to the plaintiff's property was £1,200; and, further, that the subsoil which lay directly under and formed the support of the plaintiff's land was a bed of wet running silt, which was drawn away by the pumping of the corporation. He therefore awarded the plaintiff £1,200, and the costs of the arbitration.

Held, that the plaintiff was entitled to recover.

Held, further, that the plaintiff was entitled to recover interest on the sum and costs so awarded from the date of the demand for payment.—FLETCHER *v.* BIRKENHEAD CORPORATION, *K.B.D.*; 75 L. J. K. B. 183; 94 L. T. 18.

WEIGHTS and MEASURES:—

Prosecution by inspector—"Consent" of local authority—General consent—Weights and Measures Act, 1904 (4 *Ed.* 7, *c.* 28), *s.* 14.—It is not necessary under section 14 of the Weights and Measures Act, 1904, which provides that an inspector of weights and measures may, with the consent of the local authority, prosecute before a court of summary jurisdiction any information, complaint, or proceeding arising under that Act, that a separate consent be given by the local authority in each particular case; a general consent to their inspector to prosecute in such cases being sufficient.—TYLER *v.* FERRIS, *K.B.D.*, 469; [1906] 1 K. B. 94; 75 L. J. K. B. 142; 93 L. T. 843.

WILL:—

1. *Administration with will annexed—Absolute gift—Gift cut down by subsequent words—Gift of residue to another person—Life interest—Residuary legatee preferred to executor of executrix.*—A testator made a will upon a printed form with holograph additions. By this will he bequeathed certain property to his wife "for her absolute use and benefit and after her death to come absolutely" to any person "to her and her heirs for ever." The wife was further appointed executrix.

Held, having regard to the terms of the whole will and the circumstances of the case, that the later words ought to prevail, and that t was the

intention of the testator to give his wife a life interest only. Also that the later named person was, on the true construction of the will, the residuary legatee, and entitled as such to a grant of letters of administration with the will annexed as against the executor of the widow of the testator, who had been appointed executrix by her husband, but had died without having taken out probate.—LUPTON, IN THE GOODS OF, *P.D.*; [1905] P. 321; 75 L. J. P. 162; 94 L. T. 100.

2. *Ambiguity—Admissibility of evidence of identification.*—The testatrix appointed as executrix and legatee a person she described in her will as "my granddaughter," leaving a blank where the name should have been. At the date of the will and at the testatrix's decease the testatrix had three granddaughters.

The Court admitted evidence, the object of which was the identification of the person so intended, and admitted the will to probate.—HUBBUCK, IN THE ESTATE OF, *P.D.*, 16; [1905] P. 129; 74 L. J. P. 58; 92 L. T. 665.

3. *Annuitant—Tenant for life and remainderman—Capital or income—Charges in respect of compensation fund—Licensing Act*, 1904 (4 *Ed.* 7, *c.* 23), *s.* 3.—Where part of a trust estate under a will consists of freehold beerhouses with on-licences, on which annual charges are imposed in respect of the compensation fund under section 3 of the Licensing Act, 1904, and by reason of the deduction by the tenants from their rents of the proper proportion of such charges, the income of the trust estate becomes insufficient to pay in full an annuitant under the will, such annuitant is not entitled to have any part of such charges paid out of capital, but they must be borne by the income of the estate.—SMITH, RE, SMITH *v.* DODSWORTH, *Ch.D. Swinfen Eady, J.*, 449; [1906] 1 Ch. 799; 75 L. J. Ch. 442; 94 L. T. 643.

4. *Children—Invalid marriage—Bequest to future children—Public policy.*—J. L. L. on the 21st of December, 1900, married his niece D. D. W. in Scotland.

On the 24th of December, 1902, J. L. L. made a will whereby he left a legacy of £500 to D. D. W. (otherwise known as D. D. L.), and gave his residuary estate to a trustee upon trust for sale and conversion, and directed the trustee to pay the income to D. D. W. (otherwise D. D. L) for her separate use for life without power of anticipation, and after her decease in trust for all her children living at his (the testator's) decease, who being sons should attain the age of twenty-one years, or being daughters should attain that age or marry, in equal shares. And if there should be no child of the said D. D. W. (otherwise D. D. L.), upon trust to pay the income to the testator's father for life, and after his decease to divide the residuary estate among the testator's next-of-kin.

D. D. W. had an infant daughter on the 15th of January, 1903, and the testator was informed of the fact. He died on the 27th of August, 1903.

Held, that as a will speaks from the death, a bequest to a woman's future illegitimate children born in the testator's lifetime and not defined by reference to paternity is not void for uncertainty nor contrary to public policy.—LOVELAND, RE, LOVELAND *v.* LOVELAND, *Ch.D. Swinfen Eady, J.*; [1906] 1 Ch. 542; 75 L. J. Ch. 314; 94 L. T. 336.

5. *Codicil—Construction—Devise to father and children—Revocation—Extent of revocation—Acceleration of children's interests.*—A testator devised freeholds upon trust (after events which had happened) as to one-fourth part for his son G. W. for life, and after his death (subject to a power of appointment to his widow, which was not exercised) for the children of G. W. equally; and as to the other three fourth parts upon trust for the other three sons of the testator respectively for life, and for their children, in manner corresponding with the trusts of the share of G. W. and his children. By a codicil reciting that he was dissatisfied with G. W. the testator revoked the gift "to or for the benefit of" G. W., and directed that every clause of his will purporting to entitle G. W. to any part of his estate should be construed, and the trusts thereof carried out, as if the name of G. W. had not appeared therein.

Held, that the words "for the benefit of" could be satisfied by other benefits given to G. W. by the will; that to revoke a gift by will the words of revocation must be plain; that the interests given by the will to the children of G. W. were not revoked; and that these interests were accelerated by the revocation of the interest of G. W.

Green v. *Tribe*, 27 W. R. 39, followed.

Tabor v. *Prentice*, 32 W. R. 872, distinguished.—WHITEHORNE, RE, WHITEHORNE *v.* BEST, *Ch.D. Buckley, J.*, 580; [1906] 2 Ch. 121; 75 L. J. Ch. 537; 94 L. T. 698.

6. *Conditional bequest—Hereditaments—Condition to resettle—Money upon trust for investment in land.*—A testator gave a life interest in his estate to his son upon the condition that he should resettle the "hereditaments subject to the limitations" of the will of testator's father within a year of testator's death. The son was tenant in tail of lands under the will of testator's father, part of which had been sold and was represented by money held upon trust for investment in land.

Held, that these moneys were "hereditaments" which must be resettled in order to comply with the directions in the will of the testator.

Bassett v. *St. Levan*, 43 W. R. 165, discussed and followed.

In re Duke of Cleveland's Settled Estates, [1893] 3 Ch. 244, followed.—GOSSELIN, RE, GOSSELIN *v.* GOSSELIN, *Ch.D. Farwell, J.*, 193; [1906] 1 Ch. 120; 75 L. J. Ch. 88.

7. *Construction—Bequest between the children of A. and B.*—By her will the testatrix gave a moiety of certain property to be equally divided between the children of F. M., now of Leeds, and J. C., of New York, or their heirs. Both F. M. and J. C. were nephews of the husband of the testatrix, and were both alive and had children living at the death of testatrix, but F. M. had not then been for some years living with his family.

Held, that the gift was to the children of F. M. and to J. C. personally, and that the division was to be into moieties, one moiety going to the children of F. M. and the other moiety going to J. C.—WALBRAN, RE, MILNER *v.* WALBRAN, *Ch.D. Joyce, J.*, 167; [1906] 1 Ch. 64; 75 L. J. Ch. 105; 93 L. T. 745.

8. *Construction—Devise in strict settlement—Power to charge portions—Provision limiting amount to be charged—Form of provision—Common form at date of will.*—By his will, made in 1860, a testator who died in 1863 devised his real estate in strict settlement, and empowered each person thereby made tenant for life, whether in possession or not, to charge the property with the payment of any annual sum not exceeding £1,000 by way of jointure, and with any sum not exceeding £20,000, for portions of younger children. The will then provided that the devised property should not by

virtue of these powers at any one time be liable to the payment of more than the annual sum of £1,500 for jointures, and more than the principal sum of £30,000 for portions of younger children. Provisions similar to this were to be found in books of precedents published before the date of the will. One tenant for life died in 1872, having charged the property with £20,000 for portions; and another tenant for life died in 1874, having made the same charge. Both these sums of £20,000 were raised and paid. In 1890 a third tenant for life, who never came into possession, died, having also charged the property with £20,000 for portions. On a summons taken out to determine whether this third charge was a good exercise of the power and valid and effectual for the whole amount,

Held, that, the form of the provision having been the common form at the date of the will, the words "at any one time" must be construed as applying to the sum chargeable for portions as well as to the sum chargeable for jointures; and that the third charge of £20,000 therefore did not transfer the limitations imposed by the will in respect of portions, but was valid and effectual for the whole amount.—BECKETT, RE, BETHELL v. GRIMTHORPE, *Ch.D. Joyce, J.*; 93 L. T. 746.

9. *Construction—Gift to class attaining twenty-one—Gift over in the event of death without leaving any children surviving—Death of surviving child in infancy—Vested or contingent gift—Intestacy.*—A testatrix by her will gave all her property in trust for her children, who, being sons, should attain twenty-one, or, being daughters, should attain that age or marry under that age. In the event of her death "without leaving any children surviving" her, she gave the property to her brothers and sisters. The testatrix left one child surviving her who died an infant.

Held, that the infant child did not take a vested interest at birth, and that, there being no reason for construing the words "without leaving any children" as meaning "without leaving any such children," the gift over also failed, and there was an intestacy.

Kidman v. *Kidman*, 40 L. J. Ch. 359, 19 W. R. Dig. 125, dissented from on the second point.—EDWARDS, RE, JONES v. JONES, *C.A.*, 446; [1906] 1 Ch. 570; 75 L. J. Ch. 321; 94 L. T. 593.

10. *Construction—Rule in* Howe v. Earl of Dartmouth—*Life rent—Property given to wife for life—Optional power to sell given to life tenant—Intention for enjoyment* in specie.—A testator who was at his decease in 1901 entitled to freeholds and leasehold houses, held at a ground-rent and let to weekly tenants, for a term of which thirty-nine years was unexpired, after bequeathing legacies, gave to his widow a life rent of all his property with power to sell and reinvest the proceeds on good security, after her death his property to be divided amongst his children.

Held, that although no indication of the testator's intention could be drawn from the use of the expression "life rent," which merely indicated the testator's intention to give his widow a life interest in his property, yet that, according to the rule in *In re Pitcairn, Brandreth* v. *Colvin*, 73 L. T. Rep. 430, [1896] 2 Ch. 199, the optional power of sale given to the widow, the life tenant, furnished sufficient indication of the testator's intention that she should enjoy his leasehold property *in specie* to exclude the operation of the rule of conversion in *Howe* v. *Earl of Dartmouth*, 7 Ves. 137.—BENTHAM, RE, PEARCE v. BENTHAM, *Ch.D. Kekewich, J.*; 94 L. T. 307.

11. *Devise to children born in the testator's lifetime—Divesting clause—Child* en ventre sa mère.—*Primâ facie*, in the absence of sufficiently weighty considerations to the contrary, for the purposes of devolution of property in connection with intestacies or wills, no distinction ought to be drawn between a child born at a particular time and a child *en ventre sa mère* at that time and subsequently born alive. This rule applies generally and not merely in cases where it is for the benefit of the child.

Blasson v. *Blasson*, 13 W. R. 113, is overruled on this point, and cannot be supported except on the ground that the language of the particular will there in question prevented the application of the general principle above stated.

Decision of Swinfen Eady, J. (53 W. R. 508, [1905] 2 Ch. 301), reversed.—VILLAR v. GILBEY, *C.A.*, 473; [1906] 1 Ch. 583; 75 L. J. Ch. 308; 94 L. T. 424.

12. *Discretionary trust—Remoteness.*—A testator gave property to his trustees and directed them to apply the annual income, or any part thereof, "in such proportions and generally in such manner as to my said trustees in their absolute discretion should seem best for the support of my son A. B. and his wife and children, or any of them," or to accumulate the same in their like discretion for the benefit of the children of his son who should become entitled to the capital of the property under the trust thereinafter contained, and subject to the discretionary trust, he directed his trustees to pay the income to his son and his son's widow, and after their deaths to stand possessed of the capital for the son's children, as therein mentioned.

Held, that if the discretionary trust was not limited to the lifetime of the son, it was void as infringing the rule against perpetuities.

But, held, that upon the true construction of the will the trust was limited to the lifetime of the son.

In re Wise, 44 W. R. 310, [1896] 1 Ch. 281, not followed; *Gooding* v. *Read*, 4 De G. M. & G. 510, explained; *In re Watson*, W. N. 1892, p. 192, considered.—BLEW, *Re* GUNNER v. BLEW, *Ch.D. Warrington, J.*, 481; [1906] 1 Ch. 624; 75 L. J. Ch. 373.

13. *Illegitimate child—"Children belonging to her."*—A spinster bequeathed property in trust for all the children who might belong to her at her death. She died without having been married leaving an illegitimate child born in 1878.

Held, that the illegitimate child took under the will.—FROGLEY, IN THE GOODS OF, *P.D.*, 48; [1905] P. 137; 74 L. J. P. 72; 92 L. T. 429.

14. *Illegitimate testator—Gift to "all my nephews and nieces"—Some named—Gift to "my brother A. and my sisters B., C., D., and E."—Children of unnamed sister.*—An illegitimate testator left the residue of his property, subject to his wife's life estate, in trust for his brother A. and his sisters B., C., D., and E., the income of A.'s share to be paid to him for life, and on his death, in the events that happened, the principal to go "equally amongst all my nephews and nieces then living." Like provision with regard to D.'s share. There being amongst others also reputed nephews and nieces by a reputed sister of the testator who was not mentioned in the will, it was

Held, applying *Hill* v. *Crook*, 22 W. R. 137, 6 H. L. 265, that, in the absence of legitimate brothers and sisters and nephews and nieces, all the reputed nephews and nieces took, although some reputed brothers and sisters and nephews and nieces only had been mentioned in the will.—CORSELLIS, RE, FREEBORN v. NAPPER, *Ch.D. Swinfen Eady, J.*, 536; 75 L. J. Ch. 607.

15. *Investment clause — "Any corporation or company, municipal, commercial, or otherwise"—Company formed or registered in the United Kingdom, but carrying on business abroad—Company formed or registered abroad.*—A will authorized trustees to invest in the securities of "any corporation or company, municipal, commercial, or otherwise."

Held, (1) that the clause authorized investments in the securities of (*a*) any corporation or company formed or registered in the United Kingdom, though carrying on business abroad; and (*b*) any corporation or company formed or registered outside the United Kingdom; (2) that the expression "company" is not limited to incorporated associations.—STANLEY, RE, TENNANT *v.* STANLEY, *Ch.D. Buckley, J.*, 103; [1906] 1 Ch. 131; 75 L. J. Ch. 56; 93 L. T. 661.

16. *Legacy—Debt owed by testatrix to legatee—Satisfaction.*—A testatrix bequeathed a legacy to a sister to whom she owed money at the time of her death. The amount of the legacy exceeded the amount of the debt. The sister, as an executrix, retained a sum sufficient to satisfy the debt with interest in addition to the legacy.

Held, that the legacy was in satisfaction of the debt.—RATTENBERRY, RE, RAY *v.* GRANT, *Ch.D. Swinfen Eady, J.*, 311; [1906] 1 Ch. 667; 75 L. J. Ch. 304; 94 L. T. 475.

17. *Legacy—Direction to pay legacy "six years after my decease"—Death of beneficiary before time for payment—Lapse.*—A testator declared that his trustees should stand seised and possessed of his residuary personalty and realty, upon trust to retain legacies to themselves, and to "pay the following legacies: To my brother, G. E., the annual sum of £50 for the term of five years from my decease, and the legacy of £1,000 six years after my decease." The testator died on the 6th of July, 1900, and G. E. on the 9th of May, 1903.

Held, that, there being no gift except in this direction to pay, everything depended upon the expiration of six years, and that, G. E. not having survived this period after the testator's death, his estate did not take the £1,000.—EVE, RE, BELTON *v.* THOMPSON, *Ch.D. Kekewich, J.*; 93 L. T. 235.

18. *Legacy—Specific gift—Ademption—Wills Act*, 1837 (7 *Will.* 4 & 1 *Vict. c.* 26), *s.* 4.—A testator by his will bequeathed the interest on his money invested in a certain security to his wife for her life. During the testator's life the security in question, which was held by the testator at the date of his will, was taken by a statutory authority and a new security given in its stead.

Held, that the new security held by the testator at the date of death did not pass under the bequest, the will speaking from the death.—SLATER, RE, SLATER *v.* SLATER, *Ch.D. Joyce, J.*, 602.

19. *Mistake — Legacy — Advance to legatee to be brought into hotchpot—Erroneous statement of fact—Account.*—A testator, by his will, left his residuary estate to trustees upon trust for his wife during her life or widowhood, and at her death or remarriage to divide the same amongst his children living at her death or remarriage, and the issue of deceased children in equal shares *per stirpes*. The will contained a recital that the testator had advanced to three of his sons respectively certain specified amounts, and a direction that parts of the amounts so specified should be brought into hotchpot, or so much thereof as remained unpaid at the death or remarriage of testator's wife. In the case of one of the sons the amount of the advance was incorrectly stated and in excess of the fact.

Held, that the son was only bound to account for such amount as had actually been advanced to him by the testator.—KELSEY, RE, WOOLLEY *v.* KELSEY, *Ch.D. Swinfen Eady, J.*, 136; [1905] 2 Ch. 465; 74 L. J. Ch. 701; 93 L. T. 662.

20. *"Moneys owing"—Money on deposit at bank—Payable after notice—Bearing interest.*—A gift in a will of moneys owing to the testator includes money standing in the testator's name on deposit account at a bank and bearing interest, whether such money is capable of being withdrawn on demand or only after seven days' notice.—DERBYSHIRE, RE, *Ch.D. Buckley, J.*, 135; [1906] 1 Ch. 135; 75 L. J. Ch. 95; 94 L. T. 138.

21. *Name and arms clause—Forfeiture clause—Construction.*—E. D., the widow of a peer, on becoming entitled under the terms of a will to settled estate, was required by a clause in the will, within a year of becoming so entitled, to take certain surnames and arms, and to use such surnames in all deeds and writings to which she should be a party or which she should sign, and upon all other occasions. In the event of her refusing or neglecting to take or use such surnames or arms as aforesaid she was to forfeit her interest. *E. D.* took the surnames and arms in accordance with the will, but neglected to use the assumed surnames in social and ordinary correspondence.

Held, that the period of a year applied only to the taking of the names and arms, and that neglect to use the same after the expiration of that period would involve a forfeiture; but that the clause in the will only required the use of the assumed surnames on formal occasions on which the use of a surname was customary, and that forfeiture was not incurred by neglecting to use them in social and ordinary correspondence.—DRAX, RE, DUNSANY *v.* SAWBRIDGE, *Ch.D. Swinfen Eady, J.*, 418; 75 L. J. Ch. 317; 94 L. T. 611.

22. *Omission—Miscopying—Omission in will supplied by inference.*—Where upon the construction of a will it is clear that words have been omitted from the will, owing to its having been miscopied, the court will supply the necessary words, where it can be inferred from other parts of the will what the testator intended should be inserted.

Dictum of Knight-Bruce, L.J., in *Key* v. *Key*, 4 De G. M. & G. 73, approved.—PHILLIPS *v.* RAIL, *Ch.D. Swinfen Eady, J.*, 517.

23. *Pictures—Use and enjoyment—Letting furnished flat.*—A testator gave his pictures to trustees upon trust to permit L. W. to have the use and enjoyment thereof during her life.

L. W. had some of the pictures in a flat, which she let furnished for a short time.

Held, that L. W. was entitled to let the pictures together with her flat, and was not restricted to personal enjoyment.

Marshall v. *Blew*, 2 Atk. 217, followed.—WILLIAMSON, RE, MURRAY *v.* WILLIAMSON, *Ch.D. Swinfen Eady, J.*; 94 L. T. 813.

24. *Subsequent gift by codicil—Gift "in addition" to prior gift.*—A testator by a codicil to his will gave a legacy of £1,000 to a class, and by a subsequent codicil gave £50 to each of the class "so that each receives £100." Each member of the class received more than £100 under the original gift.

Held, that the subsequent bequest was a clear gift to each member of the class which was not cut down by the words which followed.—SEGELCKE, RE, ZIEGLER *v.* NICOL, *Ch.D. Joyce, J.*, 624; 75 L. J. Ch. 494.

25. *Substitution—Gift to issue of deceased children—Son dead at date of will leaving children.*—A testator by his will, after giving certain legacies to the children of a deceased son, A. W., gave the residue of his estate upon trust "for all or any of my children (except one son R.) who shall be living at my death." This clause was immediately followed by a proviso that in case "any one or more of my children (other than R.) shall predecease me, leaving any child or children living at my death, then such child or children of my deceased child (other than R.) shall take, and if more than one in equal shares, the share which his, her, or their parent would have taken if such were living and over the age of twenty-one at my death."

Held, that the words "shall predecease me" must be read in their strict grammatical sense, and that the children of A. W., who was dead at the date of the will, did not take under the proviso.—GORRINGE, RE, GORRINGE *v.* GORRINGE, *Ch.D. Joyce, J.*, 267; [1906] 1 Ch. 319; 75 L. J. Ch. 116; 93 L. T. 831.

See also Ademption, 1; Appointment, 1-3; Charity, 1-3; Probate, 4.

WRIT OF POSSESSION.—See Practice, 7.

[THE END.]

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